

**Woodroffe & Ameer Ali's**

# **Law of Evidence**

**FOURTEENTH EDITION**

*(In Four Volumes)*

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*by*

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## LAW OF EVIDENCE

14TH ED. VOL. 2

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# THE LAW OF EVIDENCE

## Volume 2

### STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

32. *Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.* Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases :

(1) *When it relates to cause of death;* When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2) *Or is made in course of business;* When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.

(3) *Or against interest of maker;* When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or a suit for damages.

(4) *Or gives opinion as to public right or custom, or matters of general interest;* When the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter has arisen.

(5) *Or relates to existence of relationship;* When the statement relates to the existence of any relationship [by blood, marriage or adoption] between persons as to whose relationship [by blood, marriage or adoption] the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

(6) *Or is made in will or deed relating to family affairs;* When the statement relates to the existence of any relationship [by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

(7) *Or in document relating to transaction mentioned in Sec. 13, clause (a);* When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in Section 13, clause (a).

(8) *Or is made by several persons and expresses feelings relevant to matter in question;* When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

#### *Illustrations*

(a) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration, are relevant facts.

(b) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended A's mother and delivered her of a son, is a relevant fact.

(c) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that on a given day the solicitor attended A at a place mentioned, in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm by which she was chartered to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(f) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day, is relevant.

(h) The question is, what was the cause of the wreck of a ship.

A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way.

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market.

A statement of the price, made by a deceased banya in the ordinary course of his business, is a relevant fact.

(k) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son, is a relevant fact.

(l) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(m) The question is, whether, and when, A and B were married.

An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.

(n) A sues B for a libel expressed in a painted caricature exposed in a shop window.

The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

|   |  |
|---|--|
| s. 3 ("Relevant.")  | s. 38 (Relevancy of depositions.)                                    |
| s. 3 ("Fact.")  | s. 80 (Presumptions as to documents produced as record of evidence.) |
| s. 3 ("Evidence.")  | s. 114, Ill. (f) (Presumption as to course of business.)             |
| s. 3 ("Court.")   | s. 8, Ills. (J), (k) (Examples of dying declaration.)                |
| s. 3 ("Document.")  | ss. 13, 48 (Public and general customs or rights.)                   |
| s. 118 (Who may testify.)   | s. 22 (Judgments relating to matters of a public nature.)            |
| s. 158 (What matters may be proved in connection with proved statement relevant under s. 32). | s. 65, cl. (d) (Secondary evidence.)                                 |
| s. 21, cl. (1), Ills. (b), (c) (by or on behalf of person making it.)                         | s. 50 (Opinion on relationship when relevant.)                       |
| s. 90 (Ancient Documents.)  |  |
| ss. 47, 67 (proof of handwriting.)  |  |
| s. 104 (Burden of proving fact to be proved to make evidence admissible.)                     |  |

**Dying Declaration.**—Steph. Dig. Art. 26; Wigmore, Ev., ss. 1430–1452; Taylor, Ev., ss. 714–722; 3 Russ. Cr., 354–362; Best, Ev., s. 505; Phipson, Ev., 11th Edn., 384; Roscoe, Cr. Ev., 16th Edn., 32–37; Powell, Ev., 9th Edn., 81–88; Wills, Ev., 3rd. Edn., 201–204; Norton, Ev., 175–177. Declarations in the course of business.—Steph. Dig. Art. 27; Taylor, Ev., ss. 697–713; Best, Ev., s. 501; Roscoe, N.P. Ev., 60–62; Wigmore, Ev. ss. 1517–1561; Powell, Ev., 9th Edn., 316–323; Smith L. C. Note to Price v. Torrington; Wharton, Ev., ss. 238–257; Phipson, Ev., 11th Edn., 397–399; Wills, Ev., 3rd Edn., 182–188; Norton, Ev., 177–179. Declarations against interest.—Steph. Dig. Art. 28; Wigmore, Ev., ss. 1455–1477; Taylor, Ev., ss. 668–696; Phipson, Ev., 9th Edn., 292–300; Best, Ev., s. 50; Roscoe, N. P. Ev., 55–59; Smith L. C. Note to Higham v. Ridgway, Powell, Ev., 9th Edn., 366; Wharton, Ev., 226–237; Wills, Ev., 3rd. Edn., 189–200; Act IX of 1908 (Limitation), s. 20 (see now Act XXXVI of 1963, s. 19), Norton, Ev., 179–184. Declaration as to public rights—Steph. Dig. Art. 80; Taylor, Ev., ss. 607–634; Best, Ev., 48–51; Powell, Ev., 9th Edn., 338–349; Wills, Ev. 3rd Edn., 227–240; Norton, Ev., 184–188. Declarations as to relationship—Steph. Dig. Art. 31; Wigmore, Ev., ss. 1480–1510; Taylor, Ev., ss. 635–637; Best Ev., s. 498; Phipson Ev., 11th Edn., 420–428; Wills, Ev., 3rd. Edn., 217–225; Roscoe, N. P. Ev., 44–48; Hubback's Edn., of Succession, 648–711; Wharton, Ev., ss. 201–225; Powell, Ev., 9th Edn., 349–357; Norton, Ev., 188–190; Statements in documents relating to transactions mentioned in S. 13; Norton, Ev., 190–192. Statements by a number of persons expressing feelings or impressions—Norton, Ev., 192–193; Cases cited.

### SYNOPSIS

1. Principle.
2. Scope.
  - (a) Sections 32 and 33.
  - (b) Sections 11 and 32.
  - (c) Sections 13 and 32.
3. Evidence admitted is substantive evidence.
4. Requisites for admissibility.
5. Burden of proof.
6. Section relates to relevancy, not proof.
7. "Statements, written or verbal".
  - (a) General.
  - (b) "Statement".
8. "Of relevant facts".
9. "By a person".
10. "Dead or cannot be found."
11. "Incapable of giving evidence".
12. "Delay or expense".

[Note—After heading 12 the commentary on clauses 1 to 8 starts. For convenience the synopsis are given separately under each clause.]

**1. Principle.** The general ground of admissibility of the evidence mentioned in this section is that in the cases there in question no better evidence is to be had.<sup>2</sup>

The provisions in the section constitute further exceptions to the rule which excludes hearsay.<sup>3</sup> As a general rule, oral evidence must be direct. (Sec. 60). The eight clauses of section 32 may be regarded as exceptions to that general rule. The purpose and reason of the hearsay rule is the key to the exceptions to it, which are mainly based on two considerations, a necessity for the evidence, and a circumstantial guarantee of trustworthiness. Hearsay is excluded because it is considered not sufficiently trustworthy. It is rejected because it lacks the sanction of the tests applied to admissible evidence, namely, the oath and cross-examination. But where there are special circumstances which give a guarantee of trustworthiness to the testimony, it is admitted even though it comes from a second-hand source.

But it has not always been a question of absolute necessity. Sometimes practical convenience, sometimes inability to get evidence of the same value from the same or other sources, have been regarded as sufficient. Impossibility, convenience, expediency have all played a part. It may be impossible, or it may cause unreasonable expense or delay, to procure the attendance of a witness who, if present before the Court, could give direct evidence on the matter in question; and it may also be that this witness has made a statement, either written or verbal, with reference to such matter under such circumstances that the truth of this statement may reasonably be presumed. In such a case, the law, as enacted by Sec. 32, dispenses with direct oral evidence of the fact and with the safeguard for truth provided by cross-examination, and the sanction of an oath, the probability of the statement being true depending upon other safeguards which are mentioned in the following paragraphs. The truth of the declaration is deemed to be *prima facie* guaranteed by the special conditions of admissibility imposed. All the eight clauses of the section are based upon the principle that the statements are of such a nature or were made under such circumstances, as to guarantee their being true.<sup>4</sup> An important difference between the law in India and in England is, that, in the latter country, this class of evidence can only be received where the author of the statement is dead. The ground for its admissibility being the absence of any better evidence, the other conditions mentioned in the section, under which, in India, such evidence is receivable, are consonant with reason and general convenience. These conditions of admissibility apply to all the eight classes of evidence which it comprises. It is for the Judge, in his discretion, to say, whether the alleged expense and delay is such as justifies the admission of the evidence, without insisting on the attendance of the author of the statement.<sup>5</sup> The statements referred to in all the eight clauses of Sec. 32, are evidence against all the world, unlike statements receivable under the sections relating to admissions, which may only be proved as against the person who makes them or his representative-in-interest.<sup>6</sup> But an admission may be proved by or on behalf of the person making it, when it is of such a nature that, if

2. Steph. Introd., 165.

3. See Sturla v. Freccia, (1880) L.R. 5 App. Cas. 639, per Lord Blackburn; Mst. Biro v. Atma Ram, 1937 P.C. 101; 64 I.A. 92; I.L.R. 1939 All. 280; 167 I.C. 346.

4. Soney Lal v. Darbdeo, 1935 Pat. 167,

171; I.L.R. 14 Pat. 461; 155 I.C. 470 (F.B.).

5. Norton, Ev., 174, 175.

6. Ib. 143, 132, 133.

the person making it were dead, it would be relevant as between third persons under the thirty-second section.<sup>7</sup>

**2. Scope.** (a) *Sections 32 and 33.* This section is not controlled by Sec. 33.<sup>8</sup> It makes relevant statements by a deceased person as to the cause of his death; Sec. 33 makes relevant evidence given by a witness when the witness is dead or cannot be found, etc. These are two quite distinct cases, the first relating to a statement, whether given in evidence or not, made by a deceased person as to the cause of his death, the second to a previous statement made by a deceased witness in any kind of legal proceeding, civil or criminal. In the latter instance, there is a qualification which is obviously necessary, that the former evidence must have been taken subject to cross-examination. There is no such qualification as regards the first instance, but the statement made to a Magistrate, authorized to take it, is evidence within the meaning of the definition already quoted. It cannot be said that Sec. 33 governs Sec. 32, for, if it did so, no statement made under Sec. 32 to a Magistrate empowered to record it would be relevant at all unless the accused has had an opportunity of cross-examination.<sup>9</sup> The depositions of deceased witnesses will, in some cases be admissible even against strangers: as, for instance, if they relate to a custom, prescription, or pedigree, where reputation would be evidence, for, as the unsworn declarations of persons deceased would be here received, their declarations on oath are *a fortiori* admissible.<sup>10</sup> A statement not made before a Court may be admissible, under this section.<sup>11</sup> Section 273 (old Sec. 353) of the Cr. P. C. is subject to it.<sup>12</sup> And Sec. 10-A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) does not override the provisions of Sec. 32.<sup>13</sup>

If the terms of a deposition, made by a person since deceased, are such that it does not come within the provisions of these sections and also it will not be admissible under Sec. 11.<sup>14</sup> But, it has been held that statements of a deceased person, inadmissible under this section may be admissible as conduct of the person.<sup>15</sup> Whenever any statement relevant under Sec. 32 or 33 is proved, all matters may be proved either in order to contradict or corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.<sup>16</sup>

(b) *Sections 11 and 32.* These sections cover different fields and there is no question of any overlapping, if properly construed. This section is an exception to the rule of hearsay, and it is not proper to read Section 11 as an exception to this section. Section 11 deals with "facts" while this section deals with "statements". The scope of Section 11 is very wide. There is no justification for the view that it will become otiose if "statements" falling under

7. S. 21, cl. (1), ante; ib. Ills. (b), (c): as to cess-returns, see Cess Act, IX (B.C.) of 1880.
8. Shyamanand Das v. Ramakanta Das, (1904) I.L.R. 32 Cal. 6; Sulaiman v. The King, 1941 Rang. 301 : 197 I. C. 131; Aboobucker v. Sahib-khatoon, 1949 Sind 12 : I.L.R. 1947 Kar. 224.
9. Sulaiman v. The King, 1941 Rang. 301 : 197 I.C. 131.
10. *Chennupati v. Nelluri*, A. I. R. 1954 Mad. 215; (1954) 1 M.L.J. 194: 66 L.W. 841.
11. *Abdul Aziz v. The Crown*, 1950 Lah. 167: 51 Cr.L.J. 1350.
12. *Ram Singh v. The Crown*, I.L.R. 1950 Punj. 209; 1951 Simla 178.
13. *Gurunath v. Mallappa*, 1950 Bom. 340: 52 Bom. L. R. 288.
14. *Bela v. Mahabir*, 34 A. 341 : 14 I. C. 116.
15. *Chennupati v. Nelluri*, A. I. R. 1954 Mad. 215; (1954) 1 M.L.J. 194: 66 L.W. 841.
16. See Sec. 158, post.

this section are excluded from its scope. The several clauses of this section, in a measure, take in portions of a few other provisions contained in this Act. This indicates that this section exhaustively deals with the law relating to relevancy of statements made by persons mentioned therein.<sup>17</sup> As a general rule, Sec. 11, is controlled by Sec. 32 where the evidence consists of statements of persons who are dead : and the test whether such statement is relevant, under Sec. 11 though not relevant under Sec. 32 is this : it is altogether immaterial whether what was said was true or false, but highly material that it was said :<sup>18</sup> *Sethna v. Mahomed Shirazi*.<sup>18-1</sup> Obviously, there is a difference between the existence of a fact and a statement as to its existence. Section 11 makes the existence of facts admissible, and not statements as to such existence, unless of course the fact of making that statement is itself a matter in issue.<sup>19</sup> It has, however, been held that where the religion of a deceased person is a fact in issue, any solemn declaration made by him as to his religion is relevant and if such declaration is made in a formal document, for example in his will, it is relevant as an admission under the provisions of Secs. 11 (2), 14 and 21 (2) and is entitled to very great weight in deciding the question.<sup>20</sup> In a case, the Madras High Court has held that where the statements are attempted to be proved, not as statements made by the deceased but only to establish his conduct, there is no legal objection to the admission of the statements, even if they are not admissible under this section.<sup>21</sup>

(c) *Sections 13 and 32.* Section 13 lays down what facts are relevant when a right or custom is in question, while this section enumerates the cases in which the statement of a relevant fact by a person who is dead or cannot be found, etc., is relevant ; and clause (4) of this section enacts that a statement is relevant, if it gives the opinion of any person who is dead or cannot be found, etc., as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen. Where the statement of a third party is relied upon to prove the existence of a right or custom, there must be evidence, according to the provisions of this section, that that third person is either dead or cannot be found, etc., or that the third person must be examined in the case. If that third person is neither proved to have been dead, etc., nor has he been examined in the case, the statement made by him as to the right or custom cannot be held in law as admissible against a party to the suit or other proceeding. Thus, statements made about the boundaries in documents, cannot be held in law as admissible against a party, unless the third person making the statement is either examined in the case, or is proved

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| <p>17. <i>Ravjappa v. Nilakanta, A. I. R.</i><br/>1962 Mys. 53.</p> <p>18. <i>Ambica Charan v. Kumud Mohan,</i><br/>1928 Cal. 893 : 110 I.C. 521; see<br/>also <i>Sethna v. Mohamed Shirazi</i>,<br/>(1907) 9 Bom. L. R. 1047; <i>Mst.</i><br/><i>Naima Khatun v. Basant Singh</i>,<br/>1934 All. 406; <i>I.L.R.</i> 56 All. 766;<br/>149 I.C. 781 (F.B.); <i>Munnalal v.</i><br/><i>Kameshwari Dat</i>, 1929 <i>Oudh</i> 113;<br/>114 I.C. 801; <i>Latafat Hussain v.</i><br/><i>Onkarmal</i>, 1935 <i>Oudh</i> 41; <i>I.L.R.</i><br/>10 Luck. 423; 152 I.C. 1042; <i>Lu-</i><br/><i>chumanlal Pathak v. Kumar Kam-</i><br/><i>akshya Narain Singh</i>, 1931 <i>Pat.</i> 224;<br/>131 I.C. 788 : 12 P.L.T. 891; <i>Sevu-</i></p> | <p><i>gan Chettiar v. Raghunatha Dorai-</i><br/><i>singam</i>, 1940 <i>Mad.</i> 273; 1939 M.W.<br/>N. 841; See also <i>Thakurji v. Par-</i><br/><i>meshwar Dayal</i>, A.I.R. 1960 All.<br/>339.</p> <p>18-1. 9 Bom.L.R. 1047.</p> <p>19. <i>Mst. Naima Khatun v. Basant</i><br/><i>Singh</i>, 1934 All. 406; <i>I.L.R.</i> 56 All.<br/>766: 149 I.C. 781 (F.B.).</p> <p>20. <i>Leong Hone Waing v. Leon Ah</i><br/><i>Foon</i>, 1930 <i>Rang.</i> 42; <i>I.L.R.</i> 7<br/><i>Rang.</i> 720: 121 I.C. 796.</p> <p>21. <i>Venkatasubbamma v. N. Narayana-</i><br/><i>swami</i>, 1954 <i>Mad.</i> 215: (1954) 1<br/><i>M.L.J.</i> 194: 66 <i>L.W.</i> 841.</p> |
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to be dead, etc.<sup>22</sup> And a statement in a document by a third person, as to the relationship or right of a party to the litigation, is not admissible in evidence under this section, when that third person is still alive and there is no explanation for his non-examination. The statement as to the relationship, not being admissible under this Section cannot be held relevant under Section 11, nor can it be admitted under Section 13, because the determination of alleged relationship is neither a question of any right nor custom within the meaning of that Section.<sup>23</sup>

Where a person asserts his right in his written statement in a previous suit and after his death, the same right is in dispute between his heirs and a third person, the fact that the deceased asserted his right in a previous suit is relevant under Section 13, and the person asserting the right in the previous litigation having died, it becomes relevant under clause (7) of this Section and the written statement in the previous suit is admissible in evidence.<sup>24</sup>

**3. Evidence admitted is substantive evidence.** Evidence admitted under this section is substantive evidence.<sup>25</sup> A *jamabandi*, which can be used only as corroborative evidence under Sec. 34 can be used as substantive evidence, if it is relevant under this section.<sup>1</sup> But where a statement made by a person as a witness is used as evidence under this or the following section, a previous statement of his, which was used to contradict him under Sec. 158, does not become substantive evidence.<sup>2</sup>

In determining the market-value of land acquired on the relevant date, recital in a document of sale of other properties is not substantive evidence unless it amounts to an admission or falls within this section.<sup>3</sup>

**4. Requisites for admissibility.** The conditions upon which the statement may be tendered are the same as those mentioned in Sec. 33 (see notes to Sec. 33 post), with the exception that Sec. 33 adds the case of the witness being kept out of the way by the adverse party.

Before any statement can be admitted under this section, unless the person, making it is examined as a witness, it must be proved that the maker thereof is either dead, or too old and blind and unable to move about,<sup>4</sup> or cannot be found, or has become incapable of giving evidence, or that his attendance cannot be procured without unreasonable delay or expense.<sup>5</sup> State-

- 22. See *Ramautar v. Sheonandan*, A.I.R. 1962 Pat. 273; 1962 B.L.J. R. 11.
- 23. *Bhogal v. Nabihah*, A.I.R. 1963 Pat. 450.
- 24. *Satyadeo Prasad v. Chanderjoti*, A.I.R. 1966 Pat. 110; 1965 B.L.J. R. 800.
- 25. In re Karuppan Samban, 1916 Mad. 1211; 31 I.C. 359; 16 Cr. L.J. 759, 1. Charitter Rai v. Kailash Behari, 1918 Pat. 537; 44 I.C. 422; 3 P.L.J. 306; 4 P.L.W. 213; see also *Jonab Biswas v. Siva Kumari Debi*, 1927 Cal. 855; 104 I.C. 733; 46 Cr. L.J. 253.
- 2. *Niamat Khan v. Emperor*, 1930 Lah. 409; 127 I.C. 850; following *R. v. C. C. Kuttii*, I.L.R. (1902) 26 Mad. 191 and *Bishan Datt v. Emperor*, 1927 All. 705; 105 I.C. 677; 28 Cr.

- L.J. 965; 25 A.L.J. 994.
- 3. *State of Kerala v. Mariamma Abraham*, I.L.R. (1969) 1 Ker. 455.
- 4. *Bhim v. Magaram*, A.I.R. 1961 Pat. 21.
- 5. *Abdul Baqi v. Kunja Behari Pandey*, 1920 Pat. 697; 56 I.C. 818; *Lakshan Chandra Mandal v. Takim Dhali*, 1924 Cal. 558; 80 I.C. 357; 39 C.L.J. 90; 28 C.W.N. 1033; *Karapaya v. Mayandi*, 1933 Rang. 212; 147 I.C. 414; *Gunga Prasad Gupta v. Emperor*, 1945 Cal. 360; 221 I.C. 24; 46 Cr.L.J. 683; 79 C.L.J. 149; *Raja Ram v. State*, 1954 All. 214; 1955 Cr.L.J. 455; 1953 A.L.J. 686; *Nallakaruppan v. Commissioner*, I.L.R. (1965) 2 M. 404; A.I.R. 1966 M. 99; 78 I.W. 404; *Ambika Yadav v. State*, 1972 B.L.J.R. 107.

ments are not to be taken in evidence, if the Tribunal did not take steps to enforce the attendance of witnesses.<sup>6</sup>

Where there is no proper proof of statements, in the absence of the examination of the deponents or in the absence of evidence that they are dead besides the circumstances which would make them admissible under this section, the statements are not admissible in evidence.<sup>7</sup>

**5. Burden of proof.** The provisions of this section are in the nature of exceptions, and the onus of establishing circumstances that would bring a statement within any of the exceptions contemplated by it lies clearly upon that party which wishes to avail itself of the statement.<sup>8</sup>

**6. Section relates to relevancy, not proof.** The section relates only to the relevancy of evidence, not to the manner of its proof.<sup>9</sup>

**7. "Statements, written or verbal".** (a) *General.* What is relevant and admissible under clause (1) of this section is the statement actually made by the deceased (as to the cause of his death or of the circumstances of the transaction which resulted in his death) and not what he omits to state. In other words, no argument can be built upon what he has not said in his declaration. His declaration must be distinguished from the deposition he would have made, if he were alive. One could have drawn some inference from his failure to mention a fact in his deposition, but one cannot draw any inference from his failure to mention it in the dying declaration.<sup>10</sup> The statements may be oral or written. But a mere statement of a rumour that the deceased had heard is not admissible under this section.<sup>11</sup> An affidavit of a deceased person has been held to be inadmissible under this or the next section.<sup>12</sup> In the case of an affidavit of a living person, the only basis, on which it can be acted upon as admissible evidence, is, that it should be capable of being regarded as a statement in writing complying with the conditions of this section.<sup>13</sup> The expression "written statements made by a person who is dead" means, that the written statements must have been actually made by the deceased person.

A person may make a written statement either by writing it out himself, or by dictating it to somebody else. Usually a person who is in immediate expectation of death is too feeble to be able to write out his statement himself, but if any written statement is produced in Court purporting to have been

6. Nani Gopal v. Abdul, A.I.R. 1959 Assam 200.
7. Sri Chidambareswara Sivagami Ambigai Temple v. Commissioner, H.R.E., Madras, I.L.R. (1965) 2 Mad. 404; (1966) 1 M.L.J. 109; 78 M.L.W. 404; A.I.R. 1966 Mad. 99, 102; Raj Bali Singh v. Dy. Director Consolidation, A.I.R. 1972 All. 291; Prabhakar Lal v. Shyam Lal (1972) 1 Mys.L.J. 473.
8. Abdul Gani v. Emperor, 1943 Cal. 465, 467; I.L.R. (1943) 1 Cal. 423; 209 I.C. 105; 45 Cr.L.J. 71; 47 C.W.N. 332.
9. See B. Nagaraja Rao v. Koothappan, 1941 M. 602; (1941) 1 M.L.J. 759; 1941 M.W.N. 518; 53 L.W. 634; Dogarmal v. Sunam Ram, 1944 Lah. 58; 212 I.C. 416; 45 P.L.R. 441.
10. Ram Bali v. State, 1952 All. 289, 297; 1953 Cr.L.J. 600; Balkari v. State of Rajasthan, 1975 Raj.L.W. 435.
11. Ram Krishna Roy v. The State, 1952 Cal. 231; 1953 Cr.L.J. 623.
12. Doraiswami Ayyar v. Bal Sundaram Ayyar, 1927 Mad. 507; 102 I.C. 243; 52 M.L.J. 477.
13. Marneedi Satyam v. M. Venkataswami, 1949 Mad. 689; (1949) 1 M.L.J. 434; 62 L.W. 256; Saligram v. Laxmi Narainji, 1955 Ajmer 28.

made by a person who is dead, it must be shown, if that person did not write that statement himself, that he dictated the statement, and that he did not make the statement in answer to any questions except such a question as "Will you please state what it is you wish to be written down?" and there must be guarantee that the dictation has been taken down correctly.<sup>14</sup> Declarations by signs and gestures amount to "verbal statements".<sup>15</sup> The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed.<sup>16</sup> A declaration does not cease to be a dying declaration merely because the declarant lingered on for some days.<sup>17</sup>

(b) "*Statement*". The word "statement" is not defined in this Act. Hence, the dictionary meaning of the word should be looked to in order to discover its meaning. Assistance may also be taken from the use of the word "statement" in other parts of the Act to discover in what sense it has been used therein.<sup>18</sup>

8. "**Of relevant facts**". A statement to be admissible under this section, must be of a relevant fact.<sup>19</sup> In one case,<sup>20</sup> the Bombay High Court has held that this Act only permits hearsay evidence to be given under this section of statements of relevant facts and not of statements of facts in issue. But the authority of this ruling has been doubted in a case by a Bench of the same Court.<sup>21</sup> As pointed out in the case last cited, in many of the illustrations to the section, the statements said to be admissible are statements of facts in issue, and not merely of relevant facts; the line between a fact in issue and a relevant fact is often a very narrow one; and the authority of the earlier Bombay decision has been considerably impaired by the decision of their Lordships of the Privy Council in *Mst. Biro v. Atmaram*,<sup>22</sup> where a statement of a fact in issue was held to be not inadmissible. In another Privy Council case, a statement made in a document which was a copy of the original was held to be admissible as a statement made by a deceased person in a document relating to a relevant fact.<sup>23</sup>

9. "**By a person**". The word "person" must not be read as "persons". If a statement, written or verbal, is made by several persons, and one or some of them is or are dead, and one or others is or are alive, the statement of the deceased person or persons is admissible under this section notwithstanding.

14. Nga Mya Da v. Emperor, 1936 Rang. 42, 43, 44 : 160 I.C. 597 : 37 Cr.L.J. 299.
15. See note post under the heading 7 (b) "Statement", supra and notes under the heading Clause (i), "From of Statement" and "Statement by signs and gestures". Post.
16. P. Narayana Swami v. Emperor, 1930 P.C. 47: 66 I.A. 66: I.L.R. 1939 Kar. 123: 180 I.C. 1: 40 Cr. L.J. 364: 1939 A.L.J. 298: 41 Bom. L. R. 428: 69 C.L.J. 273: 43 C.W.N. 473: (1939) 1 M.L.J. 756: 1939 M.W.N. 185; 20 P.L.T. 265.
17. Thakur Singh v. Emperor, 1929 Lah. 64: 113 I.C. 177: 30 Cr. L. J. 65.
18. Bhogilal v. State of Bombay, 1959 S.C.J. 240: A.I.R. 1959 S.G. 356: 1959 Cr.L.J. 389: 61 Bom.L.R. 746: 1959 M.L.J. (S.C.) 101: 1959 All. W. R. (H.C.) 156.
19. Marneedi Satyam v. M. Venkataswami, 1949 Mad. 689: (1949) 1 M. L. J. 434: 62 L.W. 256.
20. Patel Vandravan Jekisan v. Patel Manilal Chunilal, I.L.R. 16 Bom. 470
21. Jadav Kumar Liladhar v. Pushpabai, 1944 Bom. 29: 211 I.C. 315: 45 Bom. L.R. 924; Ambika Yadav v. State, 1972 B.L.J.R. 107.
22. 1937 P.C. 101: 64 I.A. 92: 167 I.C. 346: 39 Bom. L. R. 726 (P.C.).
23. Seethayya v. P. Subramanya Soma-yajulu, 1929 P.C. 115: 56 I.A. 146: I.L.R. 52 Mad. 453: 117 I.C. 507.

standing that the other person or persons who also made the statement is or are alive. In such a case the statement is not one statement, but each person making the statement must be taken to have made the statement for himself or herself, and if anyone of the makers of the statements is dead, the statement made by that person is admissible under this section, if it comes under one or other of its clauses, being thus the statement of a person who is dead. It may, in such a case, however be matter for legitimate comments that the statement of the deceased person must be received with caution, if the party tendering it has not without proper excuse called the author or authors of the statement still living to depose to its accuracy, but the matter cannot be placed higher than that.<sup>24</sup> But statement attributed to a number of persons including deceased cannot be accepted as dying declaration.<sup>25</sup>

**10. "Dead or cannot be found".** Where a person, though alive at the time the plaintiff closed his case, was not called as a witness, statements in writing by such person filed before his death in support of the plaintiff's case were held by the Judicial Committee to be inadmissible in evidence as statements of a deceased person. It was attempted to distinguish the case on the ground that the defendant had himself (after the person whose statements were filed was dead) filed certain other statements of this same man. As to this the Privy Council observed : "But those documents which were doubtless filed in case the respondent's (plaintiff's) documents should be admitted, are not evidence and their production by the appellant (defendant) cannot be held to compel the Court to depart from the rules of evidence in the decision of the case."<sup>1</sup> This section has no application to the case of a witness who has been fully examined and cross-examined, but who happens to die before the termination of the suit. In such a case, it is not open to either party to apply under this section for the admission of the previous statement made by the witness.<sup>2</sup>

Where the first information report in writing was made by a person and he died later, the declaration of the person, who is alleged to have made it, must be shown to have been actually made by him. It is, therefore, incumbent on the prosecution to prove by whom or under whose direction it was written. In the absence of such proof, the first information report cannot be legally used as a corroborative piece of evidence.<sup>3</sup> See also the undernoted case.<sup>4</sup>

**11. "Incapable of giving evidence".** See Notes to Secs. 32 (2) and 33, post.

The incapacity to give evidence contemplated by this section need not be a permanent incapacity. But the incapacity must be proved, and proved strictly. The burden of establishing the circumstances that can bring a statement within any of the exceptions in this section rests on the party wishing to avail of the statement. Therefore, if it is shown that a person has become too

24 Chandra v. Nilmadhab, (1898) 26 C. 236.

25. Preetam Singh v. State, 1972 All Cr. R. 332; 1972 All L.J. 744; 1972 All W.R. (H.C.) 521.

1. Jagatpal v. Jageshar, (1902) 25 A. 143.

2. Sahdeo v. Kusum, 1920 Pat. 291: 47 I.C. 929; see also notes under Sec. 33, post.

3. Sk. Mansoor v. State of Bihar, 1970 P.L.J.R. 412, 414 and 415.

4. I. L. R. (1974) Him. Pra. 948.

old and blind and unable to move, he must be held to have become incapable of giving evidence.<sup>5</sup>

12. "Delay or expense". See Notes to Sec. 33 post.

## CLAUSE (I)

### SYNOPSIS

1. Statement as to cause of death. Distinction between English and Indian Laws.
2. Subject-matter of the declaration.
3. "Cause of his death".
4. Circumstances of transaction resulting in his death.
5. Statements regarding motive.
6. Statement of deceased about death of another.
7. Statement before injury.
8. "In cases in which the cause of that person's death comes into question."
9. Statement must be complete.
10. Competency and credibility.
11. Form of statement.
12. Statement by signs and gestures.
13. Deposition and dying declaration.
14. Record and proof of declaration.
15. *Ipissima verba.*
16. Evidence value : Corroboration, necessity of.
17. Dying declaration.
  - (a) Summary of salient features.
  - (b) Conclusion.
18. Miscellaneous :
  - (a) General.
  - (b) Conclusion.
  - (c) Statement under section 162, Cr. P. C.

1. **Statement as to cause of death. Distinction between English and Indian laws.** The first clause is widely different from the English law upon the subject of dying declaration,<sup>6</sup> according to which, (a) this description of evidence is not admissible in any civil case ; and (b) in criminal cases only in the single instance of homicide, that is, murder or manslaughter, where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declaration.<sup>7</sup> On the other hand, under this Act the statement is relevant whatever may be the nature of the proceeding, in which the cause of the death of the person who made the statement comes into question.<sup>8</sup> And further, according to English law certain conditions

5. Bhim Mandal v. Magaram, A. I. R. 1961 Pat. 21.
6. See Emperor v. Shivabhai, 1926 Bom. 513; I.L.R. 50 Bom. 683; 97 I.C. 660: 27 Cr. L. J. 1140: 28 Bom. L. R. 1013.
7. Taylor, Ev., ss. 714–716; thus in a trial for robbery, the dying declaration of the party robbed has been rejected; and where a prisoner was indicted for administering drugs to a woman, with intent to procure abortion, her statements were held to be inadmissible; ib., s. 715; Roscoe, Cr. Ev., 11th Ed., 32-33; 3 Russ. Cr. 354, 362; declaration is admissible even where case is not one of homicide, R. v. Bissorunjun, (1866) 6 W.R. Cr. 75, foll.; Laji v. R., 1928 Pat. 162; I.L.R. 6 Pat. 747; 106 I.C. 698; 29 Cr.L.J. 106. Now, by the Civil Evidence Act, 1968 in civil proceedings the admissibility of each declaration (whether

- oral or written) is subject to the provisions of that Act. Phipson 11th Ed., (1970) p. 381, para. 882.
8. S. 32, cl. (I); Illustration (a) gives an example of a civil, as well as of a criminal case, and as an example of the charge of rape. Even under the previous law as contained in S. 371 of Act XXV of 1861 and S. 20, Act II of 1855, it was held that the rule of English law restricting the admission of this evidence to cases of homicide had no application in India; and that the dying declaration of a deceased person was admissible in evidence on a charge of rape; R. v. Bissorunjun, (1866) 6 W.R. Cr. 75; Parmanand Ganga Prasad v. Emperor, 1940 Nag. 340; I.L.R. 1941 Nag. 110; 190 I.C. 849; 42 Cr. L. J. 17; 1940 N.L.J. 459; Norton, Ev., 175; see however, State v. Banamal, 25 Cut. L.T. 433, where it has been held that

are required to have existed at the time of declaration, viz., it is necessary that the declarant should have been in actual danger of death; secondly, that he should then have had a full apprehension of his danger and lastly, that death should have ensued.<sup>9</sup> The existence of the last condition is of course as necessary under the Act as under the English rule, inasmuch as the statement is admissible only in cases in which the cause of the death of the person who made it comes in question. But, under this Act, the statement is relevant whether the person who made it was or was not at the time when it was made, under expectation of death.<sup>10</sup> Therefore, whether the declarant was or was not in actual danger of death, and knew or did not know himself to be in such danger, are considerations which will not affect the admissibility of this kind of evidence in India. But these considerations ought not to be laid aside in estimating the weight to be allowed to the evidence in particular cases.<sup>11</sup> Of course, before the statement can be admitted under this section, the declarant must have died. Where a person making a dying declaration chances to live, his statement cannot be admitted in evidence as a dying declaration,<sup>12</sup> though it may be relied on under Sec. 157 to corroborate the testimony of the complainant when examined in the case.<sup>13</sup> The salutary provision in Sec. 164, Criminal Procedure Code should be followed, if the statement is inculpatory and in the nature of a confession.<sup>14</sup>

## 2. Subject-matter of the declaration. The statement must be as to the cause of the declarant's death, or as to any of the circumstances of the

illustration (a) to S. 32 does not apply to a case where a raped girl makes a statement to her mother and then commits suicide. It has been ruled that the statement could not be admitted under Sec. 32(2), as the rape did not cause her death but might have been a motive.

9. Taylor, Ev., s. 718; Roscoe Cr. Ev., 12th Ed., 32-33, Russ. Cr. 354—362.
10. S. 32, cl. (1); R. v. Degumber, (1873) 19 W.R. Cr. 44; R. v. Blechynden, (1880) 6 C.L.R. 278; R. v. Premananda, 1925 Cal. 876; I. L. R. 52 Cal. 987; 88 I.C. 1000; 26 Cr. L. J. 1256; 42 C.L.J. 247; 29 C.W.N. 738; State v. Kanchan Singh, 1954 All. 153; 1955 Cr. L. J. 264; 1958 A.L.J. 615; Emperor v. Akbar Ali, 1933 Bom. 479 (2); I. L.R. 58 Bom. 31; 146 I.C. 548; 35 Cr. L. J. 109; 35 Bom.L.R. 1021; Inayat Khan v. Emperor, 1935 Lah. 94; I.L.R. 16 Lah. 589; 158 I.C. 336; 36 Cr. L. J. 1885; Findal v. State, 1954 H.P. 11; Rajendra v. State, A.I.R. 1960 Punj. 310.

11. Norton, Ev., 175; R. v. Premanand, supra. Under the law which was in force prior to this Act (S. 371, Act, XXV of 1861). S. 29, Act. II of 1865, and which with one modification relating to the entertainment by the deceased of hopes of recovery was similar in this respect to the English law, it was held that

before a dying declaration could be received in evidence, it must be distinctly found that the declarant knew, or believed at the time he made the declaration, that he was dying or likely to die. In the matter of Tenoo, (1871) 15 W. R. Cr. 11; R. v. Bissorunjun, (1886) 6 W.R. Cr. 75, 76; R. v. Soyumber, (1868) 9 W.R. Cr. 2; as to the English rule, see R. v. Gloster, (1888) 16 Cox. 471, in which the result of the case-law is stated, and R. v. Mitchell, (1892) 17 Cox. 503, and text-books cited *supra*.

12. Babu v. State, 1954 All. 633; 1955 Cr.L.J. 1341; 1954 A. L. J. 614; Hari Krishna v. Emperor, 1935 Oudh 477; 156 I.C. 819; 36 Cr. L.J. 1007. See Moti Singh v. State, 1964 S.C. 900; 1963 M.L.J. Cr. 625; 1963 All.W.R. (H.C.) 469; (1964) 1 Cr.L.J. 727; 1963 Cur.L.J. (S.C.) 87; 1963 All.L.J. 647.

13. R. v. Rama, (1902) 4 Bom. L.R. 434; but see (*In re*) Muniswamachari, 1949 D.L.R. (Mys.) 9; 54 Mys. H.C.R. 120, where the declarant was not the complainant and it was doubted whether the declaration could be used even for the purposes of corroboration; Namdeo v. State of Maharashtra, 1975 Mah. L. J. 36; 1976 Cr. L. J. 871.

14. Mannem Edukondalu (*In re*), A.I.R. 1957 Andh. Pra. 729.

transaction which resulted in his death,<sup>15</sup> i.e. the case and circumstances of the death, and not previous or subsequent transaction,<sup>16</sup> such independent transactions being excluded as not falling within the principle of necessity on which such evidence is received.<sup>17</sup> When a person is not proved to have died as a result of injuries received in the incident in question, his statement cannot be said to be the statement 'as to the cause of his death or as to any of the circumstances which resulted in his death.'<sup>18</sup>

**3. "Cause of his death".** The provisions of this Section are in the nature of exceptions. The burden of establishing circumstances that would bring a statement within any of the clauses of this section lies upon the party who wishes to avail itself of the statement.<sup>19</sup> To avail of the provisions of this clause, the prosecution must establish that the statement in the dying declaration was made by a person who is dead and it relates to the cause of his death or to any of the circumstances of the transaction which resulted in his death, and that cause of that person's death is in question in the case. Where there is nothing to show that the injury to which a statement in the dying declaration relates was the cause of the injured person's death, or that the circumstances under which it was received resulted in his death, the statement is not admissible under this clause.<sup>20</sup> The fact that the deceased lingered for some days after receiving fatal injuries does not deprive his declaration of its character as a dying declaration admissible under this section.<sup>21</sup>

If the injuries received by the declarant are not the cause of his death, and he dies of some other malady, such as pneumonia, his declaration cannot be admitted under this clause.<sup>22</sup> The informant died 15 days after lodging the report not on account of injuries but on account of tetanus. The dying declaration in report cannot be admitted in evidence.<sup>23</sup> The section refers to the actual cause of death, or to the transaction resulting in death. If a woman is raped, and decides three days later to commit suicide, the rape is not the cause of her death or transaction resulting in her death, though it may be the

15. S. 32, cl. (l): Steph Dig. Art. 26; Moti Singh v. State of U.P. (1964) 1 S.C.R. 688; (1963) 2 S.C.J. 714; I.L.R. (1963) 2 A. 708 : A.I.R. 1964 S. C. 900 : 1963 M. L. J. (Cr.) 625 : 1963 All.L.J. 647 :- 1963 All.W.R. (H.C.) 469 : (1964) 1 Cr.L.J. 727 ; 1963 Cur.L.J. (S. C.) 8.
16. R. v. Mead, (1824) 2 B. & C. 605; R. v. Hind, (1860) 8 Cox. 300; R. v. Murton, (1862) F. & F. 492; Steph. Dig. Art. 26; Khana v. R. 67 P.L.R. 250: 2 Cr.L.J. 237.
17. Phipson, Ev., 11th Ed., 435; so also in America, the declarations are restricted to the *res gestae*, ib. and cases here cited.
18. Moti Singh v. State of U. P., A. I. R. 1964 S.C. 900: 1963 All.L.J. 647: 1963 All.W.R. (H.C.) 469: (1964) 1 Cr.L.J. 727: 1963 Cur. L.J. S.C. 8: 1963 M.L.J. Cr. 625.
19. Abdul Gani v. Emperor, I. L. R. (1943) 1 C. 423: 209 I.C. 105; A. I.R. 1943 C. 465: 47 C.W.N. 334;
20. (in re) Mallappa, A. I. R. 1962 Mys. 82: 1962 M.L.J. Cr. 25.
21. Ibid: see also R. v. Rudra, I.L.R. 25 B. 45.
22. Thakur Singh v. Emperor, 1929 Lah. 64: 113 I.C. 177: 30 Cr. L. J. 65.
23. R. v. Rudra, I.L.R. 25 Bom. 45; Wali Mohammad v. Emperor, 1930 Oudh 249: 126 I.C. 511: 31 Cr. L.J. 1025: 7 O. W. N. 466; In re Mallappa, A.I.R. 1962 Mys. 82: 1962 M.L.J. Cr. 25; State v. Chakradhara, A.I.R. 1964 Orissa 262, natural death long after occurrence; Manmohan Singh v. State, 1973 Cur.L.J. 276: 1973 Chand L. R. (Cri.) 268: 75 Punj. L.R. 521 (Facts mentioned in F.I.R. by injured had nothing to do with cause of his natural death).
24. Chandrabhan Singh v. State, 1970 All Cri. R. 243: 1970 All W. R. (H.C.) 381: 1971 Cri. L.J. 94 (96) (All).

contingent motive. Then her statement could only be relevant under Sec. 6, if it is so connected with her rape as to form part of the same transaction.<sup>24</sup>

If there is no evidence to show that the injuries sustained by the deceased were in any way connected with his death which occurred more than two months after the acid was thrown on him, the statements made by the deceased, first to the police head constable and next to the Magistrate, are not admissible in evidence under this section.<sup>25</sup>

**4. Circumstances of transaction resulting in his death.** This clause refers to two kinds of statements : (1) when the statement is made by a person as to the cause of his death, or (2) when the statement is made by a person as to any of the circumstances of the transaction which resulted in his death. The words "resulted in his death" do not mean "caused his death". The expression "any of the circumstances of the transaction which resulted in his death" is wider in scope than the expression "the cause of his death".<sup>1</sup> The declarant need not actually have been apprehending death.<sup>2</sup>

The expression "circumstances of the transaction", occurring in Sec. 32, Clause (13), has been a source of perplexity to Courts, faced with questions as to what matters are admissible within the meaning of the expression.

The decision of their Lordships of the Privy Council in *Pakala Narayana-swami v. Emperor*,<sup>3</sup> sets the limits of the matters that could legitimately be brought within the purview of that expression. Unfortunately however, as is the case with the decision of their Lordships in *Pulukuri Kottaya v. Emperor*,<sup>4</sup> with reference to the information admissible under Sec. 27 of the Act, so is it with this decision under Sec. 32 (1), in that difficulties arise from the contention often raised as to what their Lordships meant to say or did not mean to say. Lord Atkin, who delivered the judgment of the Board, has, however, made it abundantly clear that, except in special circumstances, no circumstance could be a circumstance of the transaction, if it is not confined to either the time actually occupied by the transaction resulting in death, or the scene in which the actual transaction resulting in death took place. The special circumstance permitted to transgress the time factor is, for example, a case of prolonged poisoning, while the special circumstance permitted to transgress the distance factor is, for example, a case of decoying with intent to murder. This is, because the natural meaning of the words, according to their Lordships, do not convey any of the limitations such as—

- (1) the statement must be made after the transaction has taken place,
- (2) the person making it must be at any rate near death,
- (3) the circumstances can only include acts done, when and where the death was caused.

But the circumstances must be circumstances of the transaction and they must have some proximate relation to the actual occurrence.

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| <p>24. <i>Kappinaiah v. Emperor</i>, 1931 Mad. 233 (2): 131 I.C. 456: 32 Cr. L. J. 751: 1930 M.W.N. 702.</p> <p>25. <i>K. Ramalakshamma v. K. Jagadheswara Reddi</i>, 1971 M.L.J. (Cr.) 392, 393.</p> <p>1. <i>State v. Ram Prasatl Singh</i>, 1953 Pat. 354: 1954 Cr. L. J. 1751.</p> | <p>2. <i>In re Kaloo Singh</i>, A. I. R. 1964 M.P. 30; <i>State of Orissa v. Kausalya</i>, A.I.R. 1965 Orissa 38.</p> <p>3. L.R. 66 I.A. 66; I.L.R. 18 Pat. 234: A.I.R. 1939 P. C. 47: 180 I.C. 1.</p> <p>4. 74 I.A. 68: I.L.R. 1948 M. 1: 230 I.C. 135: A.I.R. 1947 P.C. 67.</p> |
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The following facts and extracts from the judgment of their Lordships amply bear out the foregoing observations and show that there need be no doubts as to the limits of the matter admissible under this Section. The question was whether the statement of the widow of the deceased, that on a certain day (a couple of days prior to the murder) the deceased had told her that he was going to town as the accused's wife had written and told him to go and receive payment of his dues, was admissible under Sec. 32 (1). Their Lordships observed :

"The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction; general expressions indicating fear or suspicion, whether of a particular individual or otherwise will not directly relate to the occasion of the death, will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him, would each of them be circumstances of the transaction, and would be so whether the person unknown was or was not the person accused. Such a statement might indeed be exculpatory of the person accused. 'Circumstances of the transaction' is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in 'circumstantial evidence' which includes evidence of all relevant facts. It is on the other hand narrower than 'res gestae'. Circumstances must have some proximate relation to the actual occurrence, though, as for instance, in a case of prolonged poisoning they may be related to dates at a considerable distance from the date of actual fatal dose.

"It will be observed that 'the circumstances' are of the transaction, which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that 'the cause of (the declarant's) death comes into question'. In the present case, the cause of the declarant's death comes into question. The transaction is one in which the deceased was murdered on one of two successive days next following his statement in question: and his body was found in a trunk proved to have been brought on behalf of the accused: the statement made by the deceased that he was setting out to the place where the accused lived and to meet a person, the wife of the accused, who lived in the accused's house, appears clearly to be statement as to some of the circumstances of the transaction which resulted in his death. The statement was rightly admitted."

The Supreme Court in the case of *Shiv Kumar v. State of U. P.*<sup>5</sup> has made similar observations that the circumstances must have some proximate relation to the actual occurrence, and that general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly to the occasion of death will not be admissible.

Where the alleged statements of the deceased to certain witnesses not in the presence of the accused, some months prior to the murder contained a disclosure of the intention of the deceased to cancel a will and disinherit the accused, and the prosecution relied on this disclosure as constituting the motive for the accused to murder the deceased, it was held that the statement could not be proved by hearsay evidence of the witnesses who heard the deceased make the statements, unless the statements could be brought under Sec. 8, Explanation 1, or Sec. 32 (1) of this Act. The statements, not being statements as to the cause of the declarant's death or as to any of the circumstances of the transaction which resulted in the declarant's death, were held not admissible under Sec. 32 (1). The expressed intention of the deceased did not also amount to conduct within the meaning of Explanation 1 to Sec. 8, since what the deceased said was not in explanation of, nor did it accompany, any act of the deceased.<sup>6</sup>

The clause does not permit the reception in evidence of all such statements of a dead person as may relate to matters having a bearing howsoever remote on the cause or the circumstances of his death. It is confined to only such statements as relate to matters so closely connected with the events which resulted in his death that they may be said to relate to circumstances of the transaction which resulted in his death.<sup>7</sup> "Circumstances of transaction which resulted in his death" means only such facts or series of facts which have a direct or organic relation to death. Hence statement made by deceased long before the incident of murder is not admissible.<sup>8</sup>

The portion of the statement which explains the immediate cause of the speaker's death can no doubt be used; but the portion of the statement which is obviously not part of the transaction that led to the death of the person, may be disallowed as not coming under Sec. 32 (1). But where the earlier portion of a statement gives the outline of the story of the attack on the deceased, such portion also can be held admissible in evidence against all the persons mentioned in the statement.<sup>9</sup>

In the undernoted case, the accused was charged with the murder of a girl, K. It was suggested on behalf of the prosecution as a possible motive for the crime that the accused had attempted to seduce K, and that he had killed her because she repulsed his advances. The mother of K was allowed to say in evidence that before she, the mother, left the house for another village, some hours before the murder, K implored her to come back by night, because on a former occasion the accused had tried to have sexual intercourse with her, i.e. K. This alleged statement of K was held not admissible under Section 32 (1), since it had nothing whatever to do with the circumstances under which K met with her death and the prosecution could not prove the alleged

6. Venkatasubba Reddi v. Emperor, (1931) M.W.N. 1177: A.I.R. 1931 M. 689: 55 Cr.L.J. 51.

7. Pakala Narayana Swami v. Emperor, L.R. 66 I.A. 66; I.L.R. 18 Pat. 234; 180 I. C. 1; A.I.R. 1939 P.C. 47; Gokul Chandra v. State, A.I.R. 1950 C. 306; Public Prosec-

cutor v. Munigan, A.I.R. 1941 M. 359; Ghazi v. The State, A. I. R. 1966 A. 142.

8. Onkar v. State of M. P., 1974 M.P. L.J. 429; 1974 Jab.L.J. 377; 1974 Cr. L. J. 1200 (M.P.).

9. Raman Servai v. Emperor, (1937) M.W.N. 333.

motive through inadmissible evidence.<sup>10</sup> Statement of deceased to her parents about illicit intimacy between her husband (accused) and another woman, is not admissible in evidence.<sup>11</sup>

Where the only evidence of an alleged motive for murder consists in statements, alleged to have been made by the deceased to some witnesses long prior to the murder, the statements are inadmissible.<sup>12</sup>

Where the motive evidence was entirely derived from the statements made by the deceased to his wife and wife's sister, which provided nothing more than grounds for supposing that the deceased suspected the accused of having betrayed his wife's sister in a civil suit which in no way could be associated with the actual murder, the statements were held inadmissible, as being general expression indicating fear or suspicion, whether of a particular individual or otherwise, and not directly relating to the occasion of death.<sup>13</sup>

In the under-noted case it was in evidence, as an alleged motive for the murder, that the accused had been on intimate terms with a certain girl and the deceased was attempting to arrange the marriage of that girl with another person. The evidence for this alleged motive for the murder was derived from the statements said to have been made by the deceased prior to her death. These statements were held inadmissible in evidence.<sup>14</sup>

In *Gian Chand v. Emperor*,<sup>15</sup> S was suspected of theft. He was closely questioned. He made a confession that he had committed the theft at the instigation of G and that he handed the property to G. S agreed to go and see G and get the property back. The next day S left his house to see G and after that day was never seen alive. It was said that this Section and its Clauses (1) and (3) made it quite clear that the statement of S was admissible. It certainly was a statement which would have exposed S, who could not be called, to a criminal prosecution, and it was also a statement as to the circumstances of the transactions which resulted in the death of S.

In *Emperor v. Faiz*,<sup>16</sup> accused were charged with an offence under Section 330, I. P. C., that the deceased committed suicide as the result of their ill-treatment. The statements made by the deceased were held admissible in evidence under Section 32(1), though the accused were not charged with causing the death of the deceased as the ill-treatment by the accused was the cause, though not the direct cause of death, and though the convicts were not legally responsible for the suicide, the whole affairs of ill-treatment and suicide being all one transaction.

- 10. Venkatigadu v. Emperor, (1938) M.Cr.C. 58; see Ratan' Gond v. State of Bihar, 1959 S.C. 18; 1941 M. 101 (infra).
- 11. Ketasani Rama Lakshmamma' v. Kalasam J. Reddi, 1971 Mad. L. J. (Cri.) 392; (1971) 2 Andh. W.R. 13.
- 12. Veerankutti Hajee v. Emperor, (1938) M.W.N. 868; 39 Cr.L.J. 947.
- 13. Baggam Appala Narasayya v. Emperor, (1940) M.W.N. 937; 192 I.C. 586; I.L.R. 1941 M. 81; A.I.R. 1941 M. 101.
- 14. Public Prosecutor v. Munigan, (1940) M.W.N. 1272; I.L.R. 1941 M. 503; 195 I.C. 76; A.I.R. 1941 M. 359.
- 15. A.I.R. 1937 Lah. 399.
- 16. A.I.R. 1916 Lah. 106; 35 I.C. 998.

In *Protima Dutt v. State of West Bengal*,<sup>17</sup> the husband and the mother-in-law were charged under Section 306 read with Section 34 of the Penal Code with abetment of suicide by the deceased girl by systematic ill-treatment, cruelty and instigation to commit suicide. It was held that the time factor was not always the criterion for admissibility and the letters written by the deceased to her relatives during the period of two years prior to her death by suicide complaining about systematic ill-treatment, cruelty and instigation leading to suicide were admissible in evidence under this section.

In *T. Ratnakaran v. State*,<sup>18</sup> it was the case of the prosecution that the accused wanted to do away with the deceased because of her pregnancy through him. It was held that the statement of the deceased to the witnesses of her condition and of the person responsible for it would be admissible under Section 32(1) as it was a circumstance which had some proximate relation to her death.

In *Satish Chandra Saha v. State*,<sup>19</sup> the statement of the deceased that he was going to the accused to release his cow which the accused had confined, made almost immediately preceding the quarrel over the recovery of the cow during the course of which the deceased had sustained an injury from the accused resulting in his death, was held admissible in evidence under Section 32(1) as it related to the circumstances of the transaction which resulted in his death.

In *Alli Jan v. The State*,<sup>20</sup> a complaint in writing, made to the police by a person who died some time thereafter, expressing apprehension of death at the hands of a certain person was held admissible under Section 32(1) and Section 8 of the Act, when the person whose conduct was the source of the apprehension was charged with the offence of murder of the person making the complaint. His statement was held admissible as relating to the circumstances of the transaction which resulted in his death within Section 32(1). The fact that the deceased had made a complaint to the police against the accused charging him with serious offences could also be admitted as showing a motive under Section 8.

In *Krishna Ram v. State*,<sup>21</sup> the deceased as soon as he was carried to the verandah of his house, on being questioned by his son as to how he sustained the injuries, stated that it was the appellant who had inflicted the injuries on his person. This statement obviously related to the circumstances of the transaction which ultimately resulted in his death. The doctor deposed that the injury was the contributing factor in the death. The statement made by the deceased, very shortly after he sustained the injuries, was held admissible.

In a case from Maharashtra, applications were made by a widow for Police protection against her brother-in-law at the time when she had undertaken sowing operations because she apprehended trouble from him; these were made two months prior to her murder. The applications were held to

17. (1977) 81 C.W.N. 713.

L. J. 894; *Mohinder Singh v. State of Punjab*, 1971 Cri. L. J. 1764 (Punj.).

18. A.I.R. 1955 T.C. 87.

19. A.I.R. 1954 Cal. 379.

20. A.I.R. 1960 Bom. 290; 1960 Cr.

21. A.I.R. 1964 Assam 53.

fall within the present clause and were admissible.<sup>22</sup> A complaint by deceased regarding kidnapping of his son by accused is admissible as indicating motive of his subsequent abduction and killing by the accused.<sup>23</sup>

To sum up, the test of the relevancy of a statement under Section 32 (1) is not what the final finding in the case is but whether the cause of the death of the person making the statement comes into question in the case. The expression 'any of the circumstances of the transaction which resulted in his death' is wider in scope than the expression 'the cause of his death'; in other words, Clause (1) of Section 32 refers to two kinds of statements: (1) statement made by a person as to the cause of his death, and (2) the statement made by a person as to any of the circumstances of the transaction which resulted in his death.

The words 'resulted in his death' do not mean 'caused his death'.<sup>24</sup> Thus, it is well settled that declarations are admissible only in so far as they point directly to the fact constituting the *res gestae* of the homicide; that is to say, to the act of killing and to the circumstances immediately attendant thereon, like threats and difficulties, acts, declarations and incidents, which constitute or accompany and explain the fact or transaction in issue. They are admissible for or against either party, as forming parts of the *res gestae*.

**5. Statements regarding motive.** A statement by the deceased regarding the motive for his murder is a statement as to the "circumstances of the transaction" which resulted in his death, and is therefore admissible.<sup>25</sup> A similar view has been taken by the Courts of the Judicial Commissioner of Nagpur,<sup>1</sup> and Himachal Pradesh,<sup>2</sup> where the prosecution case was that the accused wanted to do away with the deceased woman, because of her pregnancy through him. It was held that a statement made by the deceased of her condition, and of the person responsible for it, was admissible under this clause, as it was a circumstance which had some proximate relation to the death of the woman.<sup>3</sup> But the Madras High Court, relying on the observations of their Lordships of the Privy Council in *Pakala Narayanaswami v. Emperor*,<sup>4</sup> has held that statements regarding motive are not admissible;<sup>5</sup> the same view has been taken by the Kerala High Court<sup>6</sup> and the Judicial Commissioner's Court, Goa.<sup>7</sup>

- 22. Dinkar Bandu Deshmukh v. State, 72 Bom. L. R. 405; 1970 Mah.L.J. 634; 1970 Cr. L. J. 1622; A. I. R. 1970 Bom. 438, 446.
- 23. I.L.R. (1976) 2 Punj. 362; 1975 Punj. L. J. (Cri.) 261.
- 24. See State v. Ramprasad Singh, A. I. R. 1953 Pat. 354.
- 25. Emperor v. Sonra Bhuiyan, 1938 Pat. 52; I.L.R. 16 Pat. 593; 173 I.C. 499; 39 Cr.L.J. 332; 19 P.L.T. 86; 1937 P.W.N. 897; 1975 Puej. L. J. (Cri.) 261.
- 1. Chunnilal v. R., 1924 Nag. 115 (2); 26 Cr. L. J. 1121; 88 T.C. 353.
- 2. Findal v. State, 1954 H. P. 11.
- 3. T. Retnakaran v. State, 1954 Ker. L.T. 801; A.I.R. 1955 T.C. 87; Paras Ram v. State, 1969 A.W.R. (H.C.) 865; 1970 A.L.J. 149, 164.
- 4. Pakala Narayanaswami v. Emperor,

- L.R. 66 I.A. 66; I.L.R. 18 Pat. 234; 180 I.G. 1; A.I.R. 1939 P.C. 47.
- 5. In re Baggam Appalanarasayya, 1941 Mad. 101; I.L.R. 1941 Mad. 81; 192 I.C. 586; 42 Cr. L. J. 308; (1940) 2 M.L.J. 715; 1940 M.W.N. 937; 52 L.W. 495; Public Prosecutor v. Munigan. 1941 Mad. 359; I. L.R. 1941 Mad. 503; 195 I.C. 76; 42 Cr.L.J. 664; (1941) 1 M.L.J. 227; 1940 M.W.N. 1272; 52 L.W. 942.
- 6. Fr. Benedict v. State of Kerala, 1967 Ker. L. T. 466 (deceased woman pregnant by accused) differing from the contrary view in T. Retnakaran v. State, 1954 Ker.L.T. 801; A.I.R. 1955 T.C. 87.
- 7. Vinayaka Datta v. State, 1970 Cr.L. J. 1081; A.I.R. 1970 Goa 96, 101.

In the Privy Council case cited in the preceding para, Lord Atkin pointed out that the circumstances must be circumstances of the transaction: general expressions indicating fear or suspicion, whether of a particular individual or otherwise and not directly related to the occasion of death will not be admissible'. The fact that the deceased was pregnant by the accused certainly did not cause her death and was too remote from the transaction which resulted in her death to be regarded as a circumstance of the transaction. Circumstances from which motive for the murder can be inferred are not circumstances of the transaction which resulted in the deceased's death; in other words, the circumstance of pregnancy cannot be said to be 'directly related to the occasion of the death' to use the language of the Privy Council; evidence of such a statement must be excluded. It is submitted that this is the correct view.

**6. Statement of deceased about death of another.** A dying declaration is admissible only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration, but the statement of a deceased person (who did not himself charge the accused with having wounded him) to the effect that another person who had died was stabbed by the accused, is inadmissible under the provisions of Section 32 (1).<sup>8</sup>

A similar view has been taken in *Dannu Singh v. Emperor*,<sup>9</sup> and in *Nga Te v. Emperor*.<sup>10</sup> In the last case from Lower Burma the person whose statements were sought to be admitted was a police informant of the name of P. T. G. who was present among a band of dacoits engaged in committing the crime. In the skirmish that followed between the police and the dacoits, the informant was mortally wounded by the police and subsequently died. Before his death, he made certain statements implicating certain persons in the dacoity, and those statements the prosecution sought to prove. The learned Chief Judge observed :

"It was urged at the hearing of the appeal that Section 32 (1) makes the statements admissible. That sub-section refers to statements made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death in cases in which the cause of that person's death comes into question. The present case is one concerned with the persons who were the dacoits who attacked B. Y., and it can hardly be said that the cause of P.T.G.'s death comes into question in it directly, though it may come indirectly and incidentally, but the trial is clearly not one into the circumstances of his death as to who caused it, and whether an offence was committed by someone in causing it. The provision rests on the doctrine of necessity, that is, that the injured person is dead and is generally the principal witness and so is likely to know more or as much about the circumstances of his death than or as any other person. In the present instance such doctrine of necessity does not apply as the object of the trial is to ascertain whether certain persons were the dacoits or not—a matter that has nothing to do with the circumstances of P.T.G.'s death."

Following these cases it has been held by the Lahore High Court, that where there are cross-cases for deaths of persons of two parties a dying declara-

8. *Fakir v. Empress*, 17 P.R. 1901 Cr. 10. 20 I.C. 990 (L.B.).  
9. A.I.R. 1925 All. 227; 85 I.C. 643.

tion of a member of one party could not be used as evidence in the case against the members of his own party even if the final adjudication of the case rested on the question whether the complainants were the aggressors or whether the accused were protected by the right of private defence.<sup>11</sup> In *Kunwar Pal Singh v. Emperor*,<sup>12</sup> the Allahabad High Court has held that the statement of one dead person is not a relevant fact with respect to the question about the death of another, but this has been dissented from by the Travancore-Cochin High Court. According to the latter High Court to exclude from the evidence statements made by a deceased person as to incidents which occurred during the course of the transaction which resulted in his death, statements other than those relating to the cause of his death would be to import a limitation to the words used in the section which their natural meaning does not warrant for, when a limitation like that is intended, the Legislature specially provides for it. The language of Section 27, Evidence Act, may, for instance, be compared.<sup>13</sup> In a very early Madras case,<sup>14</sup> it was held that statements made by a deceased person as to the cause of his death are admissible, not only as against the person who actually caused the deponent's death, but also against other persons concerned in the transaction which resulted in the deponent's death, in cases in which the cause of that person's death comes in question.

The above case was followed by the Rangoon High Court in *Nga Hla Din v. Emperor*.<sup>15</sup> There a husband and wife were killed at one and the same place and time. Of the two accused persons, one was the servant of the other. The husband was killed by the master and the wife by the servant. The only evidence in the case was the dying declaration of the wife who besides stating that the servant attacked her (as a result of which she died) the master killed the husband. The question arose whether the wife's statement was admissible against the master, who killed the husband. Accepting the dying declaration against both the accused persons, the trial Court had convicted each of them of murder and sentenced both of them to death. The contention as to the admissibility of the statement against the master was negatived by the High Court and the convictions for the murders and the death sentences were confirmed. The learned Judges held that statements by a deceased person as to the cause of his death are admissible, not only as against the person who caused the death of the deponent, but also against other persons concerned in the transaction which resulted in the deponent's death, in cases in which the cause of that person's death comes into question.

As pointed out by the Patna High Court, the words "resulted in his death" do not mean "caused his death," and the expression "any of the circumstances of the transaction which resulted in his death" is wider in scope than the expression "the cause of his death."<sup>16</sup> The test of relevancy under this clause is not what the final finding in the case is, but whether the cause of the death of the person making the statements comes into question in the case.

11. *Saudagar Singh v. Emperor*, 1944  
Lah. 377: 46 P.L.R. 135.  
12. 1948 All. 170: I.L.R. 1948 All.  
122: 49 Cr.L.J. 140: 1947 A.I.J.  
627.  
13. *Lukka Ulahannan v. T. C. State*,

1955 T. C. 104.  
14. *In re P. Subbu Tevan*. 2 Weir 750.  
15. A.I.R. 1936 Rang. 187. 188: 162  
I.C. 491.  
16. *The State v. Ram Prasad Singh*,  
1953 Pat. 354; 1954 Cr.L.J. 1751.

**7. Statement before injury.** As has been already observed, the statement admissible under this clause may have been made before the cause of death had arisen or before the deceased had any reason to anticipate being killed.<sup>17</sup> It may have been made before the injury causing the death was inflicted.<sup>18</sup> Where the transaction, which resulted in the death of the deceased, was an assault committed on him in the course of a quarrel over the recovery of a cow which the accused had detained, it was held that a statement of the deceased that he was going to the accused's house to recover his cow which the accused had detained was held to be admissible, as it was immediately connected with the quarrel which resulted in the accused's inflicting the fatal injury. The statement concerned was made almost immediately preceding the quarrel over the recovery of the cow and was therefore a statement relating to a circumstance of the transaction.<sup>19</sup> But where, in a trial for abetment of suicide committed by a woman, letters written by her about five months before her death and showing that her state of mind was seriously affected by the cruel conduct of the accused were tendered in evidence, it was held that the statements in the letters were not sufficiently, nor closely enough, connected with the actual transaction which resulted in the death of the woman and that being so, the letters were not admissible.<sup>20</sup> But a different view has been taken in the undenoted case where letters written during two years before incident were admitted in evidence.<sup>21</sup>

A dying declaration which refers to what took place at the time of the incident between the accused and the deceased may not come under the first part of this clause, which pointedly refers to the cause of death, but it will come under the second part as a statement made by a person who died subsequently as to any of the circumstances which resulted in his death.<sup>22</sup> Where the fact in issue was whether the accused had committed the murder of the deceased, a statement by the deceased before his death that the accused had taken money and ornaments from him and that he had, on the day of the murder, gone to him to demand the money and ornaments, was held to be admissible under this clause, as the facts stated were the circumstances of the transaction which resulted in the death of the deceased.<sup>23</sup> Statement of deceased that he was proceeding to a particular place, where his dead body was found, to meet the accused for a particular purpose is a circumstance of the transaction and is admissible.<sup>24</sup>

**8. "In cases in which the cause of that person's death comes into question".** A dying declaration is admissible under this section only in cases in which the cause of the declarant's death comes into question. The nature of the proceedings in which the cause of his death comes into question need not necessarily be a charge of murder or homicide. It may be a charge

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| <p>17. Pakala Narayanaswami v. Emperor, 66 I.A. 66; I.L.R. 1939 Kar. 123; I.L.R. 18 Pat. 234; 40 Cr. L. J. 364; 180 I.C. 1; (1939) 1 M. L.J. 756; A.I.R. 1939 P.C. 47; Sada-nanda Bissoi v. State, 35 Cut. L.T. 422, 429.</p> <p>18. Emperor v. Shivabhai Becharbhai, 1926 Bom. 513; I.L.R. 50 Bom. 683; 97 I.C. 660; 27 Cr.L.J. 1140; 28 Bom.L.R. 1013; see also cases cited therein.</p> <p>19. Satish Chandra Saha v. State, 1954</p> | <p>Cal. 379: 1955 Cr. L. J. 1015; 58 C.W.N. 160.</p> <p>20. Gokul Chandra Chatterjee v. State, 1950 Cal. 306; 51 Cr.L.J. 1201.</p> <p>21. Protima Dutta v. The State, (1977) C.W.N. 713.</p> <p>22. Kesava Pillai v. State, 1952 T. C. 70.</p> <p>23. Dr. Jainand v. Rex, 1949 All. 291; 50 Cr.L.J. 498; 1949 A.L.J. 60.</p> <p>24. Mobasingh v. State of Rajasthan, 1975 W.L.N. 373 (Raj.).</p> |
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of murder or homicide. It may be a charge of a different nature or it may be a civil action. [Second paragraph of clause (1)] The only material point is that the cause of death must come into question irrespective of the nature of the proceeding in which it comes into question.<sup>25</sup> A dying declaration may be used as evidence in a charge of rape.<sup>1</sup> It may be that on a final consideration of the evidence the cause of death is found to be not connected with the injuries caused; but the test is not what the final finding in the case is, but whether the cause of the death of the person making the statements comes into question in the case.<sup>2</sup> But whatever be the nature of the proceeding, the cause of the death of the declarant must be brought into question. Where in a trial for the murder of the husband, a statement by his wife that the accused cut her husband, was held to be inadmissible, although, after making the statement, the wife committed suicide, because, it was not her death, but her husband's death that was in question.<sup>3</sup> Statements which do not relate to the death of the maker, or are not recorded in judicial proceedings, are not admissible. Two sisters A and B were residing along with their mother. The mother found A alone in the house and asked her about B. She made a statement before her mother about B, and later in the day to others. A, however, died before her statement had been recorded. It was held that her statement related to B's death and not her own death, and hence was not admissible under Section 32 (1).<sup>4</sup> Such a declaration being inadmissible, the criminal liability of the accused for the death of B cannot be made to rest on it.<sup>5</sup>

**9. Statement must be complete.** Whatever the declaration may be, it must be complete in itself, for, if the dying man appears to have intended to qualify it by other statements which he is prevented by any cause from making, it will not be received.<sup>6</sup> But where the dying declaration, though incomplete otherwise, by reason of the deceased not being able to answer further questions, but is complete so far as the accused having murdered the deceased was concerned, it can be relied upon by the prosecution.<sup>7</sup>

The dying declaration need not be exhaustive and disclose all the surrounding circumstances. It cannot be ruled out entirely because of an omission to refer to a particular circumstance of the transaction,<sup>8</sup> nor can any argument be built upon what the declarant has not said in his declaration.<sup>9</sup> The deceased need not necessarily cover the whole incident or narrate the

25. Permanand v. Emperor. 1940 Nag. 340, 343; I.L.R. 1941 Nag. 110; 190 I.C. 849; 42 Cr.L.J. 17; 1940 N.L.J. 459.
1. Queen v. Bissorunjun Mookerjee, (1866) 6 W.R. Cr. 75, followed in Lalji Dusadh v. Emperor, 1928 Pat. 162; I.L.R. 6 Pat. 747; 106 I.C. 698; 29 Cr.L.J. 106.
2. State v. Ram Prasad Singh. 1953 Pat. 354; 1954 Cr.L.J. 1751.
3. In re Peria Chelliah Nadar, 1942 Mad. 450; 202 I.C. 290; 43 Cr. L.J. 810; (1942) 1 M.L.J. 503; 1942 M.W.N. 291.
4. Ratan Gond v. State of Bihar, 1959 S.C.R. 1336; 1959 S. C. J. 222; 1959 A.L.J. 35; 1959 A.W.R.

- (H.C.) 108; 1959 B. L. J. R. 1; 1959 Cr. L. J. 108; 1959 M.P.C. 46; 1959 M.L.J. (Cr.) 109; I.L.R. 37 Pat. 1409; A.I.R. 1959 S.C. 18, 21; Surjit Singh v. State, 1969 Cr. L.J. 98, 103 and 104 (Punj.).
5. Surjit Singh v. State, supra.
6. Taylor, Ev., s. 721.
7. Abdul Sattar v. State of Mysore, 1956 Cr.L.J. 334; A.I.R. 1956 S.C. 168.
8. Cf. State v. Govinda Pillai. 1952 T.C. 449.
9. Ram Bali v. State, 1952 All. 289; 1953 Cr.L.J. 800; State of Rajasthan v. Jawan Singh, 1971 Cr.L.J. 1656.

entire history of the transaction. Due to suddenness of attack, poor visibility or physical incapacity at the time of making statement, the victim may not be able to recapitulate the entire incident or to narrate it at length. In fact many a times copiously worded or neatly structured dying declarations excite suspicion of tutoring.<sup>10</sup> In the case of a dying declaration, where the exact words stated by a deceased matter and are of importance, a suggestion of the kind that the deceased might have said something by a mistake cannot be entertained.<sup>11</sup> The dying declaration must however be free from ambiguity. If it is capable of two interpretations, the one in favour of the accused ought to be accepted.<sup>12</sup>

**10. Competency and credibility.** The person, whose declaration is thus admitted, is considered as standing in the same situation as if he were sworn as a witness. It follows, therefore, that when the declarant, if living, would have been incompetent to testify by reason of imbecility of mind, or tender age, his dying declarations are inadmissible.<sup>13</sup> And his credibility may be impeached or confirmed in the same manner as that of a witness.<sup>14</sup> This rule is also established in America. Thus previous consistent statements by the deceased not made under the fear of death, were admitted for this purpose,<sup>15</sup> and dying declarations were allowed to be corroborated by proof of prior consistent statements, though the latter were not admissible themselves as dying declarations.<sup>16</sup>

If from the reliable doctor's opinion the court is satisfied that cumulative effect of the injuries inflicted on the deceased must have caused unconsciousness or immediate death, no reliance can be placed on the dying declaration.<sup>17</sup>

**11. Form of statement.** The declaration may be oral or written.<sup>18</sup> It cannot be rejected merely on the ground that it was not reduced to writing.<sup>19</sup> Where the wife of the deceased heard his cry naming the accused (his son-in-law) as his assailant, such evidence of oral dying declaration was believed.<sup>20</sup> A first information report may contain a declaration as to the cause of the

10. Munnu Raja v. The State of M. P., (1976) 3 S.C.C. 104; 1976 S.C.C. (Cri.) 376; 1976 U.J. (S.C.) 154; 1976 Cri.L.R. (S.C.) 54; 1976 Cri. A.R. (S.C.) 77; (1976) 2 S.C.R. 764; 1976 Cri. L. J. 1718; A.I.R. 1976 S.C. 2199.
11. Ram Nath v. State of Madhya Pradesh, 1953 S.C. 420. 424; 1953 Cr. L. J. 1772.
12. State of H. P. v. Wazir Chand, A.I.R. 1978 S.C. 315.
13. R. v. Pike, (1829) 3 C. & P. 598; R. v. Drummond, (1784) 1 Lea C. C. 338; R. v. Perkins, (1840) 9 C. and P. 395; Taylor, Ev., s. 717; Norton, Ev., 175; Samai Din v. King-Emperor, 5 O. C. 246—deaf mute incapable of understanding question put to him, see S. 1 post.
14. S. 152, post; Steph. Dig., Art. 15.
15. Felder v. State, 59 Am. Rep. 77.
16. State v. Blackburn, 80 N.C. 42 cited in Best, Ev., p. A57; see also Roscoe Cr. Ev., 16th Ed., 33; Russ. Cr. 361.
17. State of Bihar v. Harinandan Singh, 1970 P.L.J.R. 172, 177; Balkari v. State of Rajasthan, 1975 W.L.N. 812 (Raj.).
18. I. L. R. (1971) 2 Delhi 689.
19. Sital Chand Maity v. State, 1975 Cal. 82.
20. Kuma v. State, 1975 Cut. L. 3 (Cri.) 404 (Orissa).

informant's death.<sup>21</sup> So also a complaint.<sup>22</sup> It is immaterial to whom it is made, whether to a police officer or to a Magistrate; and whether the Magistrate is entitled to record statements under Section 164, Cr. P. C., or not,<sup>23</sup> or to a private person.<sup>23-1</sup> It may be even recorded by a head constable,<sup>24</sup> or a police officer during investigation.<sup>25</sup> But the Supreme Court has observed that investigating officers are naturally interested in the success of the investigation, so the practice of the investigating officer himself recording a dying declaration during the course of investigation ought not to be encouraged.<sup>1</sup>

Where the Magistrate is competent to record the statement it is not necessary that it should be proved by him, and the fact that the accused was not present at the time when the dying declaration was recorded makes no difference in this respect.<sup>2</sup> But proof of the identity of the person who made the statement is necessary.<sup>3</sup> A statement made by a person at an identification parade regarding the cause of his death is admissible although made in the presence of the police. Section 68(1) of the Bombay City Police Act, 1902, is no bar to its admissibility.<sup>4</sup>

**12. Statement by signs and gestures.** Signs made by an injured person either by a nod of the head to indicate assent or by the sign or motion of fingers or hand in answer to questions put to him for finding out the identity of the individual causing the injury amounted to verbal statement within the meaning of this clause.<sup>5</sup> A reply made by signs, by a person unable to

21. Lalaram Surajmal v. State, 1953 M.B. 249; I.L.R. 1953 M.B. 343; 1954 Cr.L.J. 1764; Vallon Kachol v. State, 1956 T.C. 207; Azimaddy v. R., 1927 Cal. 17; I.L.R. 54 Cal. 237; 99 I.C. 227; 28 Cr.L.J. 99; 44 C.L.J. 253; Kapur Singh v. Emperor, 1930 Lah. 450; 123 I.C. 120; 31 Cr. L. J. 475; 31 P.L.R. 83; Emperor v. Mohammad Sheik, 1943 Cal. 74; I.L.R. (1942) 2 Cal. 144; 205 I.C. 92; 44 Cr. L. J. 322; Chunnilal v. Emperor, 1924 Nag. 115 (2); 88 I.C. 353; 26 Cr. L. J. 1121; 7 N.L.J. 144; I. L. R. 1974 Cut. 1325; Hari Chunnilal v. State of M. P., 1977 M. P. L. J. 321; Munnu Raja v. State of M. P., 1976 Cri.L.J. 1718; A. I. R. 1976 S.C. 2199.
22. See Gouridas Namasudra v. Emperor, 36 Cal. 659; 2 I.C. 841; 10 Cr.L.J. 186.
23. Chadgi v. Emperor, 1930 Lah. 60; 120 I.C. 274; 31 Cr.L.J. 79; Rahman v. Emperor, 1932 Lah. 14; 134 I.C. 117; 32 Cr.L.J. 1118; 33 P.L.R. 8; Sulaiman v. The King, 1941 Rang. 301; 197 I.C. 131; 43 Cr.L.J. 123; 1941 Rang. L. R. 258.
- 23-1. Nathu Ram v. State, 1951 H.P. 1.
24. Vanayak Datta v. State, 1970 Cr. L. J. 1081; A.I.R. 1970 Goa 96, 99.
25. Lal Khan v. State, 1973 Kash. L. J. 123.
1. Munnu Raja v. The State of M.P., (1976) 3 S. C. C. 104; (1976) S. C. C. (Cri.) 376; (1976) 2 S.C.R. 764; 1976 Cri.L.J. 1718; A.I.R. 1976 S.C. 2199.
2. Mohammad Ali v. Emperor, 1934 All. 81; I.L.R. 56 All. 302; 147 I.C. 390; 35 Cr.L.J. 385; 1933 A.L.J. 1551 (F.B.); Suraj Bali v. Emperor, 1934 All. 340; I. L. R. 56 All. 750; 152 I.C. 249; 36 Cr. L. J. 65; Sulaiman v. The King, supra, but see Reg v. Fata Adaji, 11 Bom. H.C.R. 247; Empress v. Sumirudin, 8 Cal. 21; 10 C. L. R. 11; Gouridas Namasudra v. Emperor, supra; Krishnama Naicken v. Emperor, 1931 Mad. 430; I.L.R. 54 Mad. 678; 135 I.C. 337; 33 Cr.L.J. 115; 60 M.L.J. 404.
3. Sulaiman v. The King, supra; Queen-Empress v. Durga Sonar, 11 Cal. 580; Mohammad Ali v. Emperor, supra; Brajaballav Ghose v. Akhoy Bagli, 1926 Cal. 705; 93 I.C. 115; 30 C.W.N. 254; but see Ghadgi v. Emperor, supra, and Rahman v. Emperor, supra, where the statements were admitted without proof of identity.
4. Emperor v. Mahadeo Dewoo, 1946 Bom. 189; 224 I.C. 261; 47 Cr.L.J. 590; 47 Bom. L. R. 992.
5. R. v. Abdullah, 7 All. 385 (F.B.); Alexander Perera Chandrasekara v. The King, 1937 P.C. 24; 166 I.C. 330; 38 Cr.L.J. 281; 1937 A.L.J. 420; 39 Bom.L.R. 359; 41 C.W.N.

speak, in answer to a question put to him, taken together with the question amounts to a verbal statement.<sup>6</sup> In the undernoted case, a person was tried for the murder of one D. The deceased had been questioned by a police officer, a Magistrate and a Surgeon; the deceased was unable to speak, by reason of a wound in the throat but was conscious, and able to make signs. Evidence was offered and admitted to prove the questions put to D, and the signs, which she had made in answer to such questions. The evidence was held to have been rightly admitted, as the questions and the signs, taken together, might properly be regarded as a "verbal statement" within the meaning of this section.<sup>7</sup> In the Privy Council case of *Alexander Perera Chandrasekara v. The King*,<sup>8</sup> the greater part of the interrogation was conducted by Martin Perera, who spoke to the wounded woman in Sinhalese. The course and result of it was as follows: Asked who cut her neck, the deceased indicated by signs the height of the person and later pointed to Mr. Jayawardene and also made signs as of goading a bull. The accused had worked for Mr. Jayawardene as a carter. She also pointed to a constable, and then patted or slapped her cheek two or three times. The accused had sometimes previously assaulted a constable by slapping his face and, this was a matter of common knowledge. Probably at this stage—though the witnesses were not entirely in agreement as to the order of events—Martin Perera put the direct question: "Was it Alisandiri?"—the name by which the accused was ordinarily known. The wounded woman nodded her head in answer to this question. As to this fact, and that it was a nod of assent by witness seemed in no doubt. It was held, that the question put "was it Alisandiri?" and the nod of assent constituted a "verbal statement" within the meaning of the section 32, and that evidence of the signs made in answers to questions put to the deceased was admissible.

But though the gestures may be admissible, it has been held<sup>9</sup> that the opinion of witnesses as to the meaning of the gestures is not. It is for the Court to determine what they mean. But, as their Lordships of the Privy Council have pointed out, the dividing line between the description of signs and their interpretations is very thin.<sup>10</sup>

513: (1937) 1 M.L.J. 600; 1937 M.W.N. 169: 45 L.W. 78: 1937 O.W.N. 218; 1937 P.W.N. 231; Chandrika Ram Kahar v. Emperor, 1922 Pat. 535; I.L.R. 1 Pat. 401; 71 I.C. 353: 24 Cr.L.J. 129; 3 P.L.T. 771; Emperor v. Sadhu Charan Das, 1922 Cal. 409; I.L.R. 49 Cal. 600: 77 I.C. 993: 25 Cr.L.J. 529: 26 C.W.N. 414; Ranga v. Emperor, 1924 Lah. 581; I.L.R. 5 Lah. 305: 84 I.C. 552: 26 Cr.L.J. 328; Darpan v. Emperor, 1938 Pat. 153: 173 I.C. 833; 39 Cr.L.J. 384: 1938 P.W.N. 266; Sudama Sheoba v. King-Emperor, 1949 Nag. 405; I.L.R. 1949 Nag. 301; 51 Cr.L.J. 224: 1949 N.L.J. 354; Vaghari Madha Kana v. State, 1956 Sau. 83; see also Emperor v. Moti Ram, 1936 Bom. 372: 165 I.C. 422; 37 Cr.L.J. 1140: 38 Bom.L.R. 818; Gajendra Kar v. State of Orissa, 39 Cut. L. T. 186:

1973 Cut.L.R.. (Cri.) 109: 1973 Cri.L.J. 1058 (Orissa).  
 6. R. v. Sadhucharan, 49 C. 600: 77 I.C. 993; A.I.R. 1922 409; R. v. Abdullah, (1885) 7 A. 385 (F.B.).  
 7. R. v. Abdullah, (1885) 7 A. 385 (F.B.); Bata v. R., Punj. Rec. 1886, p. 2, cited in Henderson's Cr. P.C. So also in America it has been held that the declaration may be by signs, or any other method of expressing thought: Com. v. Casey, II Cush. 417, cited in Best, Ev., p. 456; Gajendra Kar v. State of Orissa, supra.  
 8. Supra.  
 9. Chandrika v. R., 1922 Pat. 535; I.L.R. 1 Pat. 401; Darpan v. Emperor, 1938 Pat. 153: 71 I.C. 353.  
 10. Sudama Sheoba v. King-Emperor, 1949 Nag. 405; Alexander Perera Chandrasekara v. The King, 1937 P.C. 24: 166 I.C. 330.

**13. Deposition and dying declaration.** Sometimes declarations by dying persons are made on oath in which case, assuming them to be in the presence of the accused and otherwise formal, and that an opportunity for cross-examination has been given, they are depositions. The essence of a dying declaration so-called, is that it is not upon oath. The lapse of time between the declaration and death is immaterial, and the presence of the accused at the making of the declaration is unnecessary. But, it cannot be used as a deposition, unless taken in the presence of the accused with all the usual formalities of a deposition, and unless admissible within the terms of the following section (*v. post*).<sup>11</sup>

The dying declaration must be relevant. Though the declaration must, in general, narrate facts only, and not mere opinions (*v. ante*), and must be confined to what is relevant to the issue,<sup>12</sup> it is not necessary that the examination of the deceased should have been conducted after the manner of interrogating a witness in the cause, though any departure from this mode may affect the weight of the declaration.<sup>13</sup> Therefore, in general, it is no objection to their admissibility that they were made in answer to leading questions,<sup>14</sup> or obtained by earnest solicitation.<sup>15</sup> But where a statement, ready written, was brought by the father of the deceased to a Magistrate, who accordingly went to the deceased and interrogated her as to its accuracy, paragraph by paragraph, it was, in Ireland, rejected, the Judge observing that, "in the state of languor in which dying persons generally are, their assent could be easily got to statements which they never intended to make, if they were but ingeniously interwoven by an artful person with statements which were actually true" and adding, "the Magistrate should not have trusted to the relation of a third person, but should have taken down the deceased's declaration from her own lips, or at least have had it taken down in his presence."<sup>16</sup>

A declaration is not irrelevant because it was intended to be made as a deposition before a Magistrate, but is irregular and inadmissible as such.<sup>17</sup>

**14. Record and proof of declaration.** The right to offer the declaration in evidence is not restricted to the prosecutor, but it is equally admissible in favour of the accused.<sup>18</sup> When a Judge is sitting with a jury, the admissibility of this evidence in any particular case is a question to be decided by the Judge alone.<sup>19</sup> Before the statement can be admitted, proof must be given that the person is dead, and the burden of this is upon the person who

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- 11. Norton, Ev., 175, 176; Roscoe, Cr. Ev., 16th Ed., 36; if the evidence be inadmissible under S. 33, it may yet be admissible under S. 32, cl. (1); R. v. Rochia, (1881) 7 C. & 42; Parmanand v. Emperor, 1940 Nag. 340; I.L.R. 1941 Nag. 110; 190 I.C. 849; 42 Cr.L.J. 17; 1940 N.L.J. 459.
- 12. S. 32. Indian Evidence Act, 1872.
- 13. Taylor, Ev., s. 720.
- 14. R. v. Smith, (1864) 10 Cox 82; but see R. v. Mitchell, (1892) 17 Cox 503, cited *post*; but see Nga Mya Da v. Emperor, 1936 Rang. 42; 160 I.C. 597; 37 Cr.L.J. 299.
- 15. R. v. Fagent, (1835) 7 C. & P. 238; R. v. Reason, (1722) 1 Str. 499; R. v. Whitworth, (1858) 1 F. & F. 382.
- 16. R. v. Fitzgerald, (1841) Ir. Cir. Rep. 168, 169, cited in Taylor, Ev., s. 720, but see Krishnama Naicken v. Emperor, 1931 Mad. 430; I.L.R. 54 Mad. 678; 135 I.C. 337; 33 Cr.L.J. 115; 60 M.L.J. 404; Nga Mya Da v. Emperor, *supra*.
- 17. R. v. Woodcock, (1789) 1 East P.C. 356; Steph. Dig., Art. 25; *v. post*.
- 18. R. v. Scraife, (1836) 1 M. & Rob. 551.
- 19. Cr. P. C. (1898) S. 298; Taylor, Ev., ss. 23a, 24; Roscoe, Cr. Ev., 85.

wishes to give the statement in evidence.<sup>20</sup> The recording of a dying declaration which may subsequently be produced as evidence in a Court of Justice is a grave and solemn proceeding. Unauthorized persons should not be permitted to crowd round when the declaration is being made. It is the bounden duty of the Magistrate to take every possible steps to ensure that no influence is brought to bear on the declarant and that he is not prompted or aided in any way in making his statement. The proceeding should be so conducted that the declarant is as free from personal influence in emitting his declaration as he would be if he were giving evidence in a Court of law.<sup>21</sup> The person who records a dying declaration must be satisfied that the dying man is making a conscious and voluntary statement with normal understanding.<sup>22</sup> The fact that pulse was not palpable, blood pressure unrecordable and the person was gasping would not necessarily show that he was not in a fit condition to make dying declaration if the doctor aware of such condition certified and deposed that the patient was in a fit condition to make it.<sup>23</sup> It is highly undesirable that the writing of such an important statement should be entrusted to a clerk when the Magistrate before whom it is made is not incapable of doing it himself. But where the Magistrate deposes about its authenticity it should not be rejected from evidence. A dying declaration recorded by a clerk in the presence and supervision of the Magistrate does not become inadmissible merely because the scribe is not produced to prove it. The law does not require that the record of a dying declaration must be signed by the deponent and therefore the absence of it cannot make it inadmissible.<sup>24</sup> Where the circumstances of case permit, the statement should be taken in the presence of the accused, and should be written as a formal deposition in accordance with the provisions of the Criminal Procedure Code. If this be done, and the injured person dies or becomes incapable of giving evidence at the Sessions, the depositions so taken will, subject to the provisions of the following section, be admissible in evidence without further proof.<sup>25</sup> If the statement be not taken down in the presence of the accused, and as a formal deposition, it will none the less be relevant under this section, but, before it can be admitted in evidence, it must be proved to have been made by the deceased; it is not rendered admissible without such proof because it was taken down by a Magistrate. The writing, made by such Magistrate, cannot be admitted to prove the statement of the deceased without making it evidence in the ordinary way by calling the Magistrate who took down the declaration, and heard it made. If the Magistrate be called to prove the dying declaration, he may either speak to the words used by the deceased, refreshing the memory with the writing made by himself at the time when the statement was made or he may speak to the writing itself, as being an accurate reproduction of what the deceased

20. S. 104, illustration (a), post.
21. Per Thom, J., in Nem Singh v. Emperor, 1934 All. 908 at 913; L.R. 1934 All. 1033; 152 I.C. 741; 36 Cr.L.J. 152.
22. Lallu Bhai Deuchand Shah v. State of Gujarat, 1972 G.L.J. 828; 1972 Cri. App. R. 5 (S.C.); 1972 U.J. (S.C.) 177; (1971) 3 S.C.C. 767 1972 S.C. Cri. R. 239; (1971) 2 S.C.W.R. 778; 1972 S.C.C. (Cri.)

13. A.I.R. 1972 S.C. 1776; Shahabuddin v. State of Rajasthan, 1972 W.L.N. 648; 1972 Raj. L. W. 629; 1973 Cri. L.J. 723 (Raj.); I. L. R. (1971) 21 Raj. 541.
23. State of Haryana v. Harpal Singh, A. I. R. 1978 S.C. 1530.
24. Jangir Singh v. State, 1951 Pepsu 111.
25. S. 288 of Cr. P. C. (1898), Ss. 33, 80 *post.*

had said in his presence.<sup>1</sup> Where the Magistrate who recorded the declaration has since died, proof of it may be given by the person who heard it.<sup>2</sup>

A dying declaration recorded in the absence of the accused and by a Magistrate other than the inquiring Magistrate is not admissible until it is proved by the recording officer.<sup>3</sup> In this case, what is admissible is the oral statement of the deceased, and not the record of it, and such oral statement must be proved by the person who recorded it and heard it made.<sup>4</sup> It has, however, been held in some cases that when it is not necessary in order to make a dying declaration admissible in evidence, that the Magistrate who recorded it be examined as a witness in the case, and that when the dying declaration has appended to it a certificate that it has been read over to the deponent, and declared to be correct and this is signed by the Magistrate who recorded the statement, Sec. 80 of the Act creates a presumption that the circumstances under which it is stated to have been taken, are true.<sup>5</sup> Where the dying declaration has been recorded in writing by the Magistrate and had been read over to the deceased, there can be no doubt that whatever is mentioned therein is the faithful statement of the deceased himself.<sup>6</sup> But, even then, proof of the identity of the person who made the statement is necessary.<sup>7</sup> A dying declaration made to a police officer in the course of an investigation, may, if reduced to writing, be signed by the person making it, and may be used as evidence against the accused,<sup>8</sup> if such writing be properly proved by the police officer in whose presence it was signed and the declaration, which it embodies, was made.

A petition of complaint and examination of complainant on oath, admissible as dying declaration under this clause, are not matters required to be reduced to the form of a document within the meaning of Sec. 91 so as to exclude oral evidence of their terms.<sup>9</sup> The written record of a dying declara-

1. R. v. Fata, (1874) 11 Bom. H.C. R. 247; R. v. Samiruddin, (1881) 8 C. 211; followed in R. v. Daulat, (1902) 6 C.W.N. 921; and see as to proof of dying declaration; R. v. Mathura Thakur, (1901) 6 C.W.N. 72; Kunj Lal v. R., 1924 Lah. 12 : 67 I.C. 577 : 23 Cr.L.J. 417; Hanif Gul v. Emperor, 1938 Pesh. 33 : 176 I.C. 471 : 39 Cr.L.J. 744 (case-law discussed); Nga Mya Da Da v. King Emperor, 1936 Rang. 42 : 160 I.C. 597: 37 Cr.L.J. 299; Sulaiman v. Emperor, 1941 Rang. 301 : 197 I.C. 131 : 43 Cr.L.J. 123; Krishnama Naicken v. Emperor, 1931 Mad. 430: I.L.R. 54 Mad. 678 : 135 I.C. 337 : 33 Cr.L.J. 115 : 60 M.L.J. 404 : 1931 M.W.N. 167; Kapur Singh v. Emperor, 1930 Lah. 450: 123 I.C. 120: 31 Cr. L. J. 475.
2. R. v. Balaran, 1922 Cal. 382 : I.L.R. R. 49 Cal. 358: 71 I.C. 685: 24 Cr. L.J. 221; Parmanand Ganga Prasad v. Emperor, 1940 N. 340: 1.I.L.R. 1941 Nag. 110: 190 I.C. 849: 42 Cr. L.J. 17: 1940 N.L.J. 459; Tafiz Pramanik v. Emperor, 1930 Cal. 228: 125 I.C. 749: 31 Cr.L.J. 916: 50 C.L.J. 584. See also cases cited in previous footnote.
3. Panchu v. R., (1907) 34 C. 698: 11 C.W.N. 666.
4. Gowridas v. R., 36 C. 659.
5. In re Karuppan Samban, 1916 Mad. 1211: 31 I.C. 359: 16 Cr. L. J. 759; Sulaiman v. The King, 1941 Rang. 301: 197 I.C. 131: 43 Cr. L. J. 123: 1941 R.L.R. 258 (case-law discussed); Suraj Bali v. Emperor, 1934 All. 340: I.L.R. 56 All. 750: 152 I.C. 249; Tarlok Singh v. State of Punjab, (1974) 76 Punj.L.R. 84.
6. Gonda Singh v. State, 1956 Raj. L. W. 178: 1957 Cr.L.J. 240.
7. Sulaiman v. The King, *supra*.
8. See Cr. P. Code, S. 162 (2); such a declaration is admissible not under S. 162 of the Cr. P. Code, which is a purely negative provision, but under the general law as embodied in S. 32, cl. (1) of the Evidence Act. The Code merely declares that that law shall not be affected by the fact that the declaration was made to a police officer in the course of an investigation.
9. Goturidas v. R., 36 C. 659 referred to in R. v. Balaran, 1922 Cal. 382 : 49 C. 358: 71 I.C. 685,

tion not taken down in the presence of the accused is admissible, when it is proved by a witness that the statements contained therein were, in his presence, recorded by a Magistrate and read over to the accused who admitted their correctness.<sup>10</sup> It has been held by the Madras High Court that though the written record of a statement made to a police officer in the course of an investigation is inadmissible (under Sec. 162, Cr. P. C.) oral evidence of such statement (whether it had been taken down in writing or not) is admissible.<sup>11</sup> Delay in recording dying declaration is of no consequence unless it is shown that meanwhile attempts were made to induce, prompt or influence deceased to give false statement.<sup>12</sup>

**15. Ipsissima verba.** "A declaration should be taken down in the exact words which the person who makes it uses, in order that it may be possible from those words to arrive precisely at what the person making the declaration means. When a statement is not the *ipsissima verba* of the person making it, but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence, which it is desirable should not be open in cases in which the person has no opportunity of cross-examination. In the first place, the questions may be leading questions, and in the condition of a person making a dying declaration there is always very great danger of leading questions being answered without their force and effect being freely comprehended. In such circumstances the form of the declaration should be such that it would be possible to see what was the question, and what was the answer, so as to discover how much was suggested by the examining Magistrate and how much was the production of the person making the statement."<sup>13</sup> There is no hard and fast rule that a dying declaration should be in the form of questions and answers though it is a better mode.<sup>14</sup> In a case before the Supreme Court, a Sub-Inspector of Police recorded a dying declaration of an injured person in a narrative form though the questions and answers were in the vernacular (Marathi). The record was not correct as it

10. R. v. Balaram, 1922 Cal. 382 : 49 C. 358 : 71 I.C. 685.
11. Muthukumaraswami v. R., (1912) 35 M. 397; Letters Patent appeal reviewing; R. v. Nilkanta, (1912) 35 M. 247; and see Fanindra v. R., (1908) 36 C. 281; R. v. Hanmarraddi, 1914 Bom. 263 (2); I.L.R. 39 B. 58; 26 I.C. 138; 15 Cr. L. J. 690; 16 Bom.L.R. 603.
12. Tarlok Singh v. State of Punjab, (1974) 76 Punj. L. R. 84; Public Prosecutor v. S. Gopala Rao, 1971 Cri. L.J. 536; 1969 Mad. L. J. (Cri.) 702; (1969) 2 Andh. W. R. 304.
13. R. v. Mitchell, (1892) 17 Cox. C.C. 503, 507, per Cave, J., adding: "It appears to me therefore, that a statement taken down as this was giving the substance of questions and answers, cannot be said to be a declaration in such a sense as to make it admissible in evidence and that this document cannot be admitted upon that ground" followed

- in Emperor v. Premananda Dutt, 1925 Cal. 876; I.L.R. 52 Cal. 987: 88 I.C. 1000: 26 Cr.L.J. 1256: 42 C.L.J. 247: 29 C.W.N. 738. But see Rambira Missir v. Emperor, 1943 Pat. 397; I.L.R. 22 Pat. 338: 210 I.C. 210: 10 B.R. 168 where the abovementioned cases have been explained and distinguished; Bakshish v. State of Punjab, 1958 S.C. R. 409: 1958 A.L.J. 1: 1958 Andh. L.T. 66: 1958 A.W.R. (H.C.) 94: 1958 B.L.J.R. 74: 1957 Cr.L.J. 1450: 1958 M.P.C. 23: A.I.R. 1955 S.C. 904: 1973 Cut.L.R. (Cr.) 186; I.L.R. (1971) 21 Raj. 541.
14. Vinayak Datta v. State, 1970 Cr. L. J. 1081: A.I.R. 1970 Goa 96 distinguishing Bakshish Singh v. State of Punjab, A.I.R. 1957 S.C. 904, 906 as there the statements were long and more in the nature of first Information Reports; 1973 Cut.L.R. (Cr.) 186; Public Prosecutor v. S. Gopala Rao, 1971 Cri. L.J. 536: (1969) 2 Andh. W. R. 304.

did not indicate what questions were put and what answers were given. The Sub-Inspector was not content to record what the deceased wanted to say but also recorded what he wanted the deceased to say further and the Magistrate was not called though there was time to do so; in these circumstances the Supreme Court did not rely on the dying declaration.<sup>15</sup>

The rule of *iprissima verba* is no doubt a salutary rule, but it cannot be held that unless the actual words of the declarant are repeated by each witness, it is not possible for a Court to come to the conclusion that the declarant made a declaration or what the import or meaning of that declaration was. All that they could be expected to say was that the words very similar to the words that they purported to put in the mouth of the deceased were uttered by him.<sup>16</sup> The dying declaration should be taken in the exact words of the person making it. It is not necessary that it should be in the form of questions and answers. The declaration may be open to objection if leading questions are put to the declarant for the purpose of eliciting information.<sup>17</sup> In the case of an oral dying declaration unless one is certain about the words uttered by the deceased it will not be safe to place any reliance upon them and the dying declaration cannot be acted upon without sufficient corroboration.<sup>18</sup> Where a dying declaration is made by signs of hand and head only, the precise nature of the signs which the injured person is stated to have made must be recorded. It is not the function of the person recording to record merely his interpretation of the signs, which should be left to the Tribunal.<sup>19</sup> The question should be recorded in the precise words in which they are put and the answers taken down in the actual words in which they are given. If the answers are given by gestures, then their interpretation should rest with the Court. In the undernoted case, an Inspector put his questions in Hindi and got the answers in Hindi, the deceased having understood them. He, however, recorded them in English and then interpreted in Hindi the English record of that statement to the deceased. It was held, that the statement was not admissible under this section.<sup>20</sup> But in *Bakhshish Singh v. State of Punjab*,<sup>21</sup> where the dying declaration was taken down in Urdu, though the deceased gave the narrative in Punjabi, the Supreme Court held that the recording of the dying declaration in Urdu could not be a ground for saying that the statement did not correctly reproduce what was stated by the declarant, and that that was a wholly inadequate reason for rejecting the dying declaration. In all cases, the substance and not the mere form should be considered. However, it is proper that the dying declaration is recorded in the words of the injured. But simply because the very words uttered by the injured are not reproduced, that is no reason to reject the dying declaration, if the Court

- 15. *Keshav Gangaram Navge v. State of Maharashtra*, 1971 C.A.R. 282 (S.C.).
- 16. *Prem Narain v. State*. A.I.R. 1957 All. 177; I.L.R. (1971) 21 Raj. 541.
- 17. *Majan Mia v. State*, 1970 Cr. L. J. 1327; A.I.R. 1970 Assam 121, 123.
- 18. *Ishwar Prasad v. State of M. P.*, 1969 Jab. L. J. 986; 1969 M.P.L.J. 901; 1969 M.P.W.R. 924 following *Ram Nath Madhoprasad v. State of M. P.*, A.I.R. 1953 S.C. 420; *Pritam Singh v. State*, 1972 All. Cri. R. 332; 1972 All.L.J. 744; 1972 All. W.R. (H.C.) 521.
- 19. *Darpan v. Emperor*, 1938 Pat. 153; 173 I.C. 833; 39 Cr.L.J. 384; 1938 P.W.N. 266; 4 B.R. 342.
- 20. *Shrinath v. State*, 59 Bom. L. R. 221; I.L.R. 1957 Bom. 396; A. I. R. 1957 B. 223.
- 21. 1958 S.C.R. 409; 1958 S.C.A. 391; 1958 S.C.J. 106; 1958 A. L. J. 1; 1958 Andh.L.T. 66; 1958 A.W.R. (H.C.) 94; 1958 B.L.J.R. 74; 1957 Cr.L.J. 1459; 1958 M.P.C. 23; 1958 M.L.J. (Cr.) 38; I.L.R. 1958 Punj. 262; A.I.R. 1957 S.C. 904.

is otherwise satisfied that the dying declaration, as recorded, correctly reproduced what was stated by the injured.<sup>22</sup> And although it is proper that the person who records the dying declaration should also note down the questions put to the deceased, the mere omission to mention the questions in the dying declaration can be no ground for rejecting it, specially when only general questions have been put to the declarant.<sup>23</sup>

**15-A. Plurality of dying declarations.** Whether several dying declarations are made the test is whether the version of the deceased is proved to be false in respect of the integral part of the case. The truth should be judged with reference to all dying declarations made by him. When one of the two dying declarations is found to be untruthful, the court should not readily accept the other. It should rely upon the first dying declaration only when there is convincing and adequate corroborative evidence.<sup>24</sup> Where the deceased made three dying declarations naming her assailants, the first before the villagers, second before the doctor and the third before the Tahsildar, just half an hour before her death, it was held that the first two dying declarations could be considered genuine and dependable, but much value could not be attached to the third one as at that time the faculties of the deceased would be very much impaired.<sup>25</sup> An oral dying declaration made earlier and a later statement in writing on the same subject are distinct and the oral one can be proved without regard to the writing.<sup>1</sup>

**16. Evidence value: Corroboration, necessity of.** The human mind is so constituted as to be inclined to attach a very high degree of importance to a dying declaration.<sup>2</sup>

It is absolutely necessary for the protection of society that dying declarations should be received, for otherwise a premium would be held out for the commission of crime. It is the nature of crimes of violence that they should be committed with the greatest possible secrecy; and thus, it must sometimes occur that the only testimony, often only direct testimony against an accused is to be found in the dying declaration of his victim.<sup>3</sup> That is why the law made it a "relevant fact",<sup>4</sup> and usually a dying declaration which records the very words of the dying man unassisted by interested persons is most valuable evidence.<sup>5</sup>

When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a Court of Justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath.<sup>6</sup> But they are nevertheless open to observation. For, though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation

- 22. See *Ibid*; *Hari Ram v. The State*, I.L.R. 1964 Raj. 559 : A.I.L.R. 1965 Raj. 130; 1973 Cut.L.R. (Cri.) 186.
- 23. *Hari Ram v. The State*, *supra*, I.L.R. (1971) 2 Delhi 689; see also *State of Maharashtra v. Asaram*, 1978 Cr.L.J. 1017.
- 24. *In re Narayanaswami*, 1972 Mad.J. W. (Cri.) 82; 1973 Cri.L.J. 1295 (Mad.).
- 25. *Laxman v. State of Rajasthan*, 1975

- W.L.N. 243; 1975 Raj. L. W. 154.
- 1. I. L. R. (1971) 21 Raj. 541.
- 2. Norton, Ev., s. 168, 5th Ed., p. 93.
- 3. *Ibid*.
- 4. S. 32 (1).
- 4. *Dial Singh v. Emperor*, 1934 Izh. 805; 153 I.C. 810.
- 6. See *State v. Kanchan Singh*, 1954 All. 153; 1953 A.L.J. 615; I.L.R. (1972) 54 Pat. 205.

by the means of cross-examination,<sup>7</sup> and it must be pointed out to the jury in a summing-up that the dying declaration has not been liable to cross-examination.<sup>8</sup>

Though declarations, deliberately made under a solemn sense of impending death, and concerning circumstances wherein the deceased is not likely to be mistaken, are entitled to great weight, it should always be recollected that the accused has not the power of cross-examination—a power often as effectual in eliciting the truth as is the obligation of an oath—and that where a witness has not a deep sense of accountability to his Maker, feelings of anger or revenge or, in the case of mutual conflict the natural desire of screening his own misconduct may affect the accuracy of his statements, and give a false colouring to the whole transaction. Moreover, the particulars of the violence to which the deceased has spoken are likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed and leading both to mistakes as to the identity of persons, and to the omission of facts essentially important to the completeness and truth of the narrative.<sup>9</sup> In an old case,<sup>10</sup> it was said : "It is to be remembered that though dying declarations are in some respects deserving of a degree of consideration and credence to which ordinary statements are not, they are not subject to the test of cross-examination, and if not substantially borne out by independent evidence and the probabilities of the case, or admitted facts, are worth little or nothing". So, in a case, their Lordships of the Supreme Court observed that it is settled law that it is not safe to convict an accused person merely on the evidence furnished by a dying declaration without further corroboration because such a statement is not made on oath, and is not subject to cross-examination, and because the maker of it might be mentally and physically in a state of confusion, and might well be drawing upon his imagination while he was making the declaration.<sup>11</sup> But since the law has made it a "relevant fact" notwithstanding the absence of oath and cross-examination, it means that it must not be held to be unbelievable merely on account of the absence of these matters. If it is held to be unbelievable, it must be done on the basis of other circumstances. Therefore, it would be illegal to say that a dying declaration cannot be acted upon without corroboration if it is believed, it requires no corroboration.<sup>12</sup> If the dying declaration is not believed, it is a different matter. But once it is believed, it leads to the conclusion of the respondent's guilt. There is no presumption that a dying declaration is false or that it is unworthy of belief. There is no justification for treating it as a piece of tainted evidence, as if it were a confession of a co-accused or evidence of an accomplice. So it cannot be laid down as a matter of law that no dying declaration should be believed unless it is corroborated. The law contemplates its being believed and some dying declarations may be believed even though not corroborated. Whether a dying declaration should be believed or not must depend upon the circumstances of each case. It is essentially a question of fact, to be determined by the Court on the basis of the circumstances of

7. Per Alderson, B., in R. v. Ashton, (1837) 2 Lewin C.C. 147.

8. Waugh v. R., 1950 A. C. 203; 66 T.L.R. 554.

9. Taylor, Ev., s. 722.

10. In re Dabbu Kota, (1905) 2 Weir 753.

11. Ram Nath Madho Prasad v. State

of Madhya Pradesh, 1953 S.C. 420: 1954 Cr. L. J. 1772; Thondam v. Government of Manipur, 1966 Cr. L.J. 776; A.I.R. 1966 Manipur 12.

12. State v. Kanshan Singh, 1954 All. 153; 1953 A.L.J. 615; Begepalle, In re, (1957) 2 Andh. W.R. 187.

each particular case. As far as the credibility is concerned, it is just like the evidence given by a witness. It is for the Court to decide whether to believe it or not, and no hard and fast rule can be laid down as to whether it should be believed, or should not be believed. Once it is believed, it is irrelevant and illogical to consider that it is not made on oath and that the maker has not been subjected to cross-examination. The oath is administered simply with the object of making the witness speak the truth, so that what he deposes may be believed. The object of cross-examination is to test the veracity of the witnesses.<sup>13</sup>

The rule requiring corroboration is a rule of prudence, and it has been held in a number of cases that there is no rule of law which requires that a dying declaration should not be acted upon unless it is corroborated.<sup>14</sup>

Where the Court is entirely satisfied with regard to the truth and genuineness of an uncorroborated dying declaration, there is nothing to prevent it from regarding such a dying declaration as sufficient to sustain a conviction.<sup>15</sup> "There is no absolute rule that a dying declaration should not be acted upon for the purpose of convicting an accused person even if uncorroborated, provided that the Court is fully satisfied that it is true. But, before so acting on it, the Court will apply to it every test of its genuineness, and good faith which it is possible in the circumstances of the case to apply."<sup>16</sup> This view has been followed in the undernoted cases.<sup>17</sup>

It is all a question of fact whether a dying declaration should be believed or not. Its credibility is to be determined largely by the same rules as are applied in weighing other testimony. Their value depends on their intrinsic probability, and the candour and truthfulness of the person who made them.

In weighing dying declarations, the court may consider the circumstances under which they were made, as whether they were due to outside influence or were made in a spirit of revenge, or when the declarant was unable or unwilling to state the facts, the inconsistent or contradictory character of the

13. State v. Kanchan Singh, 1954 All. 153; see also Begepale In re, (1957)

2 Andh. W. R. 187; Kori v. State, A.I.R. 1960 Cal. 509 : 1960 Cr. L. J. 1075.

14. State v. Kanchan, 1954 All. 153 : 1955 Cr. L.J. 264; 1953 A.L.J. 615; Emperor v. Akbarali Karimbhai.

1953 Bom. 479 (2); I.L.R. 58 Bom. 31: 146 I.C. 548; 35 Cr.L.J. 109:

35 Bom. I.R. 1021; In re Guruswami Teyar, 1940 Mad. 196: I. L.R. 1940 M. 158: 187 I.C. 280:

51 I.W. 65 (F.B.); Mohamad Arif v. Emperor, 1941 Pat. 409; 194 I.C. 186.

15. Gulab Rao Krishnajee Maratha v. Emperor, 1945 Nag. 153: I. L. R. 1945 Nag. 613; 221 I.C. 144: 47 Cr. L.J. 92: 1945 N.L.J. 139; I. L. R. (1971) 21 Raj. 541; Mohan Lal v.

State of Rajasthan, 1972 Raj. L.W. 437: I.L.R. (1971) 2 Delhi 689:

1975; Bainapali Enkana v. The State, 1975 41 Cut. L.T. 1379; 1975 Raj. L.W. 435: 1976 Cr. L. J. 828: 1975

All W. C. 84.

Rao v. State of Bombay, A.I.R. 1958 S.C. 22; 1958 Cr. L.J. 106:

1957 M.P.C. 813; 1958 All. L. J. 91: 1958 M.L.J. (Cr.) 100: 1958

Jab. L. J. 175; Chacko v. State, 1958 Ken. L. J. 202.

16. Mohamad Arif v. Emperor, 1941 Pat. 409; 194 I.C. 186.

17. Gulab Rao Krishnajee Maratha v. Emperor, 1945 Nag. 153: I. L. R. 1945 Nag. 613; 221 I.C. 144: 47 Cr. L.J. 92: 1945 N.L.J. 139; I. L. R. (1971) 21 Raj. 541; Mohan Lal v.

State of Rajasthan, 1972 Raj. L.W. 437: I.L.R. (1971) 2 Delhi 689:

1975; Bainapali Enkana v. The State, 1975 41 Cut. L.T. 1379; 1975 Raj. L.W. 435: 1976 Cr. L. J. 828: 1975

All W. C. 84.

declarations, and the fact that deceased has not appeared and the accused has been deprived of the opportunity to cross-examine him, and may give to them the credit and weight to which they believe, under all the circumstances, they are fairly and reasonably entitled.<sup>18</sup> A dying declaration made soon after the occurrence or at the time of expected death, or at the time when the maker could not consult others, or receive hints from others, ordinarily deserves great weight.<sup>19</sup> Very many people have been convicted solely on a dying deposition where the Court was satisfied that the man who made the dying deposition had a good opportunity of recognizing the person who attacked him, that he did recognize him, and that he was telling the truth when he made his dying deposition.<sup>20</sup> But a dying declaration is not entitled to any peculiar credit. No doubt if a man gasps out his story soon after the occurrence, it may be said that there was no time for him to fabricate, or for his friends to suggest falsehood; but where the man is in bed in hospital four days after the event and a month before he dies and makes a statement, that statement carries no more weight than if he made it in the witness-box, and rather less, because he has never been cross-examined.<sup>21</sup>

Difference in quality of language used in dying declaration and that used in the F. I. R. made by the deceased is immaterial because it is not unnatural for a person to use colloquial language while talking to one person and to use refined language while talking to another.<sup>22</sup>

Dying declarations made within  $3\frac{1}{2}$  hours of the occurrence consistent with F. I. R. and supported by oral and medical evidence stand corroborated and can be relied upon.<sup>23</sup>

Dying declaration recorded by Tahsildar in the words of the deceased in presence of doctor, where the deceased was conscious and which is corroborated by F. I. R. lodged by him can form basis of conviction.<sup>24</sup> Where the maker of F. I. R. though claiming to have knowledge of dying declaration does not make reference to it in the F. I. R. dying declaration becomes doubtful.<sup>25</sup>

A dying declaration has to stand by itself or not at all. It cannot be contradicted by reference to extraneous evidence of witnesses. The witnesses may exaggerate the facts or introduce fresh matter, in evidence in order to aggravate the offence. However, that would not militate against the reliability of the dying declaration.<sup>1</sup> Failure to give minor details will not affect the

18. Corpus Juris Secundum, Vol. XL, p. 1283. See also Munwa v. State, A.I.R. 1957 All. 466: 1957 Cr. L. J. 808.
19. Kunwar Pal Singh v. Emperor, 1948 All. 170: I. L. R. 1948 All. 122: 49 Cr. L. J. 140; 1947 A.L.J. 627; see also Guruswami, In re 1940 Mad. 196; I.L.R. 1940 M. 158: 187 I.C. 280.
20. The King v. Maung Po Thi, 1938 Rang. 282: 176 I.C. 683; 39 Cr. L. J. 771.
21. Arumuga Tevan v. Emperor, 1931 Mad. 180: 129 I.C. 252; 32 Cr.L.J. 357: 59 M.L.J. 876: 32 L.W. 940.
22. Barati v. State of U. P., 1974 Cri. L.J. 709; 1974 S.C.C. (Cri.) 420: (1974) 3 S.C.R. 570: 1974 S.C.D. 579: 1974 Cri.L.R. (S.C.) 365: (1975) 4 S.C.C. 258: 1974 Cr. App. R. 178 (S.C.): A.I.R. 1974 S.C. 839.
23. Balkaran v. State of Rajasthan, 1975 W.L.N. 812: 1975 Raj. L. W. 435 (D.B.).
24. Hari Chunnilal v. State of Madhya Pradesh, 1977 M.P.L.J. 321.
25. Manik Malakar v. State of Assam, 1976 Cr.L.J. 1921 (Gauhati).
1. State of U. P. v. Moti Lal, 1967 A. W.R. (H.C.) 345; 1968 Cr.L.J. 227: A.I.R. 1968 All. 89, 86.

validity or merits of the dying declaration.<sup>2</sup> Even though dying declaration is not comprehensive enough, it can be used to corroborate the evidence of eye-witnesses.<sup>3</sup>

It may be stated that it is not safe to base a conviction on the uncorroborated dying declaration of a deceased person.<sup>4</sup> A dying declaration which names only one person, and where the murder took place under circumstances that there could be no doubt that the dying man identified his murderer, is strong evidence. The law does not make any distinction between a dying declaration in which one person is named and a dying declaration in which several persons are named as culprits; and the latter is not any the less credible.<sup>5</sup> If one of the persons named in a dying declaration has been found to be not guilty, the dying declaration is not weakened and the court will have to judge the dying declaration as a whole.<sup>6</sup> There is no absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated. Each case must depend for decision on its own facts, keeping in view the circumstances in which the dying declaration was made. It is not that a dying declaration is a weaker kind of evidence than other pieces of evidence. A dying declaration stands on the same footing as any other evidence and has to be judged in the light of the surrounding circumstances with reference to the principles governing the weighing of evidence. Where the dying declaration has been recorded by a competent magistrate in the proper manner, it stands on a much higher footing than a dying declaration which depends upon oral testimony and which may suffer from all the infirmities of human memory and human character in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances, e.g., (a) the opportunity of the dying man for observation; (b) whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; (c) that the statement has been consistent throughout, if he had several opportunities of making a dying declaration apart from the official record of it; and (d) that the statement had been made at the earliest possible opportunity and was not the result of tutoring.<sup>7</sup> Again, unless one is certain about the exact words uttered by the deceased, no reliance should be placed on oral statements of witnesses

2. State of U. P. v. Moti Lal, 1967 A. W. R. (H.C.) 345: 1968 Cr. L. J. 227; A. I. R. 1968 All. 83 at 86.
3. Sheolochan v. State, 1971 All.W.R. (H.C.) 92.
4. Bakshish Singh v. Emperor, 86 I. C. 826; A.I.R. 1925 L. 549; Abdul Halim v. State of Assam, 1967 Cr. L.J. 714; A.I.R. 1967 Assam 26 (particularly when relying on extra-judicial confessions).
5. Harbans Singh v. State of Punjab, (1962) Supp. (I) S. C. R. 104; (1962) 2 S.C.J. 662; 1962 A.W.R. (H.C.) 169; (1962) 1 Andh.L.T. 311; (1962) 1 Cr.L.J. 479; 1962 M. L.J. (Cr.) 685; A.I.R. 1962 S.C. 439, 443 holding the contrary view

in Khurshid Hussain v. Emperor, A. I. R. 1941 Lah. 368 to be clearly erroneous); Meherchand v. State of Rajasthan, I.L.R. (1969) 19 Raj. 641; 19 Raj. L. W. 601, 608.

6. Meherchand v. State of Rajasthan, *supra*; at p. 607 of 19 Raj. L. W. (dying declaration strengthened by direct evidence of eye-witnesses; see also Lachman v. State of M. P., 1967 Jab.L.J. 181, 191; 1966 Cr. L.J. 1012 (2); A.I.R. 1966 M. P. 261, 267.

7. Ibochouba Singh v. Government of Manipur, A.I.R. 1966 Manipur 12; Bhavani Luhana Radhabai v. State of Gujarat, (1977) 1 S.C.C. 762; (1977) S.C.C. (Crl.) 181

and the oral declarations made by the deceased.<sup>8</sup> The Supreme Court has set at rest the controversy as to the necessity of corroboration of a dying declaration—see the next Note 17.

**17. Dying declaration.** (a) *Summary of salient features.* The principle on which dying declarations are admitted is indicated in the maxim of the law—*nemo moriturus proesumitur mentiri*—a man will not meet his Maker with a lie in his mouth.

When a man is dying, the grave position in which he is placed is held by law to be a sufficient ground for his veracity; and, therefore, the tests oath and cross-examination are dispensed with under such circumstances. Besides, if dying declarations are excluded there would be miscarriage of justice in many cases since, the victim being generally the only eye-witness in serious crimes, the exclusion of his statement would leave us without a scrap of evidence.

Though these declarations are entitled to great weight, it would always be recollected that, the accused has not the power of cross-examination—a power quite as essential to the eliciting of truth as the obligation of an oath can be; and that, where a witness is not a man of good character and has not a deep sense of accountability to his Maker, feelings of anger and revenge or, in the case of mutual conflict, the natural desire to screen his own misconduct may affect the accuracy of his statements and give a false colouring to the whole transaction. Moreover, the particulars of the things to which the deceased has spoken may likely have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed and leading both to mistakes as to identity of persons and to the omission of facts essentially important to the completeness and truth of the narrative. Also, the fear of punishment and public obliquity for perjury do not exist. Relatives and friends who naturally would surround the bedside of the deceased and who surcharge with emotions of deep sympathy for the deceased and involuntary resentment against the suspected offender may make suggestions which the deceased man in his enfeebled condition may readily adopt to avoid at least their importunities. There is also the danger of the statements being misunderstood and misreported. Thus implicit reliance cannot in all cases be placed on the declaration of a dying person, for his body may survive the powers of his mind; or, his recollections, if his senses are not impaired, may not be perfect; or for the sake of ease to be rid of importunity of those around him, he must say, or seem to say, whatever they choose to suggest. Cases are not uncommon in this country of false depositions being made by dying men to implicate falsely their enemies.

There are no formalities to be observed in regard to the emission of dying declarations. They may be verbal or written, or made by signs and nods in reply to questions, and may be made to officials or non-officials. The dying declarations reduced into writing may take the form of a written statement, if they had been written out by the person who is dead, or dictated by him and transcribed by a scribe and read over to him and signed by him, or has his thumb-impression affixed thereto in token of their correct description.

8. *Parmarth v. State of M. P.*, 1953 Cr. I. J. 1772: A.I.R. 1953 S. C. 420, 424; *Ishwar Prasad v. State of M. P.*, 1969 Jab. L.J. 986, 991; 1969

N.P.T.J. 901; 1969 M.P.W.R. 924; see also *Ranjit Singh v. State*, 1966 Cr. I. J. 336, 338 (corroboration not essential in all cases).

In the vast majority of cases, however, dying declarations are reduced into writing like depositions. A Magistrate empowered under Section 164, who is generally sent for by the doctor or police, if they find the injured man *in extremis* and his dying declaration, it is considered, should be recorded, may record it in the presence of the accused or in the absence of the accused. If the dying declaration, or a written statement, is written out by the person who is dead or taken down to his dictation and acknowledged as such, such a document is a written statement made by a person who is dead within the meaning of this Clause. The writing has to be produced under Section 64 and has to be proved as laid down in Section 67. In the second category of cases, the statement has to be proved by the person who took down the statement, or by persons who were present and heard it emitted. If the witness has no specific recollection of the statements made, he may under Section 160 testify to the fact mentioned in the document, if he is sure that the facts were recorded by him. The witness can testify to the facts mentioned in the document within the meaning of Section 160, if he produces the document and swears that all that was written in it was actually stated by the deceased. The important things to bear in mind is that it is not the document which by itself becomes evidence but it is the testimony of the person who wrote it down or heard it and who can refresh his memory by referring to this document which constitutes the evidence of the dying declaration.

The dying declaration recorded by a competent Magistrate, in the presence of the accused, straightaway becomes a deposition and becomes part of the record without further proof under Section 33 of the Act. When a dying declaration is recorded by a Magistrate in the absence of the accused, it becomes a record of the evidence given by a witness before an officer authorised by law to take such evidence, and the presumption under Section 80 of the Act arises. The dying declaration validly recorded under Section 164 does not require the presence of the Magistrate to prove it, but proof of identity of the declarant is still necessary and therefore some person who was present when the declaration was taken has to be examined.

The controversy relating to corroboration of dying declarations has been set at rest by the decision of the Supreme Court in *Khushal Rao v. State of Bombay*.<sup>9</sup> Their Lordships of the Supreme Court after reviewing the decisions of the High Courts observed :

9. 1958 S.C.R. 552; 1958 S.C.C. 28; 1958 S.C.J. 198; 1958 A.L.J. 91; 1958 A.W.R. (H.C.) 58; 1958 Jab. L.J. 175; 1957 M.P.C. 813; 1958 M.L.J. (Cr.) 100; 1958 Cr.L.J. 106; A.I.R. 1958 S.C. 22 at pp. 28, 29; the principle was reiterated in Pandarinath Budhie Patil v. State of Maharashtra, (1969) 2 S.C.W.R. 591, 593; 1969 Jab.L.J. (S. N.) 89 (S.C.) and the decision itself approved by a Bench of five Judges in Harbans Singh v. State of Punjab, A.I.R. 1962 S.C. 439 and affirmed again in Tapinder Singh v. State of Punjab, A.I.R. 1970 S.C. 1560 at

pp. 1570, 1571 (dying declaration within five hours of occurrence—no tutoring acted upon also other reliable evidence of eye-witnesses; Ram Kumar v. State of Rajasthan, I. L. R. (1969) 19 Raj. 625; 1969 Raj. L.W. 610; A.I.R. 1970 Raj. 60, 62; State of Gujarat v. Lohand Lakhui, 1968 Cr.L.J. 344; A.I.R. 1968 Guj. 77, 78; M. Surya Rao, *In re*, (1969) 1 Andh.W.R. 519 at pp. 521, 522; 1969 M.L.J. (Cr.) 427; Vinayak Datta v. State, 1970 Cr.L.J. 1081; A.I.R. 1970 Goa 96, 99. See also R. v. Fitzpatrick, (1910) 46 I.L.T. R. 173 (C.C.R.), cited in Phipson

"The Judicial Committee of the Privy Council had to consider in the case of *Chandrakara alias Alisandiri v. The King*<sup>10</sup> the question whether mere signs made by the victim of a murderous attack which had resulted in the cutting of throat, thus, disabling her from speaking out, could come within the meaning of Section 32 of the Ceylon Evidence Ordinance, which was analogous to Section 32(1) of the Indian Evidence Act. The Privy Council affirmed the decision of the Supreme Court of Ceylon, and made the following observations in the course of their judgment, which would suggest that a dying declaration, if found reliable by a jury, may, by itself, sustain a conviction :

'..... Apart from the evidence proceeding from the deceased woman, the other evidence was not sufficient to warrant a conviction, but at the same time that other evidence was not merely consistent with the deceased's statement but pointed in the same direction. It was a case in which, if the deceased's statement was received, and was believed, as it evidently was by the jury, to be clear and unmistakable in its effect, then a conviction was abundantly justified and, indeed, inevitable.'

"Sometimes attempts have been made to equate a dying declaration with the evidence of an accomplice or the evidence furnished by a confession as against the maker, if it is retracted, and as against others, even though not retracted. But in our opinion, it is not right in principle to do so. Though under Section 133 of the Evidence Act, it is not illegal to convict a person on the uncorroborated testimony of an accomplice, Illustration (b) to Section 114 of the Act, lays down as a rule of prudence based on experience, that an accomplice is unworthy of credit unless his evidence is corroborated in material particulars and this has now been accepted as a rule of law. The same cannot be said of a dying declaration because a dying declaration may not, unlike a confession, or the testimony of an approver, come from a tainted source. If a dying declaration has been made by a person whose antecedents are as doubtful as in the other cases, there may be a ground for looking upon it with suspicion, but generally speaking, the maker of a dying declaration cannot be tarnished with the same brush as the maker of a confession or an approver.

"On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court,<sup>11</sup> aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration

11th Ed., (1970), pp. 435, 437; *Rinkulo Paito v. State*, 1969 Cr.L.J. 703 (Orissa); *Bava Dolatgiri Itragiri v. State of Gujarat*, 1968 Cr.L.J. 1549; A.I.R. 1968 Guj. 296; *Kanbai v. State*, 1967 Cr.L.J. 1583; A. I. R. 1967 All. 561, 564 (three dying declarations all reliable conviction can

be based on them, even if uncorroborated); *Wahengbum Nimai Singh v. Manipur Administration*, 1968 Cr.L.J. 1237.

10. (1937) L.R.A.C. 220, 229; A.I.R. 1937 P.C. 24.  
11. *In re, Guruswami Tevar*, A. I. R. 1940 Mad. 196 (F.B.).

was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as any other piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration; stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character; and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

"Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining the dying declaration, in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case."

Since then the Supreme Court has delivered a number of judgments reiterating the following principles—

- (1) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.<sup>12</sup>
- (2) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it without corroboration.<sup>13</sup>

12. Mannu Raja v. The State of M. P., (1976) 3 S.C.C. 104; (1976) S.C. C. (Cri.) 376; (1976) 2 S.C.R. 764; 1976 Cri.L.J. 1718; A.I.R. 1976

S.C. 2199.  
13. V. S. More v. State of Maharashtra, A.I.R. 1978 S.C. 519; Lallubhai Devchand Shah v. State of

(3) For this purpose the court has to apply strictest scrutiny and has to be on guard to ensure that the declaration is not the result of tutoring prompting or imagination and that the deceased had opportunity to observe and identify the assailants and was in fit state to make the declaration.<sup>14</sup>

(4) Where dying declaration is suspicious it should not be acted upon without corroborative evidence.<sup>15</sup>

Gujarat, 1972 Cri.L.J. 828; 1972 Cri. App. R. 59 (S.C.); 1972 U.J. (S.C.) 177; (1971) 3 S.C.C. 767; 1972 S.C. Cri.R. 239; (1971) 2 S.C. W.R. 728; 1972 S.C.C. (Cri.) 13; A.I.R. 1972 S.C. 1776; Rasheed Beg v. State of Madhya Pradesh, 1974 U.J. (S.C.) 68; (1974) 4 S.C.C. 264; 1975 Mad.L.J. (Cri.) 48; 1974 S.C. Cri.R. 81; 1974 Cri.App.R. (S.C.) 63; (1975) 1 S.C.J. 157; 1974 M.P.L.J. 208; 1974 Mah. L. J. 236; 1973 Cri.L.R. (S.C.) 795; 1974 S.C.C. (Cri.) 426; 1974 Cri.L.J. 361; A.I.R. 1974 S. C. 332; Mohammad Ekramul v. State of Bihar, 1973 Cri.App.R. 5 (S.C.); 1973 S. C. G. (Cri.) 261; (1973) 3 S.C.C. 312; 1973 Cri.L.J. 335; A. I. R. 1973 S.C. 1395 (weapon attributed by deceased not found to have been used); Godhu v. State of Rajasthan, 1974 Cri.L.R. (S.C.) 575; 1974 Cri. App. R. 270 (S.C.); 1974 S.C.C. (Cri.) 859; (1975) 1 S.C.R. 906; 1974 S.C. Cri.A. 378; 1974 W. L. N. 720; (1975) 1 S.C.J. 106; 1975 Mad.L.J. (Cri.) 38; (1975) 3 S.C. C. 241; 1974 B.B.C.J. 906; 1974 Cri.L.J. 1500; A.I.R. 1974 S. C. 2188. (minor discrepancy); Gopal Singh v. State of M.P., 1972 Cri. App. R. 175 (S.C.); 1972 Cri. L. J. 1045; 1972 S.C. Cri. R. 411; 1972 U.J. (S.C.) 784; (1972) 3 S.C.C. 268; 1972 S.C.C. (Cri.) 513; A.I.R. 1972 S.C. 1557 (complete names and addresses of miscreants not given—corroboration needed); Gurpekan v. State of U.P., 1972 Cri. L.J. 746; 1972 S.C. Cri. R. 337; 1972 U.J. (S.C.) 776; (1972) 3 S.C.C. 361; 1972 S.C.C. (Cri.) 531; A.I.R. 1972 S.C. 1172. (some discrepancy, corroboration needed); Nirmal Singh v. State of Rajasthan, 1972 Cri.L.J. 580; 1972 W.L.N. 147; 1972 U.J. (S.C.) 741; (1972) 3 S.C.C. 781; 1972 S.C.C. (Cri.) 849; A.I.R. 1972 S.C. 945. (corroborated by doctor, declaration relied upon); Abdul Majeed v. State of Gujarat, A.I.R. 1976 S.C. 1782. (recorded by doctor, no time to call a Magistrate—relied upon); Banka Naiko v. State of Orissa, 1976 Cri. L.R. (S.G.) 141; (1976) 3 S.C.C. 401; 1976 S. C. C. (Cri.) 417; 1976 S.C. Cr. R. 211; 1976 Cri.L.J. 1556; A.I.R. 1976 S.C. 2013 (inconsistent with medical evidence—not relied upon).

14. Ram Chandra Reddy v. Public Prosecutor, (1977) 1 S.C.C. 36; (1976) C.A.R. 278; 1976 Cri.L.J. 1548; (1976) 3 S.C.C. 618; (1976) S.C.C. (Cri.) 478; (1977) 1 M.L.J. (Cri.) 1; (1976) 2 A.P.L.J. (S.C.) 39; (1977) 1 An. W. R. (S.C.) 34; A.I.R. 1976 S.C. 1994.
15. Rasheed Beg v. State of Madhya Pradesh, 1974 U.J. (S.C.) 68; (1974) 4 S.C.C. 264; 1975 Mad. L. J. (Cri.) 48; 1974 Cri. App. R.

See also the following cases.<sup>18</sup>

(b) *Conclusion.* In sum, a dying declaration is not to be believed merely because no possible reason can be given for accusing the accused falsely. It can only be believed, if there are no grounds for doubting it at all.<sup>17</sup> It is not always safe to convict an accused person merely on the evidence furnished by a dying declaration, without further corroboration, because such a statement is not made on oath and is not subject to cross-examination, and because the maker of it might be mentally and physically in a state of confusion and might well be drawing upon his imagination while he was making the declaration.<sup>18</sup> Each case, however, must be determined on its own facts, keeping in view the circumstances in which the dying declaration was made. It cannot be laid down as a general proposition, that a dying declaration is a weaker kind of evidence than other pieces of evidence. It stands on the same footing as another piece of evidence, and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence. It is however, true that a dying declaration, which has been recorded by a competent Magistrate in the proper manner, e.g., in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character. In order to test the reliability of dying declaration, the Court has to keep in view the circumstances, like the opportunity of the dying man for observation, and whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; and whether the statement had been consistent throughout if he had several opportunities of making a dying declaration; and whether the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties. If the Court comes to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no need of further corroboration. But, if it appears to be unreliable by itself, and suffers from some infirmity, then it cannot form the basis of a conviction without corroboration.<sup>19</sup>

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| <p>16. Bhaiya v. State of Orissa, (1976) 42 C. L. T. 80. (dying declaration based on oral evidence—corroboration needed to obviate chances of mistake); Jaswant v. State, 1971 All.W.R. (H.C.) 365; 1971 Cri.L.J. 1562; A.I.R. 1971 All. 482 (declaration not taken down <i>verba-tim</i>—not relied upon).</p> <p>17. Tara Chand v. The State, (1962) 2 S.C.R. 775; (1963) 2 S.C.J. 17; 1962 A.W.R. (H.C.) 135; 64 Bom. L.R. 74; 1962 (1) Cr.L.J. 196; 1963 M.L.J. (Cr.) 307; A.I.R. 1962 S. C. 130, 134; see also Bava Dolat-giri Itragiri v. State of Gujarat, 1968 Cr. L. J. 1549; A. I. R. 1968 Guj. 296 at pp. 298, 299.</p> <p>18. See Ram Nath v. State of Madhya Pradesh, A. I. R. 1953 S. C. 420; Ishwar Prasad v. State of Bihar,</p> | <p>1969 Jab. L. J. 986, 988; 1969 M. P. L. J. 901; 1969 M. P. W. R. 924.</p> <p>19. Khushal Rao v. State of Bombay, (1958) S.C.R. 552 at pp. 568-569; 1958 S.C.C. 28; 1958 S. C. J. 198; 1958 A. L. J. 91; 1958 A. W. R. (H.C.) 38; 1958 Cr. L. J. 106; 1958 Jab. L. J. 175; 1957 M. P. C. 813; 1958 M. L. J. (Cr.) 100; A. I. R. 1958 S.C. 22, 28 and 29 approved by a Bench of five Judges of the Supreme Court in Harbans Singh v. State of Punjab, (1962) Supp. 1 S. C. R. 104; (1962) 2 S. C. J. 662; (1962) 1 Andh. L. T. 311; 1962 A. W. R. (H.C.) 169; (1962) 1 Cr. L. J. 479; 1962 M. L. J. (Cr.) 685; A. I. R. 1962 S. C. 439, 444 and reiterated in Tapinder Singh v. State of Punjab, 1971 S. C.</p> |
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It is neither a rule of law nor of prudence that dying declaration requires to be corroborated. The evidence furnished by it must be considered just as the evidence of any witness, though some special considerations arise in the assessment of a dying declaration which do not arise in the case of assessing the value of statements made by witnesses. Where the dying declaration is a complete statement, even though there is some infirmity about it, it is admissible in evidence and can be taken into consideration without any corroboration.<sup>20</sup> A dying declaration, recorded and proved by the Magistrate, which is clear, concise and sounds convincing, can be accepted as truthful and acted upon for convicting the accused even in the absence of corroboration.<sup>21</sup>

Where in his dying declaration the deceased mentions two persons as his assailants and one of them is not identified that is no reason to reject the dying declaration against the other.<sup>22</sup>

**18. Miscellaneous.** (a) *General.* Dying declarations not recorded in writing are admissible.<sup>23</sup>

Signs made by injured persons amount to verbal statements.<sup>24</sup> The shrieks of a dying person imploring named assailants not to kill him amount to a dying declaration.<sup>25</sup>

The desirability of recording dying declaration in the very words of the deponent has been stressed in *Shrinath Durga Prasad v. State*,<sup>1</sup> and in the undernoted cases.<sup>2</sup>

Where the dying declaration is not free from doubt, it cannot be relied upon and the conviction of the accused cannot be sustained on it. A so-called dying declaration cannot be elevated to the status of a real and genuine dying declaration merely because the defence could not establish that the prosecution witnesses had some *animus* against the accused.<sup>3</sup>

Where a dying declaration has been recorded in writing by the Magistrate and it was read over to the deceased there can be no doubt about the fact that whatever is mentioned in it is the faithful statement of the deceased. Imaginary suspicion should not be created and dying declaration thrown out with-

Cr. R. 54, 60 and 61. See also  
*Pompiah v. State*, A. I. R. 1965  
*S. C.* 839; *Kishan Singh v. State*,  
*I. L. R.* (1962) 2 Punj. 855; *A. I. R.* 1963 Punj. 170; *State of Orissa v. Kaushalya*, A. I. R. 1965 Orissa 38; *Dhammo v. State*, 1968 A. L. J. 61.

20. *Muniappan v. State of Madras*, (1962) 3 S. C. R. 869; (1962) 2 S. C. J. 21; 1962 A. W. R. (H.C.) 447; (1962) 1 Andh. L. T. 295; (1962) 2 Andh. W. R. (S.C.) 71; (1962) 2 Cr.L.J. 404; 1962 M.L.J. (Cr.) 396; (1962) 2 M. L. J. (S.C.) 71; A.I.R. 1962 S.C. 1252.  
 21. *Tapinder Singh v. State of Punjab*, 1971 S.C. Cr. R. 54, 62; (1971) 1 S.C.J. 751; 1971 M. L. J. (Cr.)

356.  
 22. *State v. Kanchan Singh*, 1954 All. 153.  
 23. *Sital Chandra v. State*, A. I. R. 1956 Cal. 82; 1956 Cr. L. J. 509.  
 24. *Vaghari v. State*, A. I. R. 1956 Sau. 83; 1956 Cr. L. J. 1240.  
 25. *Krishna Wanti v. State*, 71 P. L. R. 280, 286.  
 1. A. I. R. 1957 Bom. 223; I. L. R. 1957 B. 396; 1957 Cr. L. J. 1104.  
 2. *Pritam Singh v. State*, 1972 A. L. J. 744; 1972 All W. R. (H. C.) 521; 1973 Cut. L. R. (Cri.) 186; *Hari Chunni Lal v. State of M.P.* 1977 M. P. L. J. 321.  
 3. *State of Bihar v. Harinandan Singh*, 1970 Pat. L. J. R. 172 at pp. 180, 181.

out good reasons. Mere presence of relatives cannot be considered to be a ground for suspicion, because it is but natural that friends and near relatives must reach the injured person as soon as information is received.<sup>4</sup>

In regard to dying declaration, spoken to by a number of persons who heard the deceased utter it, all that can be expected to see is, that the words, very similar to the words that they purport to put into the mouth of the deceased, were uttered by him, and the witnesses can be relied upon to that extent.<sup>5</sup>

The dying declaration is statement by a person as to the cause of his death or as to any other circumstances of the transaction which resulted in his death and such details as fall outside the ambit of this clause are not strictly within the permissible limits laid down by it and unless absolutely necessary to make a statement coherent or complete should not be included in the statement.<sup>6</sup>

Before the statement of a person who is indisputably dead can be admitted in evidence, it must be shown that the declaration of the person was actually made by him. Where the *fardbeyan* was in writing, it was incumbent on the prosecution to prove by whom or under whose direction it was written. The investigating officer in the instant case was not examined. Since the requirements of law were not satisfied, the first information report cannot be used as a corroboration piece of evidence under section 32. Nor is the statement made before a police officer evidence under section 33.<sup>7</sup>

(b) *Statement under section 162, Cr. P. C., 1973.* By section 162, Cr. P. C., it is provided that statements recorded by the police cannot be treated as evidence with the exception, *inter alia*, of those recorded under the present clause. If, after medical opinion as to the fitness of the person making the statement, it is recorded by a police officer conducting the investigation, it is as good as one recorded by a judicial Magistrate, provided there is nothing to doubt the veracity of the witness recording it or the truth and correctness of the statement by its maker.<sup>8</sup> A report being a dying declaration made at the police station can be made at any time, i.e., before or during investigation and would still be substantive evidence. To such a case, Section 161, Cr. P. C., 1973 is not applicable.<sup>9</sup>

4. Gonda Singh v. State, 1957 Cr. L.J. 240; 1956 Raj. L.W. 178.
5. Pre Narain v. State, A.I.R. 1957 All. 177.
6. Bakshish Singh v. State of Punjab, A. I. R. 1957 S. C. 904, 906; 1958 All L. J. 1; 1958 B. L. J. R. 74; 1958 Andh. L. T. 66; 1958 Mad. L. J. Cr. 38; 1958 All W. R. (H. C.) 94. See also Ratan Gond v. State of Bihar, A. I. R. 1959 S. C. 18; I. L. R. 37 Pat. 1409; 1959 Cr. L. J.

- 108; 1959 B. L. J. R. 1; 1960 Andh. L. T. 407; 1959 All. L. J. 35; 1959 M.P.C. 46; 1959 All.W.R. (H.C.) 108; 1959 Mad. L. J. Cr. 109.
7. Sk. Manzoor v. State of Bihar, 1971 B.L.J.R. 353, 355 and 356.
8. Bishan Singh v. State, (1969) 71 P. L.R. 73, 85.
9. State of U.T. v. Motilal, 1967 A.W.R. (H.C.) 345; 1968 Cr. L.J. 227; A.I.R. 1968 All. 83, 86.

## CLAUSE 2

### SYNOPSIS

|   |   |
|---|---|
| 1. Scope.   | of business".                                       |
| 2. Road-cess returns.   | 7. "In the discharge of professional duty".         |
| 3. Sections 32 (2) and 34.  | 8. "Acknowledgment written or signed —of any kind." |
| 4. Need not be in discharge of duty to third person.  | 9. Personal knowledge.                              |
| 5. "Ordinary course of business."<br>(a) English and American rule contrasted.<br>(b) Indian Law. | 10. Contemporaneousness.                            |
| 6. "Books kept in the ordinary course   | 11. Collateral matters.                             |
|   | 12. Extrinsic proof.                                |
|   | 13. Commercial documents.                           |

**1. Scope.** Under this clause statements made in the ordinary course of business, whether written or verbal, of relevant fact by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an unreasonable amount of delay or expense, are themselves relevant.

The corresponding English rule is: declarations, oral or written, made by deceased persons in the ordinary course of duty, contemporaneously with the facts stated and without motive to misrepresent, are admissible in proof of their contents.<sup>10</sup> The reasons for the rule are: (1) the difficulty of finding of other proof<sup>11</sup> and (2) a circumstantial guarantee of truth which comes from three factors all of which are pointed out by Tindal, C. J., in *Poole v. Dicas*.<sup>12</sup> In the first place, the declarant being under a duty to his employer to make the statement, the possibility of censure and dismissal makes for accuracy. In the words of Tindal, C. J., a false entry would be likely to bring him into disgrace with his employer. Secondly, habit and routine in making the entries furnish some likelihood of accuracy. Thirdly, "the book in which the entry is made being open to all the clerks in the office, an entry, if false would be exposed to speedy discovery." As Taylor puts it, "The considerations which have induced the Courts to recognize this exception appear to be principally these: that, in the absence of all suspicion of sinister motives, a fair presumption arises that entries made in the ordinary routine of duty are correct, since the process of invention implies trouble, it is easier to state what is true than what is false: that such entries usually form a link in a chain of circumstances which mutually corroborate each other; that false entries would be likely to bring clerks into disgrace with their employers; that as most entries made in the course of duty are usually subject to the inspection of several persons, an error would be exposed to speedy discovery; and that as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient, if not necessary, for the due investigation of truth."<sup>13</sup>

Though the statement is admissible whether it be verbal or written,<sup>14</sup> the effect of the statement as to weight may be very different in the two cases. The words "and in particular" in this clause seem to point to the superior force of written over verbal statements.<sup>15</sup>

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| 10. Phipson, 11th Ed., p. 397.   | 348, 349.; Taylor, Ev., s. 697.  |
| 11. <i>Lefebure v. Worden</i> , (1750) 2 Ves Sen 54, 55.                             | 14. S. 32. Cl. 2. ante; Illustration (i) : <i>Stapylton v. Clough</i> , (1853) 2 E. & B. 933; <i>Edie v. Kingsford</i> , (1854) 14 G. B. 759; <i>R. v. Buckley</i> , (1873) 13 Cox. 293. |
| 12. (1835) 1 Bing. N.C. 649, 652; 4 L.J.C.P. 196; 1 Scott 600.                       | 15. Norton, Ev., 177.  |
| 13. <i>Poole v. Dicas</i> , (1835) 4 L.J. C.P. 196; 1 Phip., Ev., 319; 1 Steph. Ev.. |  |

Illustrations (b), (c), (d), (g), (h), (i) refer to this clause as also Illustrations (b) and (c) of Sec. 21; the leading case in English law on the subject being that of *Price v. Torrington*.<sup>16</sup> In this case, the plaintiff, who was a brewer, brought an action against the Earl of Torrington for beer sold and delivered, and the evidence given to charge the defendant was that the usual way of the plaintiff's dealing was that the draymen came every night to the clerk of the brew-house, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their names, and that drayman was dead, but that this was his hand set to the book; and this was held good evidence of a delivery; otherwise of the shop-book itself singly, without more.<sup>17</sup> Thus also, where the plaintiff, a Mahomedan lady, sued for her deferred dower, an entry as to the amount of her dower entered in a register of marriages kept by the *Mujtahid*, since deceased, who solemnized the marriage, was held to be admissible as evidence of the sum fixed, being an entry kept in the discharge of professional duty within the meaning of this section.<sup>18</sup> In another case, a deed of conveyance which purported to bear the mark of the defendant as vendor was tendered in evidence. The defendant, however, denied that she had ever put her mark to it. It was proved to be attested by a deed-writer, who was dead, and it was manifestly all in his writing, including the words descriptive of the marks of the woman. The statement of the deed-writer, that the mark was that of the defendant, was held to be admissible under this clause, apparently on the ground that it had been made by him in the ordinary course of his business.<sup>19</sup>

The section makes particular mention of statements contained in business-books,<sup>20</sup> in receipts, in documents used in commerce, such as invoices, bills of lading, charter parties, waybills.<sup>21</sup> In this case, the prisoner was charged with forging for the purpose of cheating, and using as genuine a forged railway receipt for the purpose of obtaining from a Railway Company certain goods which had been entrusted to the Company to be carried from Delhi to Calcutta. The Standing Counsel for the prosecution sought to prove the delivery of the goods to the Company by putting in a letter from the consignor at Delhi to his partner in Calcutta, advising the despatch of the goods, submitting that the letter was a "document used in commerce written or signed" by a person "whose attendance could not be procured, etc." The Court (Macpherson, J.), refused to receive the evidence, and intimated a doubt whether such a letter would, under any circumstances, be receivable "since it was beyond the instances specified in the section." As to estimates, see *Hari v. Moro*,<sup>22</sup> and as to statements by a person who cannot be called as a witness, made in the ordinary course of business, consisting of the date of a letter or

16. I Smith, L.C. (13th Ed.) 296 and notes: as to English rule, see Taylor, Ev., ss. 697-713; Steph. Dig., Art. 27; Roscoe, N.P. 60-62; Best Ev., s. 501; Phipson, Ev., 11th Ed., 401; Wills, Ev., 3rd Ed., 182-188; Powell, Ev., 9th Ed., 316-323.

17. See also *Doe v. Furford*, 23 B. & Ad. 898, in which the earlier cases are cited and discussed.

18. *Zakeri v. Sakina*, (1892) 19 C. 689; 19 I.A. 157.

19. *Abdulla v. Gannibai*, (1887) 11 B. 690.

20. Illustrations (b), (c), as to the admissibility and effect of entries in books of account and official records whether the maker is dead or not, v. post, Ss. 34, 35; *Abinas v. Pratul*, 1928 Cal. 448; I.L.R. 55 Cal. 1070; 103 I.C. 585; 32 C.W.N. 759; *Gopeswar v. Bijoy*, 1928 Cal. 854; 108 I.C. 883; 32 C.W.N. 580.

21. As to letters of advice, see *R. v. Tarinicharan*, (1872) 9 B.L.R. App. 42.

22. (1886) 11 B. 89.

other document usually dated, written, or signed by him ; Illustration (g) to the section. In a suit to recover loss sustained on the sale by the plaintiffs of goods consigned to them by the defendants for sale by their London firm, account-sales are good *prima facie* evidence to prove the loss unless and until displaced by substantive evidence put forward by the defendants.<sup>23</sup> For an entry in a book to be relevant under this clause it is not necessary that it should be against the pecuniary interest of the person making the entry.<sup>24</sup>

**2. Road-cess returns.** Notwithstanding the provisions of Sec. 21 and the present section, road-cess returns cannot, under Sec. 95 of the Road-cess Act, be used as evidence in favour of the person by whom, or on behalf of whom, they are filed.<sup>25</sup>

**3. Sections 32 (2) and 34.** Entries in accounts relevant only under Sec. 34 are not by themselves alone sufficient to charge any person with liability ; corroboration is required.<sup>1</sup> But where accounts are relevant under this clause also, they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible only under Sec. 24, require corroboration. Entries in accounts may, in the same suit, be relevant under both the sections, and, in that case, the necessity for corroboration does not arise.<sup>2</sup>

Account books not admissible under Sec. 34 may be admissible under this clause.<sup>3</sup> If papers are admissible under this clause, Sec. 34 does not apply.<sup>4</sup> There is authority for the proposition that papers used merely to rebut a presumption under Sec. 50 of the Bengal Tenancy Act do not of themselves charge a person with liability.<sup>5</sup> In the case cited,<sup>6-16</sup> it was held that medical certificate of testator's soundness of mind made twenty-six days after execution of the will was admissible under this clause, and was relevant, but that a letter by the testator speaking of his relations with his wife, in whose favour he subsequently made the will, was held not admissible. Although zamindari papers cannot be admitted under Sec. 34, as corroborative evidence, without independent evidence of the fact of collection at certain rates, they can be used as in-

23. Barlow v. Chunni, (1901) 28 C. 209.
24. Ambalavana Pillai v. Gowri Anumal, 1936 Mad. 871, 874; 1936 M.W.N. 1274: 44 I.L.W. 467.
25. Hem v. Kali, (1899) 26 C. 832, 838; Swarnamoyi v. Sourindra Nath Mitra, 1925 Cal. 1189; 89 I.C. 747: 42 C. L.J. 14; Ram Kumar Das v. Haranarain Das, 1926 Cal. 727: 92 I.C. 104; Sheikh Intaz v. Dina Nath De Sarka, 1926 Cal. 856; I.L.R. 53 Cal. 615: 96 I.C. 72, but they are otherwise admissible; Chalho v. Jharo, (1911) 39 C. 995; following Hem v. Kali, 30 C. 1083 (P.C.); 30 I.A. 177, distinguishing Nusseerun v. Gouree, (1874) 22 W.R. 192 and see Sewdeo v. Ajodhya, (1912) 39 C. 1005.
1. Durga Shanker v. Lala Ganga Sahai, 1932 All. 500: 1932 A.L.J.

2. 498. Rampyarbai v. Balaji, (1904) 6 Bom. L.R. 50 (S.C.); 28 B. 294; Mst. Rani v. Firm Bahadur Mal Buti Mal, 1922 Lah. 119 (I.); 63 I.C. 946; Daji Abaji Khare v. Govind Narayan, 10 Bom. L.R. 811; Abdul Wahed v. Nagendra Chandra, 1940 Cal. 524; I.L.R. (1940) 2 Cal. 559: 192 I.C. 685: 44 C.W.N. 993; Chaturbhuj Singh v. Sarada Charan Ji Guha, 1933 Pat. 6: I.L.R. 11 Pat. 701: 141 I.C. 157: 14 P.L.T. 509.
3. Babhnaji v. Ratanlal, 1934 Nag. 106: 148 I.C. 1033: 30 N.L.R. 192.
4. Gopeshwar v. Bijoy, 1928 Cal. 854: I.L.R. 55 Cal. 1167: 32 C.W.N. 580.
5. Ibid.

6-16 Woolmer v. Daly, 1920 Lah. 179: I.L.R. 1 Lah. 173: 55 I.C. 798.

dependent evidence, if they are relevant under this clause.<sup>17</sup> *Hudabandi*<sup>18</sup> *Chowhaddibandi*,<sup>19</sup> *Jamabandi* and *Jamawasilbaki*<sup>20</sup> papers have been held to be admissible under this clause. The entries in the diary of a deceased *chaukidar* relating to birth and death are not admissible under this clause, where from the evidence it appears that the entries were not made by the *chaukidar* at all as he was an illiterate person, but by other persons who deposed that they made entries at the request of the *chaukidar*. It was held, that the entries were admissible either under Sec. 157 or Sec. 159 or possibly under both.<sup>21</sup> Under Sec. 34, *talabbaki* papers are not sufficient evidence to charge any person with liability. *Talabbaki* papers may be evidence under this clause; but before they can be admitted, a landlord must show that the person making the statement is dead and that the entries were made by him in the ordinary course of business.<sup>22</sup> The presumption arising from entries in the Revenue records of large number of years in favour of certain person will not be rebutted by mere stray entries in favour of others when the evidence is uncertain and inadequate.<sup>23</sup>

**4. Need not be in discharge of duty to third person.** It has also been held in England that the declarations must have been made in discharge of a duty to a third person, a mere personal custom not involving responsibility being insufficient.<sup>24</sup> No such limitation appears in the words of the section, or is to be directly gathered from a consideration of the illustrations thereto. It may be that the framers of the Act considered accuracy, which is generally produced by commercial or professional routine, to be a sufficient guarantee of the credibility of this class of evidence, without having recourse to the guarantee which exists in the obligation to discharge an imposed duty faithfully. Declarations in the course of duty differ, in English law, from those against interest, in requiring contemporaneousness, personal knowledge, and the exclusion to collateral matters, none of which restrictions is declared by the section to exist upon the admissibility of such declarations in Indian Courts.

- 17. *Charitter v. Kailash*, 1918 Pat. 537 : 44 I.C. 422; 3 P.L.J. 306: 4 P. L.W. 213; *Chaturbhuj Singh v. Sarada Charan Ji Guha*, 1933 Pat. 6: I.L.R. 11 Pat. 701; 141 I.C. 157: 14 P.L.T. 509.
- 18. *Gopewar v. Bijoy*, 1928 Cal. 854: I.L.R. 55 Cal. 1167; 108 I.C. 883: 32 C.W.N. 580; (*Smt.*) *Rajnandini Debi v. Manmatha Pal Choudhury*, 1941 Cal. 223; I. L. R. (1940) 2 Cal. 393; 197 I.C. 147; 44 C. W. N. 1079.
- 19. *Gadadhar Chowdhury v. Sarat Chandra Chakravarty*, 1941 Cal. 193 : 195 I. C. 412; 72 C. L. J. 320: 44 C. W. N. 935.
- 20. *Dukhu Mia v. Jagdishnath Roy Bahadur*, 1926 Cal. 359: 90 I.C. 564: See also *Manmohan Pandey v. Hari Nath Chawdhury*, 1928 Cal. 408 (2): 110 I.C. 338; 47 C. L. J. 457; *Abdul Wahed v. Nagendra Chandra Lahiri*, 1940 Cal. 524: I. L. R. (1940) 2 Cal. 559: 192 I.C. 685: 44 C. W. N. 993; and cases cited therein.
- 21. *Naina v. Gobardhan*, 1918 Pat. 40: 37 I.C. 424; 2 P.L.J. 42: 1919 P. H.C.C. 352; *Chandrama v. Ram Gayan*, 1922 Pat. 111: 67 I.C. 57.
- 22. *Umed v. Habibulla*, 1920 Cal. 444: I.L.R. 47 Cal. 266; 56 I. C. 38: 31 C. L. J. 68.
- 23. *Bhuneshwara Swami Vara Temple v. Pedapudi Krishna Murthi*, A. I. R. 1973 S.C. 1299.
- 24. *Hope v. Hope*, (1893) W. N. 20 C.A.; *R. v. Worth*, (1843) 4 Q.B. 132; *Massey v. Allen*, (1879) 13 Ch. D. 558, 563; "the entry must be made in the course of business in the performance of duty." *ib.* *Per Hal V. C.*; *Simon v. Simon*, (1936) P. 17: 105 L. J. P. 14: 154 L.T. 63: 52 T.L.R. 91; an apparent exception is presented by the case of *Doe v. Turford*, (1832) 3 B. & Ad. 890; but see as to this case *Wills Ev.*, 128.

5. "Ordinary course of business". (a) *English and American rule contrasted.* The early English rule covered all entries "made by a person since deceased, in the ordinary course of his business,"<sup>25</sup> or "in the exercise of his business and duty".<sup>1</sup> It is not material whether the entrant is a party, the clerk of a party, or a stranger to the proceedings, but whoever he be, he must not only have made the entry in the course of business but also in discharge of his duty,<sup>2</sup> which must not be self-imposed.<sup>3</sup> The duty must be not only to do the act stated but to make the entry at the exact time when it was actually recorded.<sup>4</sup> It is also a peculiarity of the English rule that it may not be used to prove collateral facts mentioned in the entry.<sup>5</sup> The American Courts declined to accept the rigid rule of the English Courts with respect to the declarant's duty, not only to do the act, but to record it, and have held that it is sufficient, if the entry be made in the ordinary and regular course of business without regard to the existence of any special duty respecting it.<sup>6</sup> Beyond this such an entry will be received, not only as evidence of the facts directly asserted, but also of those collaterally or incidentally mentioned.<sup>7</sup>

(b) *Indian Law.* "The applicability of this clause entirely depends on the exact meaning of the words 'course of business'."<sup>8</sup> In using the phrase 'in the ordinary course of business' the Legislature probably intended to admit in evidence statements similar to those admitted in England coming under the same description. The subject is dealt with in Chapter XII<sup>9</sup> of Mr. Pitt Taylor's Treatise on the Law of Evidence, and the cases which he has collected show that this exception to the general rule against hearsay extends only to statements made during the course, not of any particular transaction of an exceptional kind, such as the execution of a deed of mortgage, but of business or professional employment in which the declarant was ordinarily or habitually engaged. The phrase was apparently used to indicate the current routine of business which was usually followed by the person whose declaration it is sought to introduce."<sup>10</sup>

The expression 'course of business' occurs in more than one place in the Evidence Act. Thus in Sec. 16 where there is a question whether a particular act was done, the existence of any course of business according to which it would naturally have been done is a relevant fact. Illustration (a) to that section is evidently the case of *Hetherington v. Kemp*.<sup>11</sup> The 'course of business'

- 25. Doe v. Turford, (1832) 3 B. & Ad. 890.
- 1. Rawlins v. Rickards, (1860) 28 Beav. 370.
- 2. Smith v. Blakey, (1867) L. R. 2 Q. B. 326.
- 3. R. v. Worth, (1843) 4 Q. B. 132.
- 4. Polini v. Gray, (1879) L. R. 12 Cr. D. 411.
- 5. Chambers v. Bernasconi, (1894) 1 Cromp. M. & R. 347.
- 6. Inhabitants of Augusta v. Inhabitants of Windsor, (1841) 19 Me. 317; Lebrun v. Boston & Maine R. Co., (1928) 83 N. H. 293; 142 A. 298; Fisher v. Mayor, (1876) 67 N. Y. 73; Little v. Downing, (1858) 37 N. H. 355.
- 7. Chamberlayne's Trial Evidence, 2nd Ed., pp. 846-47.
- 8. Ningawa v. Bharmappa, (1897) 23 B. 63, 65—per Candy, J.
- 9. Chap. VII, Part III of 10th Ed.
- 10. Pcr Fulton, J., in Ningawa v. Bhar-mappa, (1897) 23 B. 63 at 70 followed in Girdharadas Coorji v. Kerawala Karsandas & Co., 1926 Bom. 253; 93 I.C. 622; 28 Bom.L.R. 232; Guru Charan Rudra Pal v. Mofizuddin, 1938 Cal. 150; 174 I.C. 511; 65 C.L.J. 603; Soney Lall Jha v. Darb Deo Narain Singh, 1935 Pat. 167; I.L.R. 14 Pat. 461; 155 I.C. 470; 16 P.L.T. 199 (F.B.).
- 11. (1815) 4 Camp. 193.

there put forward was a certain usage in the plaintiff's counting house. It was not a usage in a private house which, however methodical, cannot carry the same weight as the ordinary routine of an office. So, too, by Sec. 114, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. What is meant by the common course of public and private business? Illustration (f) with its explanations refers to the public business of the Post Office. Private business would apparently apply to such a case as that alluded to above.<sup>12</sup> If the expression was meant to include the dealings of a private individual apart from his avocation or business, different language would have been used. The explanation to illustration (c) of Sec. 114 speaks 'of a man of business', which in its well-known popular sense must mean a man habitually engaged in mercantile transactions or trade. Again in the Explanation to Sec. 47 it is said that a person is said to be acquainted with the handwriting of another person, when in the ordinary course of business documents purporting to be written by that person have been habitually submitted to him. Here, too, the expression must mean in the ordinary course of a professional avocation. The illustration is that of a broker, to whom letters are shown for the purpose of advice.

Again, by Sec. 34, entries in books of accounts, regularly kept in the course of business, are relevant. In *Munchershaw Bezonji v. The New Dhurumsey Spinning and Weaving Company*,<sup>13</sup> West, J., referred to a private account, tendered in evidence, which had been entered up casually once a week or fortnight, with none of the claims to confidence that attach to books entered up from day to day, or (as in banks) from hour to hour as transactions take place. "These only" (he said) "are, I think, regularly kept in the course of business."

Having regard, then, to the above considerations, there can be no doubt that the expression "in the ordinary course of business" in the second clause of this section must be read in the same sense. It may, in one sense, be true that it is in the ordinary course of business for a mortgage-deed to contain recitals of the boundaries of the land mortgaged. But that would not make the recitals evidence. The question is, whether the mortgage-deed itself is a statement made in the ordinary course of business. Looking at the particulars set out in the second clause of this section which, though not exhaustive, may fairly be taken as indicating the nature of the statement 'made in the course of business', and looking at the sense in which the expression is apparently used in other sections of the Evidence Act, it cannot be said that a mortgage-deed executed by an agriculturist falls within that term. It is not the 'profession, trade or business' (to borrow the words used in Sec. 27 of the Contract Act), of an agriculturist to execute mortgage-deeds.<sup>14</sup> In *Palaparthi Ramamurthi v. Palaparthi Subba Rao*,<sup>15</sup> Horwill, J., thought that the authors who

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| 12. Hetherington v. Kemp, (1815) 4 Camp. 193.   | 14. Ningawa v. Bharmappa, (1897) 23 B: 63. 65–67 per Candy, J.; see also Abdulla v. Gannibai, 11 Bom. 690; Mst. Lahani v. Bala, 1922 Nag. 227: 77 I.C. 798. |
| 13. (1880) 4 B. 476. This decision was not approved of by the Privy Council in <i>Deputy Commissioner v. Ram Prasad</i> , (1899) 27 C. 118: 4 C. W. N. 147. | 15. 1937 Mad. 19: 167 I.C. 30: 44 L. W. 681.  |

quoted the above remarks of Candy, J., considered that the 'course of business' to be such business as would be conducted by a man of business, i.e., by a man habitually engaged in mercantile transactions or trade, and apparently dissenting from such a view, opined that the expression 'in the course of business' means in the way that business (which may be of a purely private or even trivial nature) is conducted. It has no connection with a course of business, which suggests a series of acts of business. It is submitted that neither the learned authors referred to, nor the learned Judges who decided the case of *Ningawa v. Bharmappa*,<sup>16</sup> said anywhere that the words 'course of business' mean such business as would be conducted by a man of business, i.e., by a man habitually engaged in mercantile transactions or trade. It may also be pointed out that that passage quoted by Horwill, J., occurs in the judgment of Fulton, J., and not in that of Candy, J., as their Lordships said.

A statement of boundary in a sale-deed executed by a third party is not a statement made in the ordinary course of business or against the pecuniary or proprietary interest of the vendors.<sup>17</sup>

The judicial phrasings of this requirement vary in terms.<sup>18</sup> According to Wigmore 'the entry must have been, therefore, in the way of business'. This may be defined to mean a course of transactions performed in one's habitual relations with others and as a natural part of one's mode of obtaining a livelihood. It would probably exclude, for instance, a diary of doings kept merely for one's personal satisfaction; but it would not exclude any regular record that was helpful, though not essential, nor usual in the same occupation as followed by others. There is, therefore, no special limitation as to the nature of the occupation.

Since it is thus not essential that the occupation should be a mercantile or industrial one, nor even that it should be a secular one, it follows that a register of marriages or the like kept by a priest or minister, is admissible.<sup>19</sup> The term 'business' includes trade, profession, occupation and calling of every kind. Where the question was whether a certain taluqdar had been converted to Islam, a letter written by the Deputy Commissioner to the Commissioner regarding the conversion and reporting that the estate of taluqdar should be taken under the Court of Wards, was held to be admissible under this clause.<sup>20</sup> So also, post-mortem reports submitted by a medical man, since dead, have been held to be admissible as statements made by dead persons in the ordinary course of business and in the discharge of their professional duty.<sup>21</sup> In *Abdulla v. Ma E Kin*,<sup>22</sup> where a husband wrote a letter to his wife in which he

16. (1897) 25 Bom. 63.

17. *Sundari Kauri v. Nakat Singh*, I.L.R. 45 Pat. 314; 1966 B.L.J.R. 706, 709.

18. *Doed, Pattashall v. Turford*, 3 B. & Ad. 890 (Parke, J. and Taunton, J.: "in the ordinary course of business"); 1835 : *Poole v. Dicas*, (1835) 1 Bing. N. C. 649 (Tindal, C. J. "made in the usual course and routine of business"; *Rawlins v. Rickards*, 1860 28 Beav. 370 (*Romilly v. R.*, admitting a solicitor's books:

"in the exercise of his business and duty . . . and in the regular course of his business").

19. Wigmore, s. 1523.

20. *Keolapati v. Raja Amar Krishna Narain Singh*, 1939 P.C. 249; 183 I.C. 662 : 44 C.W.N. 66.

21. *Mohan. Singh v. Emperor*, 1925 All. 413; 85 I.C. 647: 26 C.L.J. 551; *Ram Balak v. The State*, A. I. R. 1964 Pat. 62.

22. (1911) 11 I.C. 854; 4 Bur. L. T. 185.

told her that a certain person had asked for a loan, and the learned Judges, while declaring the letter inadmissible, nevertheless were of opinion that if he had succeeded in proving that he was in the habit of consulting his wife before he made such loans, such a letter would have been written in the ordinary course of business. In that particular case, there was no reason to think that the statement was anything more than a mere piece of information, and no evidence existed that he had ever acquainted his wife with such matters before. It could not, therefore, be said that the information was given in the ordinary course of business.

The words 'have, however, to be broadly and liberally construed. An important information conveyed by a family member to his wife or a youngster even in ordinary conversation at a time when there was no controversy at all, would still be a statement in the ordinary course of business.<sup>23</sup> The record by a Magistrate of proceedings at an identification parade conducted by him cannot be regarded as a statement made by him in the ordinary course of business. Hence such a document cannot be admitted under Sec. 32 (2).<sup>24</sup>

The statement of a representative of the purchaser of goods, after inspection of those goods in the ordinary course of business is admissible.<sup>25</sup>

**6. "Books kept in the ordinary course of business".** As regards the meaning of a "book" a Bench of the Madras High Court observed : "We do not think it necessary or useful to attempt an exact definition of a 'book'. We may take it that a collective unity of sheets even at the time that the entries came to be made is implied in the conception of a 'book'. We may also assume that it connotes an intention that it should serve as a permanent record. Beyond these two ideas, it is not necessary that it should consist of a particular number of sheets, or that it should be bound in a particular way."<sup>1</sup>

But, where a party relied on certain entries in an *almanac*, and it was found that they were loose sheets of papers with blanks left at different places, so that the sheets and the entries could be substituted or interpolated at different places, if one were so minded, it was held that it was not possible to say that the entries had been made in the ordinary course of business.<sup>2</sup> A note-book, not written from day to day but *ad hoc* from rough slips at a number of consecutive sittings, is not admissible in evidence.<sup>3</sup> Even if books of accounts are inadmissible under Sec. 34 on the ground that no balances have been struck and the books are not regularly kept, they are admissible under this clause as entries or memoranda made by persons who are dead in books kept in the ordinary course of business.<sup>4</sup> An entry in the account-books regarding

- 23. Devi Singh v. Phulma, A. I. R. 1961 Him. Pra. 10.
- 24. Roshen Behari v. The State, I. L. R. 1956 Punj. 140; 1957 Cr. L. J. 678.
- 25. Modi Vanaspati Mfg. Co. v. Katihar Jute Mills, Ltd., A. I. R. 1969 Cal. 496, 505.
- 1. Ambalvana Pillai v. Gowri Ammal, 1936 Mad. 871; 1936 M.W.N. 1274; 44 L.W. 467.

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- 2. Mahasva Ganesh Prasad Ray v. Narendra Nath Sen, 1953 S. C. 431; 17 Cut.L.T. 73; 1951 Ker. L. T. (S.C.) 28.
- 3. Kanbi Dhanji Samji v. Ranbi Dhanji Ratna, 1950 Kutch 47 but see Bhabhanbai v. Kanji Ravji, 1950 Kutch 90.
- 4. Babhaji v. Ratan Lal, 1934 Nag. 106; 148 I.C. 1033; 30 N.L.R. 192.

the birth of a daughter on a certain date and the expenses incurred on the occasion made by a person since deceased is admissible under this clause.<sup>5</sup> In proceedings under Rent Control Law for fixation of fair rent, counterfoils made in ordinary course of business are admissible in evidence.<sup>6</sup>

There is no reason why a Court should not invoke the aid of Sec. 114 in proper cases and raise a presumption as to the genuineness of old accounts under that section, even when they are unsigned, if they come from proper custody and appear to have been kept regularly, regard being had to the common course of private business. Old account books may be relevant and admissible in evidence under this clause read with Sec. 114.<sup>7</sup> If the accounts are genuine and the entries are made in the ordinary course of business they are relevant and admissible.<sup>8</sup>

The entries in a diary maintained in a Solicitor's office amount to a contemporaneous record maintained in the ordinary course of business and may therefore be admissible under this Clause. It may also become admissible under section 157; *post*, as corroboration of other evidence. Entries in a bill made on the basis of the entries contained in the diary, which was lost, are neither admissible in evidence nor have any probative value even if admitted in evidence.<sup>9</sup>

**7. "In the discharge of professional duty."** "Professional men also for the due performance of the work they are engaged to do, may be under an obligation to their clients to ascertain and record facts, so as to render their records of those facts admissible after their death as having been made in the course of duty. The existence of such a duty in any particular case must depend largely upon the nature and terms of the engagement; but, in general, there is no duty upon a solicitor to record transactions carried out by him for his clients, nor upon a medical man, who is in private practice, and not in partnership, to keep records of his patients' symptoms or treatment, so as to render such statements by these professional men admissible upon the principle in question."<sup>10</sup>

An injury report prepared by a medical officer in discharge of his duty can be proved by secondary evidence if the doctor is not available.<sup>11</sup> So also secondary evidence of post-mortem report of a doctor can be admitted if the doctor died subsequently. Its probative value would however depend on the facts and circumstances of each case.<sup>12</sup>

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| <p>5. Mirabai v. Kaushalyabai, 1949 Nag. 235; I. L. R. 1948 Nag. 794; 1949 N. L. J. 154.</p> <p>6. P. K. Rukmini Bai v. V. Silk House Bangalore, (1971) 2 Mys.L.J. 635; 1972 Ren. C. R. 272; A. I. R. 1972 Mys. 143.</p> <p>7. Dogar Mal v. Sunam Ram, 1944 Lah. 58; 212 I.C. 416; 45 P. L. R. 441.</p> <p>8. Raju Pillai v. Palanisami, A. I. R. 1964 M. 205; (1964) 1 M. L. J. 103.</p> <p>9. Mohammed Yusuf v. D., I. L. R. 1966 Bom. 420; 68 Bom. L. R. 228; 1967 Mad. L. J. 65; A. I. R. 1968 Bom. 112, at pp. 119, 120.</p> <p>10. Halsbury's Laws of England, 3rd</p> | <p>Ed. Vol. 15, pp. 306-7.</p> <p>11. Ram Pratap v. State, 1967 A. W. R. (H.C.) 395.</p> <p>12. Mohan Singh v. Emperor, A. I. R. 1925 A. 413; State v. Rakshpal Singh, A. I. R. 1953 A 520; Ram Balak v. State, A. I. R. 1964 Pat. 62; Hadi v. State, A. I. R. 1966 Orissa 21; I. L. R. 1965 Cut. 403; Chandra Majhi v. State, 1966 Cut. L. T. 121; State of Rajasthan v. Mathura Lal, 1971 Raj. L. W. 260; 1971 Cr. L. J. 1816; S. R. Singh v. State, (1977) 81 C.W.N. 724. See also Krushna v. State, 24 Cut. L. T. 494; (1972) 1 Cut. L. R. (Cri.) 219.</p> |
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The statements in the report of a Commissioner, who died after the trial of the suit commenced in the lower court, are admissible in evidence under this Clause.<sup>13</sup>

Entries in Panjis (Palm leaf manuscripts of genealogy) maintained by panjkars who are professional genealogists and systematically maintain pedigree tables in the community of Naitnal Brahmins are relevant under the clause even if clause 6 does not apply to prove relationships.<sup>14</sup> So also entries of *kursinama* (Genealogies) contained in books maintained by Bhatts or professional heralds,<sup>15</sup> or in jijmani books of Pandas of Mathura.<sup>16</sup> A family pedigree kept by the family chronicler prepared by him from time to time from information supplied by members of the family is admissible under the clause, as having been kept in the ordinary course of business by a professional man or person whose business it was to keep the books for the benefit of the families.<sup>17</sup> Where the question was as to the amount of the dower of a Mohammedan lady, a register of marriages kept by the *istahad*, since deceased, who celebrated her marriage, in which register was entered the amount of the dower, was held to be admissible and relevant as evidence of the sum fixed, being an entry in a book kept in the discharge of duty within this clause.<sup>18</sup> Where a statement regarding a dacoity made to the police was entered in the police diary by a police Sub-Inspector, and subsequently both the maker of the statement and the Sub-Inspector were murdered; in a trial for the murder, it was held that the entries in the police diary were admissible under this clause, as they were made by the deceased Sub-Inspector in the discharge of his professional duties.<sup>19</sup>

8. "Acknowledgment written or signed—of any kind." Illustrations (e) and (g) to the section indicate that the pieces of evidence made relevant by the latter part of clause (2) are not restricted to what is done in the course of business if the word "business" is to be understood in a narrow sense. An entry in an account book, written by a person since deceased, acknowledging receipt of a certain sum of money on a certain date is admissible under the latter part of this clause, even if the book was not kept in the course of business.<sup>20</sup> A receipt consisting of an acknowledgment, written or signed by a person since deceased of the receipt of money and stating that the plot in dispute was one of the boundaries of an adjacent plot was held to be admissible under this clause.<sup>21</sup>

13. Luxmi Narayan v. State Bank of India, A. I. R. 1969 Pat. 385, 391.
14. Sitaji v. Bijendra Narain Choudhary, 1954 S.C. 601.
15. Kartickchandra Chakrabarty v. Gossain Rudra Nanda Gir, 1921 Cal. 482; 66 I.C. 894; 25 C.W.N. 908.
16. Dukh Haran v. Bihasa Kuer, A. I. R. 1963 Pat. 390.
17. Mohansingh v. Dalpat Singh, 1922 Bom. 51; I. L. R. 46 Bom. 753; 67 I. C. 235; see also (Mst.) Anandi v. Nandlal, 1924 All. 575; I. L. R. 46 All. 665; 83 I.C. 618; 22 A.L.J. 657; Balakram High School v. Nanumal, 1930 Lah. 579; I.L.R. 11 Lah. 583; 128 I.C. 532; Amritsaria v. Prabhu Dial, 1926 Lah. 157; 89 I.C.

- 989; Bura v. Nanak, 1925 Lah. 281 (3); 184 I.C. 912; Acharaj Ram v. Ganesh Das, 1934 Pesh. 78; 151 I. C. 622; (1922) 24 Bom. L. R. 289; Mangal v. Manphul, A. I. R. 1961 Punj. 251.
18. Zakeri Begam v. Sakina Begum, I. L. R. 19 Cal. 689; 19 I.A. 157 (P.C.).
19. Abdul Aziz v. Emperor, 1932 All. 442; 140 I.C. 578; 34 Cr. L. J. 109; 1932 A. L. J. 301.
20. Ambalayana Pillai v. Gowri Ammal, 1936 Mad. 871; 1936 M.W.N. 1274; 44 L.W. 467.
21. Ahmad Sha v. Jamal Ahmad, 1928 Oudh 248.

**9. Personal knowledge.** According to the English rule, it is necessary that the declarant should have had personal knowledge of the transaction recorded.<sup>22</sup> But this appears not to be law in India.<sup>23</sup> Under the present section, it seems to be necessary that the person making the entry or other statement should have had a personal knowledge of the fact recorded or stated; it is sufficient to show that the statement was made in the ordinary course of business, the question as to how the person making the statement came to know about the matter, though it might affect the weight to be given to the statement, not affecting its admissibility.<sup>24</sup> So, it has been held, that account books containing entries not made by, nor at the dictation of, a person who had a personal knowledge of the truth of the fact stated, if regularly kept in course of business, are admissible as evidence under Sec. 34 and semble under the second clause of this section.<sup>25</sup> In a case<sup>1</sup> a Bench of the Nagpur High Court followed the English rule. It appears the above-cited case<sup>2</sup> was not cited before the Bench and perhaps the decision might have been otherwise, if it were cited. The observations of the Privy Council as to the necessity of personal knowledge and belief which must be found or presumed in any statement of a deceased person<sup>3</sup> relate to statements under clause (5), the terms of which require "special means of knowledge."

**10. Contemporaneousness.** According to the English rule, the statement must also have been made at the time of, or immediately after, the performance of the transaction.<sup>4</sup> Thus, an interval of two days has sufficed to exclude a declaration.<sup>5</sup> But contemporaneousness is not required by the section for the admissibility of the evidence, though in determining the weight to be allowed to it in particular cases it will always be important to consider how far the statement or entry was contemporaneous with the fact to which it relates.<sup>6</sup>

22. *Brain v. Preece*, (1843) 11 M. & W. 773 where the facts were as follows: It was the ordinary duty of one of the workmen at coal pit, named H, to give notice to the foreman of the coal sold. The foreman who was not present when the coal was delivered, being himself unable to write, employed a man named B to make the entries in the books from his dictation and these entries were read over every night to the foreman. H and the foreman being dead B was called with the book to prove delivery of the coal; but the evidence was held inadmissible, on the ground that although the entries made under the foreman's direction might be regarded as made by him yet, as he had no personal knowledge of the facts stated in them, but derived his information secondhand from the workman, there was not the same guarantee for the truth of the entries as in *Price v. Torrington*, where the party signing the entry

had himself done the business. See *Taylor*, Ev., ss. 609, 700, 708; *Wills* Ev., 3rd Ed., 186; *Phipson*, Ev., 11th Ed. (1970) 399; *Steph. Dig.*, Art. 27; *Powell*, Ev. loc. cit.; *Ryan v. Ryan*, (1889) 25 L.R.Ir. 184.

23. *R. v. Hanmanta*, (1877) 1 B. 610.  
24. *R. v. Hanmanta*, *supra*; *Cumringham* Ev., 156.  
25. *R. v. Hanmanta*, *supra*.  
1. *Maroti Raghoba v. Mahadeo Chindhu*, 1947 Nag. 106; I. L. R. 1946 Nag. 707; 226 I.C. 307; 1946 N.L.J. 561.  
2. *R. v. Hanmanta*, *supra*.  
3. *Jagatpal v. Jageshar*, (1902) 25 A. 143.  
4. *Doe v. Turford*, (1832) 3 B. & Ad. 890; *Sturla v. Freccia*, (1880) 5 App. Cas. 623; *Smith v. Blakey*, (1867) 1 L. R. 2 Q. B. 326; *The Henry Coxon*, (1878) 3 P. D. 156; *Taylor*, Ev., s. 704; *Phipson* Ev., 11th Edn. (1970) p. 398.  
5. *The Henry Coxon*, *supra*.  
6. *Cunningham*, Ev. 157.

**11. Collateral matters.** Further, entries made in the course of business are, under English law, evidences only of those things which—according to the course of business, it was the duty of the person to enter, and are no evidence of independent collateral matters, however intimately any such collateral matters may be incorporated in the statements.<sup>7</sup> Thus, where the question was, whether A was arrested in a certain parish—a certificate annexed to the writ by a deceased sheriff's officer, stating the fact, time and place of the arrest, returned by him to the sheriff, was held inadmissible on the ground that the duty merely required the fact and time but not the place of the arrest to be returned.<sup>8</sup>

**12. Extrinsic proof.** This clause relates only to the relevancy of evidence and not to the manner of its proof.<sup>9</sup> Before a relevant statement is admitted in evidence, its authorship has to be proved.<sup>10</sup> For that purpose, Sec. 90 is commonly relied upon in the case of old documents, the authorship of which cannot be proved by persons who knew the handwriting or can recognize the signature of the maker, but this section cannot be relied upon for the proof of a document which does not purport to be in any known person's handwriting or to be signed by any known person.<sup>11</sup> Entries in books of account kept in the ordinary course of business are statements made by persons who made those entries in the ordinary course of business. That those persons are dead, or cannot be found, both in the sense as to their identity (i.e. who they were) and in regard to their whereabouts (i.e. where they were), or have become incapable of giving evidence, may be safely inferred from the dates of the entries. It is not necessary that the names of the persons who made such entries must be known before the expressions "who cannot be

7. Chambers v. Bernasconi, (1834) 1 Cr. M. & R. 347; Taylor, Ev., s. 705; Phipson, 11th Edn. (1970) p. 399.
8. Chambers v. Bernasconi, 1834 1 Cr. M. & R. 347, per Lord Denman: "We are all of opinion that whatever effect may be due to an entry made in the course of any officer reporting facts necessary to the performance of a duty the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of these circumstances." But this restriction on inadmissibility is not imposed in terms by the section. "The statement or entry, in order to be admissible under the Act, must relate to a relevant fact, and must have been made in the ordinary course of business; and it would appear to make no difference, so far as the question of admissibility is concerned, whether this fact is connected with the performance of a duty or is merely an independent collateral matter. Whether this fact naturally finds a place in the narrative, what is the nature of its connection with the fact the state-

ment of which was a matter of duty; and whether this connection was such as to raise a presumption of accuracy of information or observation must however be questions of importance in estimating the weight due to such evidence, when it relates to collateral matters merely". Cases may perhaps, however, occur in which the matter in question is so collateral and the entry for this and other reasons is of such an unusual character that it can scarcely be said to have been made "in the ordinary course of business."

9. B. Nagaraja Rao v. Koothappan, 1941 Mad. 602; (1941) 1 M. L. J. 759; 1941 M. W. N. 518: 53 L. W. 634; Dogar Mal v. Sunam Ram, 1944 Lah. 58: 212 I.C. 416; 45 P. L. R. 441; Govindu, In re, 1969 Cr. L. J. 1157, 1160 (A. P.) post-mortem certificate of doctor who subsequently migrated to Pakistan.
10. B. Nagaraja Rao v. Koothappan, supra; Pratapsingh v. State, 1955 Sau. 68, Govindu, In re, 1969 Cr. L. J. 1157, 1160 (A. P.).
11. B. Nagaraja Rao v. Koothappan, supra; see also cases cited therein.

found" or "who have become incapable of giving evidence" can be applied to them. There is a clear distinction between 'a person' in Sec. 32 and 'any particular person' in Sec. 90. A person may be said to have been not found when it is known who he was, and if in spite of search he was not found or was found to have been dead. But he may equally be said not to have been found, if his identity cannot be traced or found, and who therefore, on account of the absence of his identity, cannot be found. The Court may, in a proper case, raise a presumption as to the genuineness of old accounts.<sup>12</sup> An injury report prepared by a medical officer may, if his attendance cannot be procured without unreasonable delay or expense, be proved by his compounder.<sup>13</sup> Where the statement is a written one, evidence must be given that it is in the handwriting of the person alleged to have made it; and this may be done by calling a witness who saw him write it, or who is conversant with his handwriting.<sup>14</sup>

**13. Commercial documents.** Statements made by persons, deceased or alive, in certain commercial documents described in the Schedule to the Commercial Documents Evidence Act XXX of 1939 are relevant, and such statements shall, in the case of documents mentioned in Part I of that Schedule, and may, in the case of documents mentioned in Part II of that Schedule, be presumed to be accurate.

### CLAUSE 3

#### SYNOPSIS

1. Scope.
2. Admissions and statements admissible under this clause.
3. Statement of payments saving limitation.
4. Concept of Interest.
  - (a) English law.
  - (b) Indian law.
  - (c) American law.
5. "Against interest."
  - (a) General.
  - (b) Amount of interest immaterial.
  - (c) Partly against interest.
  - (d) Knowledge of statement being against interest.
  - (e) At the time of statement.
  - (f) Collateral matters.
6. Pecuniary interest.
7. Proprietary interest.
  - (a) General.
  - (b) Recitals of boundaries in documents.
8. Recitals in documents.
  - (a) General.
  - (b) Statements abridging or encumbering estate.
9. "Would have exposed."
10. "To a criminal prosecution."
11. Confession of deceased co-accused.
12. Collateral facts.
13. Personal knowledge : Contemporaneity.
14. Proof.

**1. Scope.** This clause embodies another exception to the hearsay rule. The ground of reception of such statements is the presumption that what a man states against his interest is probably true.<sup>15</sup> "The principle upon which hearsay evidence is admitted under Sec. 32 (3) is that a man is not likely to make a statement against his own interest unless true."<sup>16</sup> Self-interest is a

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12. Dogar Mal v. Sunam Ram, 1944 Lah. 58: 212 I. C. 416: 45 P.L.R. 441.
13. The State v. Rakshpal Singh, 1953 All. 520; 1954 Cr. L. J. 1240: 1953 A. L. J. 416.
14. Doe v. Davies, (1847) 10 Q.B. 314; Riggs-Miller v. Wheatley, 28 L. R. Ir. 144; and see Ss. 47, 67 post, as to proof of handwriting.
15. Ward v. Pitt & Co., Lloyd v. Powell, (1913) 2 K. B. 130, 137: 1914 A. C. 733: 83 L.J.K.B. 1054: 111 L. T. 338.
16. Savitri Devi v. Ram Ran Bijoy, 1950 P.C. 1, 6; 76 I. A. 225: 68 L. W. 45; see also Dal Bahadur v. Bijai Bahadur, 1930 P.C. 79: 57 I. A. 14; I. L. R. 52 A. 1: 122 I.C. 8.

sufficient security against wilful misstatement, mistake of fact, or want of information on the part of the declarant. The place of tests of oath and cross-examination is in some measure supplied by the circumstances of the declarant and the character of his statement. Lastly, the inconveniences that would result from the exclusion of this kind of evidence are considered to be greater, in general, than any which are likely to be experienced from its admission.<sup>17</sup> The third clause of Sec. 32 extends the rule as accepted in English Courts. For, while in the latter the interest involved must be pecuniary or proprietary, no other kind being sufficient<sup>18</sup> under the Indian Act the statement is admissible when, if true, it would expose, or would have exposed, the declarant to a criminal prosecution or to a suit for damages (*v. post*). It may well be thought that a declaration by which a man makes himself liable to a criminal prosecution or payment of damages, offers as good a guarantee for its truthfulness as one simply against his pecuniary or proprietary interest.<sup>19</sup>

Though the ground of admissibility of this kind of evidence is the improbability that a party would falsely make a declaration to fix himself with liability, yet cases may be put where this doing so would be an advantage to him.<sup>20</sup> The declarations must also have been against interest at the time they were made; it is not enough that they might possibly turn out to be so afterwards.<sup>21</sup> Where the declaration takes the form of an entry in a book of account it will be against the declarant's interest if it either acknowledges the payment of money due to himself, or charges him with the receipt of money for which he is accountable to a third person.<sup>22</sup> The test is whether the statement is against interest at the time, and not what its effect might be in the future.<sup>23</sup> In *In re Adams, Re, Brenton v. Powell*,<sup>24</sup> Horridge, J., following *R. v. Exeter Guardian*,<sup>25</sup> and *Taylor v. Witham*,<sup>1</sup> said that it was clear "that any statement which is *prima facie* against the interest of the speaker is admissible, even if, when the facts are further examined, it may turn out not to be detrimental."

17. Taylor, Ev., 668; Best Ev., 500; Phipson, Ev., 11th Ed., 381; Wills Ev., 3rd Ed., 189; Wigmore paragraph 1457; the attention and care ordinarily given by men to concerns in which their interests are involved are supposed to be a sufficient guarantee against inaccuracy. "It is, however, easy to conceive cases, e.g., that of a headless spendthrift heir, who has just succeeded to an inheritance, in which these guarantees would be of little value. This is, however, a point concerned not with the admissibility, but with the weight of the evidence." Field Ev., 6th Ed., 188; and see note, *post*.

18. Sussex Peerage Case, (1844) 11 C. F. 85 explained and acted upon in *Davis v. Lloyd*, (1844) 1 C. & Kir. 275; Illustration (f) is particularly pointed out to this case, and indicates the departure in this Act from the English rule.

19. Norton, Ev., 184.

20. Best, Ev., s. 500 e.g., the account of

the receiver or steward of an estate have, through neglect or worse, got into a state of derangement which it is desirable to conceal from his employer; and one very obvious way of setting the balance straight, is falsely charging himself with having received money from a particular person, ib.

21. *Smith v. Blakey*, (1867) L. R. 2 Q. B. 326; *Massey v. Allen*, (1879) 13 Ch. D. 558; *Ex. Parte Edwads, re Tollemache*, (1884) 14 O. B. D. 415 *Tucker v. Oldbury U. D. C.* (1912) 2 K. B. 317 (C.A.) *Lloyd v. Powell*, (1913) 2 K. B. 190. (C.A.) but see as to the last case, (1914) A. C. 733.

22. *Foster v. McMahon*, (1847) 11 Ir. Eq. R. 287, 299.

23. Phipson, Ev., 11th Ed. 386.

24. 1922 P. 240; 91 L.J.P. 209; 127 L. T. 528.

25. (1869) L. R. 4 O. B. 341. (1870) 3 Ch. D. 605.

The leading case on the subject-matter of this clause is that of *Higham v. Ridgway*.<sup>2</sup> There the question was whether one William Fowden, junior, was born before or after the 6th April, 1768. The plaintiff, in order to prove that his birth was subsequent to that date, tendered in evidence the entries from the Day Book and Ledger of a man-midwife, who had attended the mother of William Fowden, junior, at his birth and was since deceased. It was held that the entries were connected together or one whole and that the entry as to the payment of the man-midwife's charges rendered them admissible. The entry of 22nd April, 1768 was in no way against the interest of the person who made it, but was, collateral to that portion of the entry, namely, "Pd. (paid) 25th Oct., 1768", which was against interest, as showing that a certain sum of money was no longer due and owing to such person. On this point Lord Ellenborough said : "It is idle to say that the word 'paid' only shall be admitted in evidence without the context, which explains to what it refers ; we must, therefore, look to the rest of the entry to see what the demand was which he thereby admitted to be discharged" (v. post). The statements, provided they be relevant, may be either written or verbal. The form in which such declarations are ordinarily offered is that of written entries ; the inaccuracy with which oral statements are repeated makes them less satisfactory, but such objection lies to the credibility of the statement and not to its reception.<sup>3</sup> Such entries are not receivable where better evidence is to be had to prove the same 'act', as where the maker of the entry is himself forthcoming personally ; but they are not the less receivable because the same fact may be proved by evidence of 'another description'. For instance, in *Higham v. Ridgway*,<sup>2</sup> "the evidence of the entry of the accoucheur would not have been rejected, because the evidence of a midwife, who was present at the delivery, might have been forthcoming ; though this may seem at first sight to militate against the rule that the best evidence shall alone be received. The entry of the accoucheur would not have been receivable if he himself had been forthcoming, because then his testimony on oath would have been superior to his entry, which was not on oath ; but as we shall see hereafter when we come to consider the rule, that the best evidence must always be given, the rule applies to the quality and not the quantity of evidence ; and that a fact may often be proved by independent testimony, notwithstanding there may be two distinct ways of proving it".<sup>4</sup>

2. 2 Smith's L. C. (13th Ed.) 284: (1808) 10 East 109. Illustration (b) in this case, with the portion of the entry which was against interest omitted. It is intended to illustrate the rule as to statements made in the course of business, not that as to the present class of statements which is exemplified by illustrations (e) and (f); see *Ningawa v. Bhar-mappa*, (1897) 23 B. 63; see also *Doe v. Davies*, referred to in the last-mentioned case, and in *Hari v. Moro*, (1886) 11 B. 89. In *Hirabhai v. Dhanjibhai*, 1927 Bom. 433: 102 I. C. 145: 29 Bom. L. R. 427 the statement tendered was not against interest.

3. Cf. section and *Zaynub v. Hadjee*

Babu, (1866) 2 Ind. Jur. N. S. 54; Best Ev., s. 502.

4. Norton, Ev., 181: "Thus, the mere fact that there has been a written receipt given for money will not preclude the proof of payment by the oral evidence of witnesses who saw the payment. Thus in the case of *Middleton v. Melton*, (1829) 10 B. & C. 317, a private book, kept by a deceased collector of taxes, containing entries by him acknowledging the receipt of sums in his character of collector was also held to be admissible evidence in an action against his surety, although the parties, who had paid him were alive and might have been called", ib. 182.

**2. Admissions and statements admissible under this clause.** The distinction should be observed between mere admissions and statements receivable under the present clause. An admission may or may not be against the interest of the maker at the time when it is made. An admission merely as such is neither receivable in maker's favour, nor in favour of his representatives-in-interest, nor against any person other than the maker or his representative. On the other hand, an admission which amounts to a statement against interest within the meaning of this clause may not only be receivable in favour of the maker thereof and his representatives, but is evidence in favour of, or against, strangers. Documents which, it was contended, were inadmissible against the appellant on the ground that they were *res inter alios acta*, and did not come within any of the classes of evidence enumerated in Sec. 32 of the Evidence Act (I of 1872) were held to be admissible against him as being clearly evidence against persons through whom he claimed.<sup>5</sup>

**3. Statement of payments saving limitation.** A class of statements which may be admissible under this clause is that of endorsements or entries in respect of the payment of interest due on bonds and similar instruments.<sup>6</sup> Such endorsements or entries, if made before the claim became barred by the Law of Limitation, would be against the interest of the payee, inasmuch as they are admissions of payment, but if they are made after the claim became so barred, they would be for and not against the creditor's interest inasmuch as by the admission of a small payment he would be enabled to recover the larger remaining portion of the debt, such payment having the effect of preventing the claim to the capital sum from being barred. Whether then the endorsement or entry is admissible, as an entry against interest, depends upon the question whether it was *bona fide* made before the claim became barred by limitation, and it ought not to be admitted until it be shown by evidence *de hors* the instrument that it was made at a time when it was against the interest of the creditor to make it.<sup>7</sup>

**4. Concept of Interest.** (a) *English Law.* The present day rule in England is confined to statements against pecuniary and proprietary interests. There seems to be very little reason, why declarations against penal or social interests and declarations conceding tortious liabilities should not stand on the same footing as those against pecuniary and proprietary interests. Declarations conceding liabilities in tort are very closely allied to declarations against pecuniary interest, but they may be rejected, because it could not be said with certainty that there was a definite financial liability on the maker at the time the statement was made. But such a reason does not apply with equal force to declarations against social interest, and not at all to declarations against penal interest. If a man makes a statement that is likely to bring him into

5. *Rani Srimati v. Khagendra Narayan Singh*, 31 Cal. 871; 31 I.A. 127; 9 C.W.N. 74.
6. See S. 20 of Act IX of 1908 (Limitation); and ib., Art. 75, Schedule II (corresponding respectively to Section 19 and Article 37 of the Limitation Act of 1963); Norton Ev., 182, 183.
7. *Taylor*, Ev., ss. 690–696 and cases there cited; *Rose v. Bryant*, (1809) 1.L.E.—125

2 Camp. 321; Norton, Ev., 182, 183; Wigmore, s. 1466; *Briggs v. Wilson*, (1854) 5 D.M. & G. 12. The express provision of S. 20 of the Limitation Act of 1908 (now section 19 of the Limitation Act of 1963) that the payment, whether of interest or principal, must have been made before the right to sue had become barred, appears to require proof of the time of payment.

disfavour with his neighbours or cause him scorn, or ridicule, or hostility that surely has as great a guarantee of trustworthiness as an entry in a debtor's account book acknowledging a guinea. A statement subjecting its maker to a criminal liability has an even greater guarantee of credibility. As Holmes, J., said in *Donnelly v. U. S.*,<sup>8</sup> "no other statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations, which would be let in to hang a man"

Wigmore has pointed out<sup>9</sup> that, until the decision in the *Sussex Peerage* case,<sup>10</sup> there had been no restriction of "against interest" to "pecuniary and proprietary" and that the rule had been sometimes stated simply in the broad form such as that used by Bayley, B., in *Middleton v. Melton*:<sup>11</sup> "It is a general principle of evidence, that declarations or statements of deceased persons are admissible when they appear to have been made against their interest". Vaughan, B., in *Gleadow v. Atkin*<sup>12</sup> made a similar statement of principle. Wigmore submitted, therefore, that the House of Lords, in excluding a statement which made its maker liable to a criminal prosecution, imposed an arbitrary limitation on the rule, that was justified neither by precedent, nor by principle nor by policy.<sup>13</sup>

In the *Sussex Peerage* case<sup>14</sup> (where a peerage was in dispute, it was sought to prove the marriage of A and B by adducing the statements of a clergyman (since deceased) that he had performed the ceremony. It was held that this statement was inadmissible despite the fact that the circumstances were such as to render the declarant liable to a criminal prosecution. It is to be noted that, though there are numerous forthright statements by the Law Lords that the exception is confined to statements against pecuniary and proprietary interests, it is at least possible that the case is not such an absolute authority excluding penal interest from the rule as at first sight it seems. For, Lord Campbell in the course of his judgment made the following statement:<sup>15</sup> "Even if such a rule did exist it would not permit the learned counsel to bring in the statements, for how are your Lordships to know what state Mr. Gunn's (the clergyman) mind was in when he made the declarations.... He might have believed that the marriage having been celebrated abroad, the provisions of the Royal Marriage Act did not extend to it, and that he was in no danger whatever from what he had done". Is it not possible then that in a more definite case, where it was obvious that the declarant must have known what the consequences of his statement would be, the statement might be received?

However, the law is now firmly established in England that statements against pecuniary and proprietary interests only are admissible.

(b) *Indian Law.* In India, the present section extends the English rule by recognizing two additional forms of interest, viz., an interest in escaping a criminal prosecution and an interest in escaping liability for damages.

(c) *American Law.* As regards the American law, it is stated in Chamberlayne's Trial Evidence (Handbook):<sup>16</sup> "There are many other kinds of

8. (1857) 228 U.S. 243, 278.

9. Para. 1476.

10. (1844) 11 Cl. & F. 109.

11. (1829) 10 B. & C. 317, 323.

12. (1833) 1 Cr. & M. 410, 425.

13. Wigmore, ss. 1476, 1477.

14. (1844) 11 Cl. & Fin. 85: 8 E.R.

1034.

15. Sussex Peerage Case, (1844) 11 Cl.

& F. 109 at p. 114.

16. 2nd Ed., p. 782 and p. 734.

interest which a sane declarant may well regard as of equal or even greater value than his money or tangible possessions, and declarations as to such matters ought on principle to be admissible as much as declarations against material interest, but such is not the law. Even a declaration against the reputation of the declarant or subjecting him to legal liability is not admissible." But the American Model Code has included both penal and social interests within the concept of interest.<sup>17</sup>

**5. "Against interest."** (a) *General.* This clause, however, makes only such statements admissible in evidence as are against the pecuniary or proprietary interest of the person making it. In order to determine, whether a certain statement is against the pecuniary or proprietary interest of the person making it, we must look to the statement itself, and not to the nature of the transaction in the course of which the statement is made. Thus, where a Hindu widow asserts that certain property was hers, that cannot be said to be a statement against her interest merely because it was made in the course of a transaction by which she gave away that property to her daughter by a deed of gift.<sup>18</sup> An entry against interest means an entry *prima facie* against the interest of the maker, that is to say, the natural meaning of the entry, standing alone, must be against the interest of the man who made it,<sup>19</sup> and not a kind of interest which a man may feel about a friend or relation.<sup>20</sup> If the entry is *prima facie* against interest, it is admissible for all purposes irrespective of its effect or value when received. Thus, the following entry in the handwriting of a deceased person : "J. W. paid me three months' interest", which was followed by other entries pointing to a loan to J. W., was held to be admissible as evidence whether or not the effect of it, when admitted, would be to establish the existence of a debt due to the testator.<sup>21</sup> A statement made in a deed by a person that certain property was already gifted away by his predecessor-in-interest attracts the terms of clauses (3) and (7) of this Section, as they are against his proprietary interest and relate to a transaction as is mentioned in Section 18. When the validity of a document is challenged after a considerable time, and the parties to it are all dead, and it is not possible for the transferee to produce better evidence, the recitals in it acquire importance and become relevant.<sup>22</sup> A statement by a deceased executor as to the beneficiaries who on the directions of the testator were to take under the will, is not a statement against the pecuniary or proprietary interest of the executor

17. See Baker's The Hearsay Rules, p. 70.
18. Markhu Mahto v. Saharai Mahto, 1940 Pat. 16; 184 I.C. 246; 20 P.L.T. 877; 6 B.R. 33.
19. (Smt.) Sabhagibai v. Pirkash Chand, 1940 Sind 173; I.L.R. 1940 Kar. 334; 191 I.C. 911; Taylor v. Witham, (1876) L.R. 3 Ch. D. 605, 607, per Jessel, M. R. following Parke, B., in R. v. Inhabitants of Lower Heyford: "of course if you can prove *aliunde* that the man had a particular reason for making it and that it was for his interest, you may destroy the value of the evidence altogether, but the question of admissibility is not a question

- of value. The entry may be utterly worthless when you get it, if you show any reason to believe that he had a motive for making it, and that though apparently against his interest yet really it was for it but that is a matter for subsequent consideration when you estimate the value of the testimony" ib. per Jessel, M. R.
20. Arjun Sukla v. Jujesthi Sukla, 1954 Orissa 52; 19 Cut. L. T. 354.
21. Ib. Adams Re, Benton v. Pawell, 1922 P. 246.
22. Purnananda v. Purnanandam, A. I. R. 1961 A. P. 435; 1961 Andh. L. T. 150.

where by the terms of the will he had no pecuniary or proprietary interest in the residuary estate and never could have had any such interest.<sup>23</sup> Statements by a deceased putative father admitting paternity of a child are not admissible as declarations against his pecuniary and proprietary interest, though admissible on the issue of paternity as part of the *res gestae*<sup>24</sup> and that case was reversed on appeal *sub nom Lloyd v. Powell Duffryn Steam Coal Co. Ltd.*<sup>25</sup> It must be remembered that it is not merely the statement that must be against interest, but the fact stated. It is because the fact is against interest that the open and deliberate mention of it is likely to be true. Hence the question, whether the statement of the fact could create a liability is beside the mark.<sup>1</sup> Where the fact that the declaration is against the declarant's interest does not clearly appear from the statement itself, it is permissible to give independent evidence to supply this want.<sup>2</sup>

(b) *Amount of interest immaterial.* Though the statement must have been *prima facie* against an interest specified by the section, yet the amount of the interest is immaterial, so far as the admissibility of the declaration is concerned. But it must have some value.<sup>3</sup>

(c) *Partly against interest.* When a declaration is partly against interest, only such part is admissible.<sup>4</sup>

(d) *Knowledge of statement being against interest.* The principle upon which hearsay evidence is admitted under this clause is that a man is not likely to make a statement against his own interest unless true, but this sanction does not arise unless the party knows the statement to be against his interest. Hence, before a statement is admissible, it must be shown that the person making it knew that it was admissible against his interest.<sup>5</sup> The question whether the statement was made consciously with the knowledge that it was against the interest of the person making it would be a question of fact in each case and would depend in most cases on the surrounding circumstances except where the statement is in categorical terms like 'I owe so much to such and such person'; direct evidence will be rarely available<sup>6</sup> (in this case the statement was held to be made consciously with the requisite knowledge). So, the party must know the statement to be against his interest.<sup>7</sup>

23. *Re Gardner's Will Trusts*, *Boucher v. Horn*, (1936) 3 All E. R. 938.

24. See *Ward v. H. & S. Pitt & Co., Lloyd v. Powell* (1913) 2 K. B. 130 (C.A.).

25. (1914) A.C. 733; *Re Jenion, Jenion v. Wynne*, (1952) Ch. 454 G. At at pp. 465, 477; (1952) 1 All E. R. 1228 at pp. 1234, 1241.

1. Wigmore, s. 1462.

2. *Wills*, Ev., 134; see *Jaynub v. Baba*, (1866) 2 Ind. Jur. N. S. 54.

3. *Phipson*, Ev., 11th Ed., 386: but upon the amount of interest involved the degree of attention likely to secure accuracy must materially depend, ib.

4. *Mohatap v. Kali*, 1914 Cal. 200; I. L. R. 41 Cal. 57; 20 I.C. 78; 17 C. W. N. 1013; 18 C. L. J. 547; *Hollaram Verhomal v. Dwarkadas Kodumal*, 1939 Sind 145; I. L. R.

1939 Kar. 573; 185 I.C. 67; see also *Shyamanand v. Rama Kanta*, 32 Cal. 6.

5. *Sabitri Devi v. Ram Ran Bijoy Prosad Singh*, 76 I.A. 255; 1950 A. L. J. 134; 1950 A. W. R. 220; 54 C. W. N. 232; (1950) 1 M. L. J. 163; 63 M. L. W. 45; Pak. Cas 1950 P.C. 15; A. I. R. 1950 P. C. 1 at p. 6 based on *Tucker v. Oldbury*, (1912) 2 K.B. 317 and *Ward v. Pitt. & Co.* (1913) 2 K.B. 130, C.A.

6. *Ramvati Kuer v. Dwarika Prasad Singh*, (1967) 1 S. C. R. 153; (1967) 2 S. C. J. 789; (1967) 1 S. C. W. R. 641; 1967 A. L. J. 277; 1967 B. L. J. R. 278; A. I. R. 1967 S. C. 1134, 1139.

7. See also *Sussex Peerage case*, (1844) 11 Cl. & F. 85; 8 Jur. 793.

(e) *At the time of statement.* The declarations must have been against interest at the time they were made ; it is not sufficient that they might possibly turn out to be so afterwards.<sup>8</sup> A statement as to paternity by an alleged father, unlike one by mother, is not one as to a fact of which he has peculiar, direct or personal knowledge, nor is it one which is against interest at the time, though it might, on subsequent (bastardy) proceedings ultimately turn out to be so.<sup>9</sup> The statements being held admissible as conduct and possibly as part of the *res gestae*, such a statement would not, therefore, be admissible under this clause.

(f) *Collateral matters.* Statements and entries against interest may be received as evidence of independent and collateral matters, which, though forming part of the declaration, were not in themselves against the interest of the declarant. A statement, though indifferent in itself, becomes against the proprietary interest of the declarant, when made as a material part of the deed, the object of which is to limit his proprietary interest. It cannot be said not to affect his interest, because, assuming it to be material, the deed, if it were struck out, would be less effective than it otherwise would be. If, on the other hand, the statements were unconnected with the purpose of the deed and were not in themselves adverse to the declarant's interest, they would doubtless have to be rejected.<sup>10</sup>

In an early case, where the declarations were partially against interest, the rule was applied as follows :

"We cannot concur in the opinion of the learned Judge that this statement was not admissible in evidence. It is a statement by which the interest in the *mahal* of the person making it is reduced or affected ; it is against his interest and against his proprietary right. The effect of it is to cut down the proprietary right, to subject it to the tenure or incumbrance which is mentioned. It is true that in one part of it there is what may be said to be not against his interest, but in his favour, namely, the amount of the original rent and increased rent payable to him. But, when a document of this kind is tendered in evidence, it is not to be divided into parts, and the part which is in favour of the person making it rejected, and that which is against his interest accepted. The question is whether, taking the document as a whole, it is against the interest or the proprietary right of the person making it. In estimating the value of any particular part of it, that may be looked at ; but the principle upon which the admissibility of it is determined is whether it has been made under such circumstances as make it reasonable to suppose that it was done *bona fide* and the statements are true."<sup>11</sup>

8. (*Ex parte Edwards, Re*) *Tollemaache*, (1884) 14 Q. B. D. 415 416; *Massey v. Allen*, (1879) 13 Ch. D. 558; *Smith v. Blakey*, (1867) L. R. 2 Q. B. 326 (the interest must not be too remote); *Arjun Sukla v. Jujeishi Sukul*, 1954 Orissa 52 : 19 Cut. L. T. 354; *Wigmore*, *Ew.*, s. 1466; *Phipson*, 11th Edn., (1970), p. 386.

9. *Lloyd v. Powell*, (1913) 2 K. B. 130 (C.A.) reversed upon the other grounds, (1914) A.C. 733.  
 10. *Ningawa v. Bharmpappa*, (1897) 23 B. 63, 71, 72; following case next cited.  
 11. *Leelanund v. Lakhsuttee*, (1874) 22 W. R. 231, 233, *Couch*, C. J., cited and followed in *Ningawa v. Bharmpappa*, (1897) 23 B. 63, 68.

So, in the undermentioned case,<sup>12</sup> the plaintiff sued in 1893 to recover possession of certain land. The defendants denied the plaintiff's title. The latter tendered in evidence a registered mortgage deed of adjacent land executed in 1877, which set forth the boundaries, and referred to the land in question as then belonging to the plaintiff. At the date of the deed, there was no litigation existing between the present litigants, and at the date of the present suit the mortgagor was dead. It was held that the statement in the deed was admissible under this clause of this section. The Court, referring to the case cited in the preceding note at the foot of this page, and pointing out that the law prior to this Act was the same, observed as follows:

"If then, a statement of a *zemindar* that there was a certain *ghatwali* occupant in portion of his *mahal* was held to be a statement against the interest of the *zemindar*, in the same way the statement of a registered occupant of a survey number in the Bombay Presidency that he is indebted in a certain sum of money, which is a charge on his land, must be held to be both against his pecuniary and proprietary interest. If so, then the same case quoted above is also an authority for holding that the whole statement is admissible in evidence, not only to prove so much contained in it as was adverse to the interest of the person making it, but to prove any collateral fact contained in the statement, which fact was not foreign to the part actually against interest and formed a substantial part of it."<sup>13</sup>

Thus, accounts are admissible, some items of which change the declarant, though other connected items discharge him, or even show a balance in his favour for it is not to be presumed that a man will charge himself falsely for the mere purpose of getting a discharge, and, in the latter case, the debit items would still be against interest, since they diminish the balance in his favour.<sup>14</sup> A statement by a deceased Sapinda that he had received a sum of money for consenting to an adoption, thereby invalidating such consent, has been held admissible under this clause.<sup>15</sup>

But it is immaterial that the declaration may prove, in the circumstances which have happened at the time when it is sought to be put in evidence, to be for the interest of the declarant, or even that it can be shown by independent evidence to have been in truth for his interest at the time when it was made, provided, that, standing by itself, it was at the time, when it was made, against his interest.<sup>16</sup>

Statements made by insolvents in their public examination that they had executed mortgages of their properties in favour of their relations are not statements against their interest.<sup>17</sup> So also, a statement by a deceased Hindu in his will, that he was separate from his son, is a statement not against his interest and is not admissible.<sup>18</sup>

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| <p>12. Ningawa v. Bharmappa, (1897) 23<br/>B. 63.</p> <p>13. Ningawa v. Bharmappa, (1897) 23<br/>B. 63.</p> <p>14. Taylor, Ev., s. 674.</p> <p>15. Danakoti Ammal v. Balasundara<br/>Mudaliar, 36 M. 19: 18 I. C. 989.</p> <p>16. Taylor v. Witham, (1876) L. R. 3</p> | <p>Ch. D. 605; Wills, Ev., 3rd Ed., 190,<br/>v. ante.</p> <p>17. Luchiram v. Radhacharan, 1922 Cal.<br/>267: I. L. R. 49 Cal. 98: 66 I.C.<br/>15: 34 C. L. J. 107.</p> <p>18. Manglomal v. Mst. Padibai, 1936<br/>Sind 217.</p> |
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**6. Pecuniary interest.** (a) *General.* A declaration is against the pecuniary interest of the declarant, who makes it, whenever it has the effect of charging him with a pecuniary liability to another, or of discharging some other person upon whom he would otherwise have a claim.<sup>19</sup> The declarations must also have been against interest at the time they were made; it is not enough that they might possibly turn out to be so afterwards.<sup>20</sup> Where the declaration takes the form of an entry in a book of account, it will be against the declarant's interest, if it either acknowledges the payment of money due to himself, or charges him with the receipt of money for which he is accountable to a third person.<sup>21</sup> A statement in a sale-deed by the executant that he was liable for particular amount is admissible under this clause as a statement made against his pecuniary or proprietary interest.<sup>22</sup> The recital in a document of sale by a deceased predecessor-in-interest that consideration had been paid would be binding on the successor-in-interest as being against the pecuniary and proprietary interest of the vendor.<sup>23</sup> Attestation of a deed of adoption by the natural sons of the adopter amounts to a statement against the pecuniary interest, and it is admissible as such.<sup>24</sup> A statement by a *wasiqadar* that the title of his cousin to the property was as good as his own, is a statement against his own interest and is admissible under this clause.<sup>25</sup> A statement by a person that money deposited by him in the name of another belonged to him, and not to the other, is a statement in his own favour and is not admissible.<sup>1</sup> The statement by a person *in a disposition* by a will that his interest in a certain property was only 8 annas is admissible.<sup>2</sup> Recitals as to the passing of consideration which are against the pecuniary interest of the maker are admissible against the maker and persons claiming under him.<sup>3</sup> The statement of the deceased in a compromise petition in a previous suit in which she had challenged the adoption that her husband adopted the defendant, is admissible as it affects her pecuniary and proprietary interest in as much as she would be disinherited of the properties and would become only a maintenance holder.<sup>4</sup> Whether the statement is really against the pecuniary interest of its maker must be ascertained, in case of mortgages, with reference to value of

19. Doe v. Robson, (1812) 15 East 32, 35, per Bayley, J.; Wills Ev., 3rd Ed., 190; Higham v. Ridgway, (1808) 10 East 109 : in 2 Smith L.C. (13th Edn.) 284 affords an example of a statement which discharges another and Williams v. Geaves, (1838) 8 C. & P. 592 [see next note and illustration (e) of a statement charging the maker].
20. Smith v. Blakey, (1867) L.R. 2 Q. B. 326; Massey v. Allen, (1879) 13 Ch. D. 558; ex parte Edwards, re Tollermache, (1884) 14 Q.B.D. 415; Tucker v. Oldbury U. D. C., (1912) 2 K.B. 317 C. A.; Lloyd v. Powell, (1913) 2 K. B. 130 C. A.; but see as to the last case Lloyd v. Powell, (1914) A. C. 733 at p. 737.
21. Foster v. McMahon, (1847) 11 Ir. Eq., R. 287, 290.
22. Babhnaji v. Ratanlal, 1934 Nag. 106; 148 I. C. 1033; 30 N. L. R. 192; see also Sita Ram v. Khublal, 1926 Pat. 255; I.L.R. 5 Pat. 168; 94 I.C. 13; Kalyan Rai v. Jagannath, 1925 All. 130 (1): 78 I. C. 133.
23. Ghulam Ali Saha v. Sultan Khan, I. L. R. 1966 Cut. 571; 32 Cut. L. T. 510; A. I. R. 1967 Orissa 55, 56; (1973) 2 Cut. W. R. 1759.
24. Nagammal v. Sankarappa Naidu, 1931 Mad. 264; I. L. R. 54 Mad. 576; 131 I.C. 9; 61 M. L. J. 19; 1931 M. W. N. 501; 33 L. W. 269; see also Gnanamuthu Nadan v. Veilukanda Nadathi, 1924 Mad. 542; 79 I.C. 2; 1924 M. W. N. 451; 19 L. W. 494.
25. Baqar Ali Khan v. Anjuman Ara Begam, 30 I. A. 94; I. L. R. 25 All. 236 (P.C.).
1. Hiraba v. Dhanjibhai, 1927 Bom. 433; 102 I. C. 145; 29 Bom. I.R. 427.
2. Kamal Lochan v. Mitabhanu, 32 Cut. L. T. 343, 356.
3. I. L. R. (1974) Cut. 33.
4. Savitri Dei v. Bhaskar, (1971) 2 Cut. W. R. 814; A. I. R. 1972 Orissa 148.

mortgaged property itself.<sup>5</sup> The statements and the description of the boundaries in a mortgage deed between deceased father of the plaintiff and third party were admissible in evidence against the plaintiff if they were against the pecuniary interest of the plaintiff's father.<sup>6</sup>

A declaration may be against the pecuniary interest of the person who makes it, if part of it charges him with a liability, though other parts of the book or document in which it occurs may discharge him from such liability in whole or in part,<sup>7</sup> and though there may be no proof, other than the statement itself, either of such liability or of its discharge in whole or in part.<sup>8</sup> For, it is not necessary to give independent evidence of the existence of the charge of which the entry shows the subsequent<sup>9</sup> liquidation.

(b) *Road-cess returns.* Notwithstanding the provisions of the twenty-first section and the present section, cess-returns cannot, under Section 95 of the Bengal Cess Act, 1880 be used as evidence in favour of the person by whom or on whose behalf they are submitted.<sup>10</sup> But they can be used as evidence otherwise.<sup>11</sup>

**7. Proprietary interest.** (a) *General.* Declarations made by persons in disparagement of their title to land are admissible, if made while the declarant was in actual possession<sup>12</sup> of the property<sup>13</sup> as statements against their proprietary interest. And as, in the absence of other proof, mere possession implies an absolute interest,<sup>14</sup> any declaration by an occupier tending to cut down, charge or fetter his presumably absolute interest will be receivable under this head.<sup>15</sup> And *a fortiori*, if it shows that he has no interest in the

5. Mohan Lal v. Ram Prasad, 1972 W. L. N. 332; 1972 Raj. L. W. 458.
6. I. L. R. (1972) Gui. 790.
7. Doe v. Robson, (1812) 15 East 32, 35, per Bayley, J.; Wills, Ev., 3rd Ed., 190; Higham v. Ridgway, (1808) 10 East 109 : in 2 Smith L.C. (13th Edn.) 284 affords an example of a statement which discharges another, and Williams v. Geaves; (1838) 8 C. & P. 592 [see next note and illustration (e) of a statement charging the maker].
8. Steph. Dig. Art. 28: where the question was whether A received rent for certain land, a deceased steward's account, charging himself with the receipt of such rent for A, was held to be relevant although the balance of the whole account was in favour of the steward; ib. illustration (d); Williams v. Geaves, (1838) 8 C. & P. 592; see Leelanund v. Lakhpuree, (1874) 22 W. R. 231.
9. Taylor, Ev., s. 675; Steph. Dig. Art. 28; R. v. Heyford, cited in note to Higham v. Ridgway, (1808) 10 East 109 in 2 Smith L.C. (13th Ed.) 284 *aliter*; Doe v. Vowles, 1833 (Littledale) & R., 261; in Taylor v. Witham, (1876) L.R. 3 Ch. D. 605, Jessel, M. R. followed R. v. Bowles, (1810), 145 E. R. 1196. There is nothing in the Act to prevent the admission of the statement in the case abovementioned; any objection that may be made will go to the weight and not to the admissibility of such evidence.
10. Hem v. Kali, (1899) 26 C. 832; and see Hem v. Kali, (1903) 30 C. 1033 (P.C.).
11. Sewdeo v. Ajodhya, (1912) 39 C. 1005; Chalho v. Jharo, (1911) 39 C. 995.
12. There ought to be some evidence that the declarant was actually in possession since otherwise his declaration that he has an interest though limited, may appear to be a statement rather in his favour than otherwise.
13. The English rule adds "and as to matters within his personal knowledge or belief"; Phipson, Ev., 11th Ed., 387-388; Taylor, Ev., s. 685; Trimblestown v. Kemmis, 9 C. & F. 749, 780; *aliter* under this section v. post.
14. Taylor, Ev., s. 685; see also S. 110, post.
15. Phipson, Ev., 11th Ed., 387; Wills, Ev., 3rd Ed., 198; Taylor Ev., ss. 684-686; Norton, Ev., 179, 180.

land whatever.<sup>16</sup> So, where a Hindu widow executed, in favour of one B D, a *varaspatra* or deed of heirship, this deed was, in a subsequent suit between the heir of B D, and a mortgagee of certain property covered by it, admitted in evidence as being against the widow's proprietary interest, as by it she divested herself of her widow's estate in the property.<sup>16.1</sup> So also was the statement of a Hindu widow, which was in the nature of an admission of a preceding gift.<sup>17</sup> But, if a Hindu widow who, after a lifelong enjoyment of her husband's property, desires at the end to pass it on to her own relations, and for this purpose goes through the form of adopting her brother's grandson, to effectuate which she is bound to allege authority from her husband, her statement that she had the authority to adopt cannot be admitted under this clause as being against her interest.<sup>18</sup> Recitals in documents executed by deceased describing A as his adopted son and showing transfer of property by himself as guardian of A are admissible in evidence under sub-sections (3), (5) and (6) of this section as being statements against the proprietary interest,<sup>19</sup> so also recital in adoption deed executed by deceased relating to authority to adopt is admissible being statement against proprietary interest.<sup>20</sup>

The statement of a person that he is separated from a joint family, of which he was a coparcener, and that he has no further interest in the joint property or claim to any assets left by his father, is, however, a statement made against the interest of such person, and, after such person is dead, it would be relevant under this clause. The assertion that there was separation, not only in respect of himself but between all the coparceners, would be admissible as a connected matter and an integral part of the same statement.<sup>21</sup> So also, a statement by a deceased occupier of land that he held a life-estate in it under a particular will of which C and B were executors, is admissible to prove the existence of the will, being against his proprietary interest on account of its twofold limitation of the declarant's estate to a life interest, and under a particular document.<sup>22</sup> A statement by a landlord, who is dead, that there was a tenant on the land, is a statement against his proprietary interest.<sup>23</sup>

Statements made by deceased ancestors of parties that there was a partition of joint family property are admissible as statements against the pro-

16. Grey v. Redman, 1 Q. B. D. 161.
- 16.1. Hrai v. Moro, (1886) 11 R. 89.
17. Appasami v. Ramu Tevar, 1932 Mad. 267; 136 I. C. 340; 61 M. L. J. 887; 34 L. W. 776.
18. Dal Bahadur v. Bijai Bahadur, 1930 P. C. 79; 57 I. A. 14; I. L. R. 52 A. 1; 122 I. C. 8; 1930 A. L. J. 122; 32 Bom. L. R. 487; 34 C. W. N. 369; 51 C. L. J. 230; 58 M. L. J. 446; 31 L. W. 434.
19. Jagabandhu v. Bhagu, (1973) 1 Cut. W. R. 809; I. L. R. (1973) Cut. 553; A. I. R. 1974 Orissa 120.
20. Audhi Kuar v. Rajeshwar Singh, A. I. R. 1972 Patna 325; Chitra v. Padhmuni, I. L. R. (1974) Cut. 368; A. I. R. 1975 Orissa 24.
21. Bhagwati Prasad Sah v. Dulhin Ramehwari Kuer, 1952 S. C. 72, 74; 1952 S. C. J. 115; (1955) 2 S. C. R. 22; Appalanarasimham v.

- Udalama, A. I. R. 1959 A.P. 407; Gopinath v. Jagannath Baral, I. L. R. 1969 Cut. 146; A. I. R. 1969 Orissa 18, 19.
22. Sly v. Sly, (1877) 2 P.D. 91. So again here the question was whether A (deceased) gained a settlement in the parish of B by renting of tenement, a statement made by A whilst in possession of a house that he had paid rent for it, was held relevant, because it reduced the interest which would otherwise be inferred from the fact of A's possession; R. v. Exeter, (1869) L. R. 4 Q.B. 341; Steph. Dig., Art. 28, illustration (f).
23. Abdul v. Ebrahim, (1904) 31 C. 965 following Leelanund v. Lukhpurnee (1874) 22 W. R. 231; Manik Biswas v. Jagadindra Nath, 24 I. C. 283; A.I.R. 1914 C. 704.

proprietary interest of the persons making them.<sup>24</sup> A statement by some members of Rajgond that amongst Rajgond, a son takes interest in the family property by birth is admissible as a statement against the proprietary interest of the declarant.<sup>25</sup>

Even a cancelled will can be admitted to prove a statement against the interest of the testator.<sup>1</sup> But the statement by deceased that sale made by him was a sham transaction, being a self-serving statement, is not admissible.<sup>2</sup>

The statement in a departmental inquiry by A that he had given a certain sum to B for delivery to A's parents living elsewhere is neither against the proprietary nor the pecuniary interest of A nor if true would expose A to criminal prosecution. It is therefore not relevant under this clause.<sup>3</sup>

(b) *Recitals of boundaries in documents.* Recitals of boundaries in documents not *inter partes* can be admitted under this clause<sup>4</sup> to prove the ownership or possession of adjoining property. When the deed is a mortgage-deed, it amounts to a statement against the pecuniary or proprietary interest of the mortgagor, inasmuch as he admits therein that he is indebted in a certain sum of money and that this money is a charge on his property<sup>5</sup> and when the deed is a deed of conveyance, on the ground that it amounts to a statement against the vendor's interest, inasmuch as he admits therein that he is extinguishing his interest in the property conveyed.<sup>6</sup> The mortgage-deed or the deed of a conveyance having thus been held to contain a statement against the pecuniary or proprietary interest of the executant of the deed, on the authority of *Higham v. Ridgway*,<sup>7</sup> the document is made evidence not only of the precise fact against interest, but of all the collateral facts mentioned therein, and consequently of the possession or ownership of persons who are mentioned in the deed as possessing or owning the land adjoining the property mortgaged or conveyed.<sup>8</sup>

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- 24. *Jaitram v. Narottam*, 1929 Nag. 131; but see *Raj Narain v. Maharaj Narain*, 1937 Oudh 133; 165 I. C. 785; 1936 O. W. N. 1203.
- 25. *Ram Nath v. Sukalsi*, 1924 Nag. 330; 78 I.C. 185.
- 1. *B. L. Chouda v. B. K. Rai*, 1939 Nag. 274; 185 I.C. 216; 1939 N. L. J. 421.
- 2. (1973) 2 Cut. W. R. 1759.
- 3. *M. G. Verghese v. Government of Manipur*, 1970 Cr. J. 812; A. I. R. 1970 Manipur 40, 42.
- 4. *Thyagarajan Chetty v. Narayan Thevan*, 1940 Mad. 450; *Tikaram v. Motilal*, 1930 All. 299; I. L. R. 52 All. 464; 126 I.C. 29; 1930 A. L. J. 564; *Ahmad Shaji v. Jamal Ahmad*, 1928 Oudh 248; 113 I. C. 414; 5 O. W. N. 174; *Ketabuddin v. Nafar Chandra Pattok*, 1927 Cal. 230; 99 I. C. 907; 44 C. L. J. 582; *Pramatha Nath v. Bejoy Singh*, 1927 Cal. 234; 99 I.C. 910; 44 C.L.J. 587; *Abdul Rahim Kazi v. Ionab Ali Sikdar*, 1928 Cal. 299; 68 I.C. 929; *Ambar Ali v. Lutfe Ali*, 1918 Cal. 971; I. L. R. 45 Cal. 159; 41 I.C. 116; 25 C. L. J. 619; 21 C. W. N. 996; *Natwar v. Alku*, 18 I. C. 752; 11 A. L. J. 139; *Imrit Chamar v. Sri-dhar Pandey*, 13 I.C. 120; 15 C.L. J. 7; *Abdullah v. Kunj Behari Lal*, 12 I. C. 149; 14 C. L. J. 467; *Haji Bibi v. The Aga Khan*, 2 I. C. 874; 11 Bom. L. R. 409; *Ningawa v. Bharamappa*, (1897) 23 Bom. 63; *Hrimbak v. Ganesh*, 1923 Nag. 22; 68 I. C. 314; (1975) 2 Kant. L. J. 468.
- 5. *Ningawa v. Bharmappa*, 25 Bom. 63; *Thyagarajan Chetty v. Narayana Thevan*, *supra*; *Abdullah v. Kunj Behari Lal*, *supra*.
- 6. *Abdullah v. Kunj Behari Lal*, *supra*; *Leelanund v. Lakbputtee* (1874) 22 W.R. 231.
- 7. (1808) 10 East 109.
- 8. *Reajaddi Sarkar v. Ganga Charan Bhattacharya*, 1919 Cal. 499; 53 I.C. 863; *Ambar Ali v. Lutfe Ali*, *supra*; *Abdullah v. Kunj Behari Lal* *supra*; *Ram Sarup Kamkar v. Bhagwat Prosad* 1920 Pat. 696; 57 I. C. 194.

Another ground on which recitals of boundaries of the land conveyed is held to be against interest is that a statement by the vendor that his land is limited by certain boundaries is an admission that his proprietary interest does not extend over any land, beyond the boundaries mentioned in the deed.<sup>9</sup> On the authority of the above cases, it has been held by the Madras High Court that there is no impediment in regard to the relevancy and admissibility of a document between strangers, reciting boundaries under this section, provided in the circumstances of the case the other requirements of this clause are complied with.<sup>10</sup>

But there are other cases in which such recitals have been held to be not admissible under this section.<sup>11</sup> In *In re Daddapaneni Narayanappa*,<sup>12</sup> Krishna-swami Iyer, J., said. "I fail to see how it is a statement against the interest of a person to say that his property is bounded on the north, south, east or west by a certain other man's property." In *Venkataraya Gopala v. F. Narasayya*,<sup>13</sup> Seshagiri Aiyar, J., observed that if the view that such recitals of boundaries are admissible is correct, it could follow that any person who states that a particular property belongs to another should be held to have made a statement against his interest, because he lays no claim to it himself. Similarly in *Karuppanna Konar v. Rangaswami Konar*,<sup>14</sup> Jackson, J., argued: "It cannot be said that a statement of boundaries is against the proprietary interest of the person making it except on the assumption that every person must be presumed to own the universe until he makes a statement circumscribing his title. On the contrary, a person may be presumed to own nothing until he brings into existence an effective deed evidencing his title to property and such a deed with the boundaries stated therein is a document not against but in his proprietary interest."

This latter view that the recitals are not admissible is supported by the decision in *Grease v. Barrett*.<sup>15</sup> This case concerned an action for conversion ciple in question."<sup>10</sup>

9. *Ningawa v. Bharmappa*, 23 Bom. 63 : *Haji Bibi v. The Aga Khan*, 2 I.C. 874 : 11 Bom.L.R. 409; *Tikaram v. Motilal*, 1930 All. 299; *Trimbak v. Ganesh*, 1923 Nag. 22; *Kangall Molla v. Beni Madhab Biswas*, 1916 Cal. 278 : 34 I.C. 534; *Abdullah v. Kunj Behari Lal*, 12 I.C. 149 : 14 C.L.J. 467; *Natwar v. Alkuhi*, 18 I.C. 752; *Pramatha Nath v. Bejoy Singh*, 1927 Cal. 234; *Abdul Rahim v. Jonab Ali*, 1923 Cal. 299; *Ram Nandan v. Tilakdharlal*, 1933 Pat. 636 : 145 I.C. 944; *Lalu Singh v. Sahdeo Singh*, 1916 Pat. 416 : 36 I.C. 610.
10. *Rangayyan v. Innasimuthu*, 1956 Mad. 226; (1955) 2 M. L. J. 687.
11. *In re Daddapaneni Narayanappa*, 8 I. C. 268; *Venkataraya Gopala Raju v. Fota Narasayya*, 1915 Mad. 746 : 26 I. C. 747 : 1914 M. W. N. 779; *S. K. Acharji Chowdhry v. Umed Ali*, 1922 Cal. 251; 63 I.C. 954; 35 C. L. J. 19: 25 C. W. N. 1022; *Pramatha Nath Chaudhuri v. Krishna Chandra*, 1924 Cal. 1067: 84 I.C. 420; 28 C. W. N. 1092; *Choonilal v. Nilmadhab Barik*, 1925 Cal. 1034: 86 I.C. 734; 41 C. L. J. 374; *Abdul Karim v. Chhale Ahmed*, 1926 Caf. 479: 91 I. C. 688; *Brojo Mohan v. Gaya Prosad*, 1926 Cal. 948; 97 I.C. 265; 45 C. L. J. 55: 30 C. W. N. 761; (*Smt.*) *Kumuda Kumari v. Dilsookh Roy*, 1927 Cal. 918; 101 I.C. 542; 45 C. L. J. 138; *Sarat Chandra Rakshit v. Sarala Bala Ghosh*, 1928 Cal. 63; 105 I. C. 61; *Ambica Charan Kundu v. Kumud Mohun*, 1928 Cal. 893; 110 I.C. 521; *Daulat Shah v. Bishan Das*, 1934 Lah. 750; *Nanak Chand v. Mian Mohammad Shahbaz Khan*, 1936 Lah. 114; *Hari Ahir v. Sri Sanghat Chacha*, 1934 Pat. 617 (2): 152 I.C. 829; *Soney Lal Jha v. Darabdeo Narain Singh*, 1935 Pat. 167: I. L. R. 14 Pat. 461; 155 I.C. 470; 16 P. L. T. 199 (F.B.); *Karuppanna Konar v. Rangaswami Konar*, 1928 Mad. 105 (2): 107 I. C. 293; *Arjun Shukla v. Jujesthi*, 1954 Orissa 52.
12. 8 I. C. 268.
13. 1915 Mad. 746: 26 I. C. 474; 1914 W. M. N. 779.
14. 1928 Mad. 105 (2): 107 I. C. 293.
15. (1835) 1 C. M. & R. 919.

of tin and ore, the plaintiff claiming that the defendant had worked a tin mine under land belonging to the plaintiff as part of the waste of a manor. The defendant offered in evidence formal declarations by a deceased owner of the manor as to the extent of his claim to the waste, such claim not covering the *locus in quo*. It was held that the declarations were inadmissible. Wigmore<sup>16</sup> criticised this decision, too, on the basis that a declaration as to the extent of one's land should be on the same footing as a declaration as to the limits of one's interest is; the former should be admitted, he said, as indicating that neighbouring estates extended at least up to the point named. But Parke, B., in *Crease v. Barrett* gave the right answer to such a criticism. "This is a case," he said<sup>17</sup> "in which a person merely declares that he is entitled as far as a certain point but no further, and his declaration taken altogether can hardly be said to be against his interest, for whilst he disclaims his right to one part, he affirms it as to another." But these arguments lead only to the conclusion that a statement of the boundaries is not against the proprietary interest of its maker, but they do not meet the first ground in which such statements have been held to be admissible.

The opinion with regard to the admissibility of statements regarding boundaries in documents between third parties is, however, not uniform. The Calcutta and Patna High Courts hold against the admissibility and the Madras and Bombay High Courts hold in favour of admissibility. The Madras view in *Rangayyan v. Innasimuthu*,<sup>18</sup> is that the recitals of boundaries of a property in a document *inter partes* is a joint statement made by parties to the document and therefore relevant against all of them as an admission. When such a recital is in a document between a party and a stranger, it is relevant against the party as an admission but is not admissible in his favour. But, where such a recital is in a document between stranger, it is not ordinarily admissible to prove possession or title as against a person who is not a party to the document except in cases falling under Sections 11, 13, 32 (3) and 157 of the Act, the particular circumstances of the case determining the particular section applicable to the facts of that case. And the probative value to be attached depends upon the circumstances of each case and may vary from nothing to almost clinching evidence. Where the case is concerned with clause (3) of Sec. 32, under which one of the tests is if the statement made is against the pecuniary or proprietary interest of the person making it and if this question is found in the affirmative, the statement of the dead person is relevant, but when a recital cannot be said to be against the pecuniary or proprietary interest of the party making it, the statement of the dead person is not relevant. The same holds when the statement, if true, would not expose him or would not have exposed him to criminal prosecution or to a suit for damages. Recitals as to boundaries in documents between strangers could not be admitted in evidence unless the executant is produced as a witness.<sup>19</sup> A Full Bench of the Patna High Court in *Soneylal v. Darbdeo Narain*,<sup>20</sup> reviewed all the previous decisions of the Calcutta, Bombay and Madras High Courts and came to the conclusion that the statements of boundaries made in documents between third parties are

16. Para. 1458, n. 2.

17. (1835) 1 C.M. & R. 919 at p. 9331.

18. A.I.R. 1956 M. 296; (1955) 2 M.L.J. 687.

19. V. A. A. Nainar v. A. Chettiar,

84 Mad. L. W. 691; (1972) 1 Mad.

L. J. 317; A. I. R. 1972 Mad. 154.

20. I. L. R. 14 Pat. 461; A. I. R. 1935 Pat. 167 (F.B.).

not admissible in evidence under clause (3) of this Section, and that such statements cannot be said to be necessarily and *prima facie* against the proprietary interest of the person making it. They could be admissible only if it is shown that,—

- (1) at the time they were made, they were against the interest of the maker, and
- (2) at the time they are sought to be used, they are statements of a relevant fact.

The Orissa High Court followed the above view of the Full Bench.<sup>21</sup> The Patna High Court has reiterated this view.<sup>22</sup>

**8. Recitals in Documents.** (a) *General.* Where in a suit by the successors of the trustee or a mosque to redeem the mosque properties mortgaged by the former trustee a compromise decree in a previous suit against the trustee declaring that certain properties including the property sought to be redeemed belong to the mosque was adduced in evidence, it was held that the compromise decree was admissible under this clause and once it was admitted, it was admitted for all purposes and that it was sufficient to establish the title of the mosque to the suit properties.<sup>23</sup> But where there were no recitals in the consent decree as to the previous rights of the respective parties in the subject-matter of the litigation, but it was stated at the outset that, regardless of the rights of the parties, they had come to an arrangement that in future their rights would be regulated in the manner specified in the decree, it was held that such recitals in the decree cannot be used as evidence under this section.<sup>24</sup>

Recital by a stranger relating to the ownership of a house is not admissible under clause (3) when the party is dead and the recital is sought to be used in connection with litigation between third parties nor is it admissible under Section 11 (2) *ante*.<sup>25</sup>

(b) *Statements abridging or encumbering estate.* A distinction, however, exists between statements which limit the declarant's own title, and those which go to abridge or encumber the estate itself. According to English law, the former are admissible even between strangers, whereas the latter are only so as against the declarant and his privies. Thus admissions by the holder of a subordinate title are not receivable to affect the estate of his superior, which he has no right to alienate or encumber, e.g., those of an occupier, his landlord's title, or those of a tenant for life, the title of the remainderman or reverser. The ground for this distinction is said to be that, though it is unlikely (to take a specific instance) that a person possessed of an absolute interest in property will admit that he is only a tenant, many causes might

21. Subudhi v. Raghu, A. I. R. 1962  
Orissa 40: I. L. R. 1961 Cut. 249.

22. Audhi Kuer v. Rajeshwar Singh,  
1973 Pat. L. J. R. 399; A. I. R.  
1973 Pat. 215.

23. P. Venkatasubbiah Chetty v. Jumma  
Mosque, 1941 Mad. 666; (1941) 1 M.

L. J. 754; 1941 M. W. N. 532; 53  
L. W. 731.

24. Jagadish Chandra De v. Harihar,  
1924 Cal. 1042; 78 I.C. 219; 40 C.  
L. J. 39.

25. Bhuriya v. Ram Kali, A. I. R. 1971  
Punj. 9, 12.

induce a tenant to acknowledge the existence of an easement, or a highway, or the like which might be either not inconvenient or even absolutely beneficial to him.<sup>1</sup>

9. "Would have exposed." It has been already noticed that the section at this point extends the English rule.<sup>2</sup> The words would have exposed him mean would have exposed him at the time that the statement was made. It was hardly intended that a statement made after the risk had passed away, as for example - after a suit for damages had become barred by limitation, or after the expiry of the time, if any, within which a prosecution for offence must be instituted should be admitted, merely because if made at some earlier period it would have exposed the declarant to a prosecution, or suit for damages.<sup>3</sup> This construction is supported by the rule laid down with regard to statements against pecuniary and proprietary interest.<sup>4</sup> On the other hand, it may be said that, if the fact that the risk had passed away was not known to the declarant, the statement might in the belief of the latter, though not in fact, be against his interest and thus have the guarantee which is proper to this class of evidence.

The principle underlying the clause is that when a person makes a statement rendering him liable to criminal prosecution, the statement is likely to be a true statement. The section can have no application to cases where there is already in existence evidence which would inevitably lead on to that person's prosecution and itself lead to his conviction.<sup>5</sup> But, it has been held that such a statement could be admitted under this section, where the accused implicates both himself and his confederates. In an attempt to commit dacoity, one of the members of the gang received gunshot wounds from a villager. When the other members of the gang had run away, the wounded man disclosed the names of his companions to the villagers, before he died. It was

1. *R. v. Bliss*, (1837) 7 A. & E. 550; *Scholes v. Chadwick*, (1843) 2 M. & Rob. 507; *Howe v. Malkin*, (1878) 40 L.T. 196: 27 W. R. (Eng.) 340; *Papendick v. Bridgewater*, (1855) 5 E. & B. 166. (In this case the question was whether there was a right of common way over a certain field. A statement by A, a deceased tenant for a term of the land in question, that he had so much right, was held to be relevant as against the successors in the term but not as against the owner of the field); *Phipson* Ev., 11th Ed., 394; *Steph. Dig.*, Art. 28; *Powell*, Ev., 224; *Taylor*, Ev., s. 687. It is difficult to see any objection in principle to treating declarations by an occupier of land which admit the existence of an easement over it as being within the rule, since the admission of its existence might well be considered a statement against interest. See remarks in *Wills*, Ev., 3rd, Ed., 199. Probably here as elsewhere under

the Act any objection that may be made will go, not to the admissibility, but to the weight of the evidence.

2. *v. ante*, Introd. to Secs. 32, 33.
3. The construction given in the text and adopted in the first edition from *Whitley Stokes* P. 874 was subsequently approved by the Calcutta High Court in the case of *Nicholas v. Asphar*, the final judgment which is reported in (1896) 24 C. 216. The decision of the Court, however upon this point having been given during the course of the examination of the witnesses has not been reported.
4. See *ex parte Edwards*, re *Tallemache*, (1884) 14 Q. B. D. 415 and *Massey v. Allen*, (1879) 13 Ch. D. 558.
5. *Achhay Lal Singh v. Emperor*, 1947 Pat. 90, 96; I. L. R. 25 Pat. 347; 28 I. C. 567; 48 Cr. L. J. 242; 13 B. R. 250; 27 P. L. T. 298.

held that his statement implicating himself as well as his companions was admissible and provable against the other accomplices named by him.<sup>6</sup>

The section cannot be extended and stretched in such a way as to admit a statement by an accused person after a criminal prosecution had been started against him.<sup>7</sup> Where a confessional statement of a doctor, since deceased, that a medical report made by him was made falsely on the instructions of the accused, was put in evidence, and its admission was objected to on the ground that, before the confessional statement was made, the doctor had already exposed himself to a criminal prosecution when he made the false report, it was held, that, conceding that the statement was not admissible under this clause, it was admissible under Section 10 in view of the other evidence as to the existence of a conspiracy.<sup>8</sup>

**10. "To a criminal prosecution."** In a suit for divorce filed by the husband in India on the ground of adultery, a letter written to him by the co-respondent admitting adultery with the respondent-wife was admissible under this clause, as the co-respondent was in England and his admission of adultery would have exposed him to a prosecution there.<sup>9</sup> But where at the time and place (foreign country) of making a statement the person making it would not be exposed to any criminal prosecution the statement is not admissible.<sup>9-1</sup> The statement of a person that he witnessed the accused committing a murder is admissible under this clause, if he failed to give information of the fact to the nearest Magistrate or police officer under Section 39 (old Section 44), Cr. P. C., as it would have exposed him to a criminal prosecution for an offence under Section 202, I. P. C.<sup>10</sup> A statement made by a person to the headman of a village that he had set fire to a heap in the village has been held to be admissible under this clause, as it would have exposed him to a prosecution for arson or a suit for damages.<sup>11</sup> In *Umrao v. Emperor*,<sup>12</sup> where an accomplice incriminating himself and the appellant by a statement to the police about the crime, had subsequently died, his statement was admitted in evidence by the High Court under this clause, and special leave for appeal to the Privy Council was rejected as the question was one of interpretation of certain sections of a statute. On the strength of this it was held by the Nagpur High Court, not without some degree of doubt, that a statement made by a convict just before he was about to be hanged that he alone and not the accused committed the murder was admissible under this clause.<sup>13</sup> The confession of a person who is dead and has never been brought to trial is, however, not admissible under Section 30, as the confession of a co-accused,

6. *Narpat v. State*, 1960 A. L. J. 567.
7. *Emperor v. Keshav Narayan*, 25 Bom. L. R. 248; *Janu v. Emperor*, 1947 Sind 122; I. L. R. 1946 Kar. 79 : 48 Cr. L. J. 74 : 228 I. C. 157; see also *Achhay Lal Singh v. Emperor*, 1947 Pat. 90; I. L. R. 25 Pat. 347: 228 I.C. 567: 48 Cr. L. J. 242: 13 B. R. 250: 27 P. L. T. 298.
8. *Kunjalal Chose v. Emperor*, 1935 Cal. 26: 155 I.C. 261: 36 Cr. L. J. 678: 38 C. W. N. 1015.
9. *Gerald Thomas Cockman v. Mrs. Olga Mrtle Cockman*, 1934 All. 618: I. L. R. 56 All. 570: 150 I.C.

- 445: 4 A. W. R. 469: 1934 A. L. J. 1254 (S.B.).
- 9-1. *Lalchand v. State of Rajasthan*, 1972 Raj. L. W. 675.
10. *Mst. Ajodhi v. Emperor*, 1920 Nag. 170: 56 I. C. 582: 21 Cr. L. J. 486: 16 N. L. R. 30.
11. *S. Paul De Silva v. The Korossa Rubber Co. Ltd.*, 1919 P. C. 231.
12. A. I. R. 1925 P. C. 52: 6 Lah. 45: '52 I.A. 121 (P.C.).
13. *Sheikh Shafi v. Emperor*, 1930 Nag. 259: 125 I.C. 686: 31 Cr. L.J. 661; but see *Nga Te v. Emperor*, 20 I.C. 990: 14 Cr. L.J. 510,

nor can it be admitted under Section 10.<sup>14</sup> It is doubtful whether this clause is subject to the provisions of Section 162 of the Cr. P. C., sub-section (2) of which makes an exception only in the case of a dying declaration under clause (1) of this section.

**10-A. Confession of deceased co-accused.** The confession of a person who is dead and has never been brought for trial is not admissible under Section 30 which insists upon a joint trial. But the confession of a co-accused fully tried jointly with another accused and dying before judgment is pronounced becomes relevant under Section 30 read with Section 32 (3).<sup>15</sup>

**11. Collateral facts.** The statement against interest is not only evidence of the precise fact which is against interest, but of all connected facts (though not against interest) which are necessary to explain, or are expressly referred to in the declaration and whether contained in the same or other document.<sup>16</sup> It is not merely the precise fact which is against interest that is admissible, but all matters that are "involved in it and knit up with the statement."<sup>17</sup> Thus, in an action by the executor of one T, by which it was sought to establish against defendant a debt of £2,000 as due to the testator's estate for money lent, and where the defence was that the defendant had received it as a gift, the plaintiff tendered in evidence a private account book of the deceased containing (a) entries of several of £20 each, purporting to have been received from the defendant as quarterly payments of interest; and (b) an entry stating that the defendant had on a particular date acknowledged that he had borrowed from the testator the sum of £2,000 in favour of the estate. But it was held that the entries of the receipt of interest taken by themselves<sup>18</sup> were, at the time, admissible, notwithstanding that the entry by which the testator recorded the defendant's acknowledgment of the loan was, in his favour.<sup>19</sup> As in the case of a declaration against pecuniary interest, so in the case of a declaration against proprietary interest, so soon as the adverse interest is proved the whole statement becomes admissible.<sup>20</sup> So, statements by tenants have been admitted to prove not merely the fact that they were tenants, but also both the amount<sup>21</sup> and the payment<sup>22</sup> of the rent, and the nature of the tenure.<sup>23</sup> Recitals of boundaries in deeds have been admitted on the same principle.<sup>24</sup>

14. Dengo Kandero v. Emperor, 1938 Sind 94 : 175 I.C. 99 : 39 Cr. L. J. 515.
15. Haroon Haji Abdulla v. State of Maharashtra, (1968) 2 S.C.R. 641: 1968 S.G.D. 391: (1968) 2 S.C.J. 534: (1968) 1 S.C.W.R. 243: 70 Bom. L.R. 540: 1968 Cr. L.J. 1017: 1968 M.L.J. (Cr.) 591: A.I.R. 1968 S.C. 832: 835.
16. Ningawa v. Bharmappa, (1897) 23 B. 63: Phipson, Ev., 11th Ed., 389: Steph. Dig. Art. 28; Powell, Ev., 9th Ed., 307, 308; Wills, Ev., 3rd Ed., 192-3; Taylor, Ev., ss. 677, 680; Higham v. Ridgway, (1808) 2 Smith L. C. 13th edn., 284; Taylor v. Witham, (1876) 3 Ch. D. 605; Sita v. Khub, 1926 Pat. 255; I.L.R. 5 Pat. 168; 94 I.C. 13; 7 P.L.T. 573; Sisir Kumar Saha v. Jugneswar Saha,
- 42 C.W.N. 359, *v. ante*, Concept of Interest.
17. Bhagwati Prasad v. Ramchhatri Kuer, 1952 S.C. 72: 1952 S.C.J. 115.
18. *v. ante*.
19. Taylor v. Witham, (1876) 3 Ch. D. 605, and *see ante*. Higham v. Ridgway, and the remarks on debtor and creditor accounts; Leelanund v. Lakputtee, (1874) 22 W.R. 231.
20. Peaceable v. Watson, (1811) 4 Taunt. 16.
21. R. v. Birmingham Overseer, (1861) 31 L.J.M.C. 69.
22. R. v. Exeter, (1869) L.R. 4 Q.B. 341.
23. Doe v. Jones, (1848) 1 Camp. 267.
24. See Ambar Ali v. Lutfe Ali, 1918 Cal. 971; I.L.R. 45 Cal. 159; 41 I.C. 116; and other cases cited under the heading "Recital of boundaries," *supra*.

But disconnected facts, though contained in the same document or statement, are inadmissible statements not referred to in, or necessary to explain, declarations against interest, and are not relevant merely because they were made at the same time or recorded in the same place.<sup>25</sup> Upon the question, in the case of written entries, as, what is to be deemed the whole statement within the meaning of the rule, it would seem that the same test which exists in regard to admissions must be applicable here, namely, that the statement which is sought to be given in evidence as a part of the main statement must, if antecedent, have been incorporated in it by reference and if contemporary, have been virtually parcel of it.<sup>1</sup> So far as a statement against the pecuniary or proprietary or other interest of the person making it is concerned such statement may be given in evidence against third persons, provided that the reference to such third persons is not foreign to that portion of the statement which is against the interest of the declarant. Although the whole statement of a deceased person is admissible in evidence, the value which the Court will attach to such evidence will depend in each case upon a variety of circumstances. If the statement happens to be recorded in a document it must naturally possess greater value than when it depends upon the evidence of a witness who purports to have heard it. The Court, in each case, will also have to consider whether or not the statement in question bears on its face the appearance of truth, also the circumstances under which it came to be made, and whether or not the deceased person had a motive in making it or an object in naming the particular person whom he charges with complicity in the crime in question. These are all matters which affect the weight of the evidence and not its admissibility.<sup>2</sup>

**12. Personal knowledge: Contemporaneousness.** The statements are admissible, although the declarant had no personal knowledge of the fact stated, but received them merely on hearsay.<sup>3</sup> Nor is it necessary that such statements should be contemporaneous with the fact recorded; it is sufficient that they are made at any subsequent time. These circumstances affect the weight, not the admissibility, of the declaration.<sup>4</sup>

**13. Proof.** Extrinsic proof must be given of the declarant's death or the existence of the other circumstances under which alone this evidence is receivable; and that the statement was either made, written, or signed by him, or if made or written by another on his behalf, that it was authorized or

25. Steph. Dig., Art. 28; Doe v. Bevis, (1949) 7 C.B. 456; Knight v. Waterford, (1840) 4 Y. & Coll. 29; Whaley v. Carlisle, (1866) 15 W. R. (Eng.) 1185; Ningwa v. Bharmappa, (1897) 23 B. 63, v. ante.

1. Wills Ev., 132 ib. 3rd Ed., 192.  
2. Mohammad v. Emperor, 1926 Lah. 54: 89 I.C. 252.

3. Crease v. Barrett, (1835) 1 C.M. & R. 919; Percival v. Ransom, (1851) Ex. 1; Taylor, Ev., s. 689; but see Lloyd v. Powell, (1913) 2 K.B. 130 C.A. reversed on other grounds in (1914) A.C. 733 H.L.; Ramanatham Chetty v. Murugappa Chetty, 1917

Mad. 930 : 33 I.C. 969 : (1916) 1 M.W.N. 216; Wills, Ev., 3rd Ed., 194. There were cases of declarations against pecuniary interest in England. Declarations against proprietary interest are not admissible, unless the declarant adds his own belief to the hearsay; Trimlestown v. Kemmis, (1824) 9 C. & F. 749. The Act, however, makes no such distinction. As to the decision in Jagatpal v. Jageshwar, (1909) 25 A. 143 (P.C.) which refers to cl. (5), see notes to cl. (2) ante.

4. Doe v. Turfurd, (1832) 3 B. & Ad, 890, 897, 898.

adopted by the declarant.<sup>5</sup> Further, if the declarant purports to charge himself as the agent, or receiver of another, it is generally necessary, in addition, to give some proof that he really occupied the alleged position.<sup>6</sup>

The statement relevant must, however, have been, to the knowledge of the deceased, contrary to his interest.<sup>7</sup> So, where the statement of a person is received under this clause on the ground that it might expose that person to a suit for damages, but there is no reason whatever for thinking that he supposed that he was exposing himself to a suit for damages, the statement can be admitted in evidence.<sup>8</sup>

#### CLAUSE 4

##### SYNOPSIS

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|--|--|
| 1. Scope.                                | 5. Matters of Public and general interest. |
| 2. Opinion: Particular facts.            | 6. Form of declaration.                    |
| 3. "Opinion"—Sections 32 (4), 48 and 49. | 7. Lis mota and interest.                  |
| 4. Custom.                               | 8. Mode of proof.                          |
| (a) General.                             |  |
| (b) Recitals of boundaries.              |  |

**1. Scope.** Declarations made *ante litem motam* by persons who are now dead in respect of a question relating to a matter of general or public interest, are admissible, even if they be no more than evidence of reputation or hearsay evidence.<sup>9</sup> Illustration (i) exemplifies this clause and the points to be regarded in it are, that (a) opinion may be given in evidence as to the existence of, (b) any public custom or right, (c) or of any matter of public or general interest, (d) provided there was a probability of knowledge on the part of the declarant, and (e) provided the declaration was made *ante litem motam*. The grounds upon which the evidence in this and the seventh clause mentioned is admitted, are considered in the note to such last clause, and in the Introduction, *ante*. The basis for the reception of this kind of hearsay evidence was put very concisely by Sargent, L. J. in *Stoney v. Eastbourne D. C.*<sup>10</sup> in the following words :

"Looking at the reasons for the admissibility of hearsay evidence with regard to public rights, it appears to me that this is founded upon the nature of those rights and the reliability of evidence with regard to them."

It is not essential to the admissibility, though it is to the weight of the declarations, that they should be corroborated by proof of the exercise of the

5. Doe v. Hawkins, (1841) 2 Q.B. 212; Barry v. Bebbington, 4 T.R. 514; Lancum v. Lovell, (1834) 6 C. & P. 437; Exeter v. Warren, (1844) 5 Q.B. 773; Brady v. James, (1853) 13 C. B. 822; *Quare*—whether the Act adopts rule by the use of the word "made" in the opening clause of the section; as to proof of handwriting, see Ss. 47, 67; and as to documents 30 years old, see S. 90, post.
6. Taylor, Ev., ss. 682, 683; as to in-
- dependent evidence of the existence of the charge subsequently liquidated, v. ante pp., 343-344.
7. Lloyd v. Powell, (1913) 2 K.B. 130 (C.A.).
8. Savitri Devi v. Ram Ran Bijoy Prasad Singh, 1950 P.C. I; 76 I. A. 255; 1950 A. L. J. 134; (1950) 1 M. L. J. 163; 63 L. W. 45.
9. Busoid v. Newaj Ahmad Khan, 1929 Cal. 533; 119 I.C. 116. (1927) 1 Ch. 367, 406.

right within living memory.<sup>11</sup> The best way to prove ancient rights is to prove particular acts and usage, as far back as living memory goes, and then adduce evidence of reputation in regard to the preceding time. In a suit, in which the question was whether there existed a custom of the *Kadwa Kandi* caste to which the parties belonged, prohibiting a widow from adopting a son, the lower Court, apparently considering that it would be unreasonable to oblige the plaintiff to incur the expense of procuring attendance of the witnesses, admitted in evidence under this clause, a statement signed by several witnesses to the effect that a widow of this caste cannot adopt according to the custom of the caste, without the express authority of her husband. On appeal, the Bombay High Court held, that the fourth clause of the thirty-second section was not applicable to the case, as the evidence was required to prove a fact in issue and not merely a relevant fact and the statement was, therefore, inadmissible to prove the alleged custom.<sup>12</sup> But this was dissented from by a Bench of the Madras High Court in *Raghubbhushna Tirthaswami v. Vidyavaridhi Tirthaswami*,<sup>13</sup> in which Abdur Rahim, J., observed :

"That obviously was not a proper case under Sec. 32, cl. (4); for the inconvenience and expense to be taken into account must be with respect to individual witnesses, and not arising merely from the number of witnesses which a party wishes to call. But when the learned Judges observe that the statement was inadmissible because it was required to prove a fact in issue, and not merely a relevant fact, I venture to think with all deference that it is not a sound distinction to draw. A fact in issue is always a relevant fact, and I can see no reason for excluding from the operation of cl. (4), Sec. 32, statements relating to facts in issue. If they were to be excluded, much valuable evidence hitherto considered admissible would be unavailable as will be apparent from the illustrations to Sec. 32 and also to the definitions of facts in issue and relevant facts."

As observed by Phillips, J. in the same case<sup>14</sup> :

"If a fact is in issue, it is undoubtedly a fact relevant to the case or proceeding. Facts must be either relevant or irrelevant, and I am not prepared to uphold the learned Advocate-General's contention that there are separate classes of facts, relevant, irrelevant, and facts in issue. To hold that facts in issue are not relevant facts within the meaning of Sec. 32, and I cannot see that the meaning in that section can be different to the meaning in other portions of the Evidence Act, would lead to startling results. Dying declarations as to the deceased's murderer would be inadmissible in evidence, for undoubtedly the identity of the murderer is a fact in issue in a trial for murder. A court could also shut out most important evidence by framing issues as regards all the relevant facts. These facts would then become facts in issue, and all statements relating to them would at once be inadmissible. This can-

11. *Crease v. Barrett*, (1835) 1 C. M. & R. 919, 930; and cases cited in *Taylor, Ev.*, s. 619.

12. *Patel Vandravan Jekisan v. Patel Manilal Chunilal*, (1891) 15 Bom.

565. 13. 1917 Mad. 809 at 815: 34 I. C. 875.

14. At p. 824 of A. I. R. 1917 Madras.

not have been the intention of the Legislature. Facts in issue are facts about which there is a question in issue between the parties, and although all relevant facts are not necessarily facts in issue, I cannot understand how the facts that are in issue can be other than relevant to the determination of the suit, and this, I think, is clear from the language of Sec. 6, which says: 'Facts, which though not in issue are so connected with a fact in issue as to form part of the same transaction, are relevant', thus implying that facts in issue must be relevant."

**2. Opinion: Particular facts.** The statement declared by the Act to be relevant is a statement which gives the opinion of the person making it, not facts within his own knowledge, but of reputation which his position has naturally brought within his own knowledge. The declarant's statement must embody, not his own individual knowledge or belief alone, but also the concurring opinions of others similarly interested to himself, and those opinions in their turn may be based in part on earlier traditions extending back through any number of generations. This is what is understood in this connection by the term "reputation". But, if the declarant's circumstances were such that he was apparently competent to state what the common report upon the subject was, it will be presumed, till the contrary is shown, that this utterance was an expression of opinion both to himself and others. Reputation as to the existence of particular facts is inadmissible. The declaration must relate to the general right, and not of particular facts which support or negative it, for the latter not being equally notorious are liable to be misrepresented or misunderstood, and may have been connected with other facts which if known, would qualify or explain them.<sup>15</sup> Thus, if the question be whether a road is public or private, declarations by old persons, since dead, that they have seen repairs done upon it, are inadmissible.<sup>16</sup> On the other hand, on the same question, declarations by deceased residents in the neighbourhood that it was 'public'<sup>17</sup> or that it was 'private'<sup>18</sup> are receivable. The test of admissibility is whether the deceased person expressing the opinion was likely to have had knowledge. In the case of the *mahants*, even if they may have had knowledge by means of oral tradition handed down from *mahant* to *chela*, the opinion would be relevant but not particular facts.<sup>19</sup>

As, however, reputation is evidence as well as against a public right as in its favour, declarations have been received which not only directly negative the rights but which indirectly do so, as by setting up an inconsistent private claim, or by omitting all mention of it, where mention might reasonably have been expected.<sup>20</sup>

15. Wills. Ev., 3rd. Ed., 227-228 and cases there cited; Taylor Ev., s. 617; Steph. Dig. Art. 30. Declarations as to particular facts from which the existence of any such public or general right or custom or matter of public or general interest may be inferred are deemed to be irrelevant.

16. R. v. Bliss, (1837) 7 A. & E. 550.

17. Crease v. Barrett, (1835) 1 C. M. & R. 919.

18. Drinkwater v. Porter, (1835) 7 C.

& P. 181.  
19. Ram Prashad v. Shiromani Gurudwara Committee, 1931 Lah. 161: I.L.R. 12 Lah. 497; 135 I. C. 657.  
20. Drinkwater v. Porter, (1835) 7 C. & P. 181 followed in Sivasubramanya v. Secretary of State, (1884) 9 M. 285, 294: (No distinction can be drawn between evidence of reputation to establish, and to disparage a public right, Taylor, Ev., s. 620).

**3. "Opinion"—Secs. 32 (4), 48 and 49.** A living witness may state his opinion on the existence of a family custom, and may state, as grounds thereof, information derived from deceased person but it must be the expression of independent opinion based on hearsay, and not repetition of hearsay. The weight of the evidence would depend on the position and character of the witness, and of the persons on whose statement he has formed his opinion : see *Garuradhwaja Prasad v. Superundhwaja Prasad*.<sup>21</sup> However evidence, oral or documentary, as to statements of a deceased person as to the custom in a family is not admissible, if it appears that such statements were made after controversy as to the custom had arisen, see *Ekradewhar v. Mst. Janeshwari*.<sup>22</sup> Sections 48 and 49, Evidence Act, deal with opinion evidence. Section 49 refers to the evidence of living witnesses. Section 48 refers to the evidence of a living witness produced before a Court, shown and subjected to cross-examination. This section when read with Sec. 60, Evidence Act, requires that the person who holds the opinion should be called as a witness. Statements made by deceased persons after the controversy had arisen, and therefore inadmissible under Section 32, are admissible under Sections 48 and 49. They cannot be admitted under clause (7) of this either.<sup>23</sup>

**4. Custom.** (a) *General.* *Wajib-ul-arz* entries in a 'Record-of-Rights', or a *wajib-ul-arz* or *rewajeam* being the recorded opinions of the *lambardars* and other leading men of the village have been held to be admissible as evidence of village customs under this clause.<sup>24</sup> In *Lekraj Kuar v. Mahpal Singh*,<sup>25</sup> their Lordships of the Privy Council, referring to certain entries in a *wajib-ul-arz*, stated that even if those entries were not to be treated as records describing the custom, they could at all events be treated as recording the opinions of persons likely to know it, and as such, the record of those opinions could be admitted in evidence. So also, a settlement report in which record of the evidence may be taken without examining its author.<sup>1</sup> Direct evidence cannot be obtained of things which occurred before the memory of man, and persons having special means of knowledge are, therefore, permitted to testify to their existence from such knowledge as they might possess of what has been practised in the community, or from what they might have heard from persons having special means of knowledge of what was practised before.<sup>2</sup>

(b) *Recitals of boundaries.* It cannot certainly be contended that the recitals in the boundaries of plots covered by any document constitute the opinion of the executant of the deed on any matter whatsoever ; they are not, therefore, admissible to prove any public right or custom under this clause.<sup>3</sup>

- 21. (1900) 23 All. 37: 27 I. A. 238 (P.C.).
- 22. A. I. R. 1914 P.C. 76: 25 I.C. 417; 41 I.A. 275; 42 Cal. 582 (P.C.).
- 23. (Mst.) Amina v. Khalilurrahman, 1933 Oudh 246; I. L. R. 8 Luck. 445; Parbhu Narain v. Jitendra Mohan, 1948 Oudh 307; I. L. R. 22 Luck. 522; Pratap Chandra v. Jagdish Chandra, 1925 Cal. 116: 82 I.C. 886.
- 24. Gujar v. Shamas, 107 P. R. 1887; see also Digambar Singh v. Ahmad Sayeed Khan, 1914 P. C. 11; I. L. R. 37 All. 129: 42 I.A. 10: 28 I.C.

- 34; Sheobaran Singh v. Mst. Kulsumunnissa, 1927 P.C. 113; 54 I. A. 204; I. L. R. 49 All. 367: 101 I.C. 368; Jwala Singh v. Province of Punjab, 1948 East Punjab 59: 50 P.L.R. 113.
- 25. (1880) 5 Cal. 744; 7 I. A. 63 (P.C.).
- 1. Somar Ram v. Budhu Ram, 1937 Pat. 463: 171 I. C. 115.
- 2. Iqbal Narain v. Rajendra Narain, 1918 Oudh 449: 48 I.C. 767: 21 O.C. 276.
- 3. Ram Saran v. Narayan Chandra, 1954 Cal. 125.

**5. Matters of public and general interest.** The terms "public" and "general" are sometimes used as synonymous. But a distinction is drawn in English law between the two terms when dealing with the question of the competent knowledge of the declarant. According to it, public rights are those common to all members of the State, e.g., rights of highway and ferry, while general rights are those affecting any considerable section of the community, e. g., questions as to the boundaries of a parish or manor. The distinction is of importance in English law, because when the point in issue is of a public character, evidence of any person is receivable as to it, even though he has no specific means of knowledge; all being concerned are presumed competent, the absence of peculiar means of knowledge going to weight and not admissibility; in the case of general rights, on the other hand, the declarants must have possessed competent knowledge which may either be shown by proof of residence in, or other connection with, the locality, or presumed from the circumstances under which the declaration was made.<sup>4</sup> But, as this clause requires a probability of knowledge in all cases, this distinction ceases to be of importance in India. In both classes of rights, public and general, the rights must have been only one of the existence of which, if they existed, the declarant would have been likely to be aware.<sup>5</sup> It is to be noted, that "interests" in this context does not mean that which is interesting as gratifying curiosity or satisfying a desire for amusement; by pecuniary interests are meant those which are connected with the legal rights or liabilities of the members of the community.<sup>6</sup> Instances of matters which have been held to be of public and general interest are questions as to the boundaries of a country, town, parish, manor or hamlet, the existence of a highway or of a right to tolls on a public road, the liability of certain land-owners to repair a bridge or sea-wall, manorial customs, and the like. On the other hand, questions as to the boundaries of two private estates, the existence of a private right of way over a field, a custom of electing the master of a grammar school, and the like, have been held to be matters of a private nature.<sup>7</sup>

The question of the limits of a particular revenue mahal is not a matter of public right, or public or general interest as to be within this clause.<sup>8</sup> A statement that certain premises were a mosque to use which the Mahommedan public of the vicinity have a right, is a statement as to a matter of general or public interest.<sup>9</sup>

The decided Indian cases furnish few examples but one instance of the admission of such statements is to be found in a suit<sup>10</sup> brought by a zamindar

4. Taylor, Ev., ss. 609, 612; Steph. Dig. Art. 30; Phipson Ev., 11th Ed., 406; Devonshire v. Meill, (1877) L.R. 2 Ir. (Q.B.) 132; as to the meaning of "general custom or right" see S. 48, post; as to whether the rights mentioned in this clause are incorporated only; see Gujju v. Fateh, (1880) 6 C. 171 (F.B.) 186, 187 and Sivasubramanya v. Secretary of State, (1884) 9 M. 285.
5. S. 32, cl. (4).
6. Campbell, C. J., in R. v. Bedfordshire, (1855) 4 E. & B. 535; 24 L. I. Q. B. 81.
7. See Taylor, Ev., ss. 613, 614, where a large number of cases are collected.
8. Kesho Prasad Singh v. Mst. Bhagjogna Kuer, 1937 P.C. 69; I. L. R. 16 Pat. 258; 167 I.C. 329; 1937 A. L. J. 638; 39 Bom. L. R. 731; 65 C.L.J. 241; 41 C. W. N. 577; (1937) 2 M. L. J. 631; 1937 M. W. N. 583; 45 L. W. 580; 1937 O. W. N. 396.
9. Busoid v. Newaj Ahmed Khan, 1929 Cal. 533; 119 I.C. 116.
10. Sivasubramanya v. Secretary of State for India, (1885) 9 Mad. 285.

to recover certain forest tracts from Government on the ground that they were included within the limits of his zamindari. Both plaintiff and defendants in this case relied on certain *ayakut* accounts as containing statements of boundaries and furnishing proof of the inclusion of the disputed tracts in the zamindari limits of Government villages. These accounts were accounts made for revenue purposes to show the sources of revenue in each village, and they gave the limits of the villages to which they referred. Inasmuch as they were from time to time prepared for administrative purposes by village officers, they were said to be admissible as evidence of reputation, provided they were produced from proper custody and otherwise sufficiently proved to be genuine.<sup>11</sup>

Illustration (i) is taken from those parts of the country in which the village system still exists; it has long died out, if it ever perfectly existed, in lower Bengal. Public rights or customs are little understood; and the order of the Government, or of the Executive head of a district is often accepted as conclusive rights concerning them. In large zamindaries, questions, however, occasionally arise somewhat analogous to those which occur in manors in England, such as, for example, as to the zamindar's right to take dues on the sale of trees, or to receive one-fourth of the sale proceeds in cases of involuntary sale, as in execution or in case of a house sold privately.<sup>12</sup>

Except as evidence of reputation to discharge a public right,<sup>13</sup> declarations by deceased persons as to private right are inadmissible, since these are not likely to be commonly or correctly known, and are more liable to be misrepresented.<sup>14</sup> In the undermentioned case, it was held, that neither clause 4 nor clause 5 of this section justifies the admission of hearsay evidence upon the question whether a particular person survived another, or upon the question whether a man was, at the time of his death, joint with or separate from other members of his family, nor can the grounds of the opinion of a deceased person as to the existence of custom, even if stated to a witness, be as such proved under this section.<sup>15</sup> The grounds upon which evidence of reputation upon general custom is receivable do not apply to private titles, either with regard to particular custom or private prescriptions, as it is not generally possible for strangers to know anything of what concerns only private title.<sup>16</sup> Reputation may, however, be given in evidence under this Act in proof of private rights, if it consists of the written statements mentioned in the seventh clause, post.

**6. Form of the declaration.** Declarations as to the public and general rights may be made in any form or manner.<sup>17</sup> The statements under this clause may have been written or verbal. But reputation as to matters of gene-

11. *Ibid.*

12. As to manorial customs, see S. 42, post; and as to presentments of customary Courts, see Wills, Ev., 2nd Ed., 230-232.

13. *Drinkwater v. Porter*, (1835) 7 C. & P. 181; *Sivasubramanya v. Secretary of State for India*, (1885) 9 Mad., 285 at 294.

14. Taylor, Ev., ss. 615, 616; Phipson, Ev., 11th Ed., 406; Roscoe, N. P. Ev. 49 and cases there cited; Heiniger v. Droz., (1900) 23 B. 433, 440, 441; 3 Bom. L. R. 1 (S. 32 cl. (4) is

manifestly inapplicable to a document purporting to deal with the right of a private individual as against the public, in which the interest of the individual formed the subject-matter of the statements); as to the evidence of "ancient possession", v. post.

15. *Parbati v. Rani Chandrapal*, (1902) 8 O. C. 94 (P.C.); 361 I. A. 125.

16. *Morewood v. Wood*, (1791) 14 East 327n.

17. Steph. Dig. Art. 30.

ral interest is not confined to the declarations here mentioned. It may be evidence by recitals, in deeds, wills, or other documents under the provisions of the seventh clause. The following are instances of the manner in which declarations as to matters of public and general interest may be made; they may be made by or in statements, verbal or written, giving opinions,<sup>18</sup> maps prepared by, or by the direction of, person interested in the matter,<sup>19</sup> deeds and leases between private persons,<sup>20</sup> orders, judgments and decrees of Courts, if final.<sup>21</sup>

**7. Lis mota and interest.** In order to prevent bias, the declarations, to be admissible, must have been made *ante litem motam*, or before the commencement of any controversy, legal or otherwise, touching the matter to which they relate. By *lis mota* is meant the commencement of the controversy and not the commencement of the suit.<sup>22</sup>

A statement as to the existence of a family custom relating to disposal of property by will, made in a petition of objection in a probate case, has been held to be inadmissible, as it was made after a controversy as to the custom of making a will had arisen.<sup>23</sup> This qualification is not confined to matters of public and general interest, but equally governs the admissibility of hearsay evidence in matters of pedigree.<sup>24</sup> "There must be, not merely facts which may lead to a dispute, but a *lis mota* or suit, or controversy preparatory to a suit, actually commenced or dispute arisen, and that upon the very same pedigree or subject-matter which constitutes the question in litigation."<sup>25</sup> Therefore, declarations will not be rejected in consequence of their having been made with the express view of preventing disputes.<sup>1</sup>

They are admissible, if no dispute has arisen, though made in direct support of the title of the declarant,<sup>2</sup> and the mere fact of the declarant having stood, or having believed that he stood, *in pari jure* with the party relying on the declaration, will not render his statement inadmissible.<sup>3</sup> The declaration

18. S. 32, cl. (4) v. ante.

19. Hammond v. Bradstreet, (1854) 10 Ex. 390; see cl. (7), post.

20. Plaxton v. Dare, (1829) 10 B. & C. 17.

21. S. 42 post; Steph. Dig. Art. 30, illust. (b).

22. Ekradeshwar Singh v. Mst. Janeshwari Bahusin, 1914 P.C. 76; 41 I. A. 275; I. L. R. 42 Cal. 582; 25 I. C. 417; 12 A. L. J. 1217; 17 Bom. L. R. 18; 21 C. L. J. 9; 18 C. W. N. 1249; 27 M. L. J. 373; 1914 M. W. N. 807; (Mst.) Amina Khatun v. Khalilurrahman Khan, 1933 Oudh 246; I. L. R. 8 Luck. 445; 10 O. W. N. 268; Parbhoo Narain v. Jitendra Mohan Singh, 1948 Oudh 307; I. L. R. 22 Luck, 522; Berkeley Peerage Case, (1811) 4 Camp. 401; Monkton v. Attorney-Genl., (1831) 2 Russ. & Myl. 161; Taylor Ev., s. 629.

23. Protap Chandra v. Jugadish Chandra, 1925 Cal. 116; 82 I.C. 886; 40

C. L. J. 331.

24. See cl. (5) and (6); its operation may therefore be illustrated by indiscriminate reference to both these classes of cases; Taylor, Ev., s. 628.

25. Davies v. Lowndes, (1843) 7 Scott N. R. 211, per Lord Denman; Taylor, Ev., s. 630 and cases there cited.

1. Berkley Peerage Case, (1811) 4 Camp. 401.

2. Doe v. Davies, (1847) 10 Q. B. 314. (although a feeling of interest will often cast suspicion on declarations it will not render them inadmissible, per curiam). See also Mazhar Ali v. Gulam Murtujah, A. I. R. 1958 A. P. 8 where a statement by great-grandson's son of original grantee in inam proceedings was given great weight as one made *ante litem motam*, although it was in the interests of the maker.

3. Taylor, Ev., ss. 630, 631.

will also be received, although made after a claim had been asserted but finally abandoned,<sup>4</sup> or after the existence of non-contentious legal proceedings involving the same right,<sup>5</sup> or after the existence of contentious legal proceedings involving the same right only *collaterally* and not directly,<sup>6</sup> for the controversy must have related to the particular subject in issue.<sup>7</sup> But declarations made, after the controversy has originated, are inadmissible, although the existence of the controversy was not known to the declarant, for to enquire into this would be to enter into a collateral issue.<sup>8</sup> The admissibility of declarations terminates with the commencement of the controversy, and the termination of this admissibility is not affected by its being known that proceedings were fraudulently commenced with the view to exclude the possibility of any such declaration,<sup>9</sup> and the evidence will be excluded, even though the former controversy were between the same parties or had reference to a different property or claim, if matters to which the statement relates were clearly under discussion in the former dispute.<sup>10</sup>

**8. Mode of proof.** If a right is claimed by virtue of a custom, all the essential characteristics of a custom, bearing on it, have to be established, e.g., (a) that the right was certain and invariable; (b) that its enjoyment was not had by leave or permission; (c) that the custom could be said to be reasonable; and (d) that it had been in existence for a fairly long period of time. Sections 13, 32 (4), 43 and 48 of the Act have a bearing on the mode of proving a customary right.<sup>11</sup>

### CLAUSES 5 AND 6 SYNOPSIS

1. Scope.
  - (a) General.
  - (b) Distinction between clauses (5) and (6).
2. Conditions for the application of clauses (5) and (6).
3. Form of declaration.
  - (a) General.
  - (b) Horoscopes.
  - (c) Wills and deeds; Inscriptions on tomb-stones or paintings.
  - (d) Register of baptism.
  - (e) School registers.
4. Pedigrees.
5. Issue on which declarations are admissible.
  - (a) English law.
  - (b) American law.
  - (c) Indian law.
    - (i) Minority, age and date of birth.
    - (ii) Date of death.
    - (iii) Legitimacy. Parentage and names of relations.
6. The existence of any relationship by "blood, marriage or adoption".
  - (a) General.
  - (b) By blood.
  - (c) By marriage.
  - (d) By adoption.
7. Persons from whom declarations are receivable.
  - (a) Persons having special means of knowledge.
  - (b) Evidence of general reputation not admissible.
  - (c) Proof of special means of knowledge.
  - (d) Family Bards and Priests.
  - (e) Mukhiyas, Wasiqadars.
  - (f) Other statements.
8. Personal knowledge.
9. Contemporaneousness.
10. Particular facts.
11. Lis mota.
12. Objection to admissibility.

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4. Phipson, Ev., 11th Ed., 407.
5. Phipson, Ev., 11th Ed., 407; Briscoe v. Lomax, (1838) 8 A. & E. 198; Gee v. Ward, (1857) 7 E. & B. 509.
6. Ib., Freeman v. Phillips, (1816) 4 M. & S. 486.
7. Taylor, Ev., s. 632; Wills Ev., 2nd Ed., 230.
8. Sheldden v. Attorney-Genl., (1861) 30 L. J. P. & M. 217; Berkeley Peérage Case, (1811) 4 Camp. 401; R. L. Singh v. A. A. Singh, A. I. R. 1958 Manipur 7.
9. Sheldden v. Attorney-Genl., supra.
10. Taylor, Ev., s. 633.
11. Ram Chandra Singh v. Partap Singh, A. I. R. 1965 Raj. 217: 1965 Raj. L. W. 242.

**1. Scope.** (a) *General.* Under the Act the extent to which hearsay evidence with regard to relationship is admissible may be summarised shortly under three heads: (a) statements made orally or in writing by persons deceased, etc., having special knowledge,<sup>12</sup> *ante litem motam* (Section 32, fifth clause), (b) statements in writing as to relationship between persons deceased in will, or deeds relating to the affairs of the family to which they belonged, etc., made *ante litem motam* (Sec. 32, sixth clause), (c) opinion shown by conduct as to the existence of a relationship by a person who had special means of knowledge (Sec. 50).<sup>13</sup>

(b) *Distinction between clauses (5) and (6).* Clauses fifth and sixth, which are exemplified by illustrations (k), (l) and (m), together with Sec. 50 post, deal with the relevancy of certain facts which are treated by English text-writers under the single head of "matters of pedigree". There are, however, important differences between the English and Indian law on the subject of the statements which are dealt with by abovementioned clauses of this section. There is further a distinction to be noted between the kinds of evidence to which each clause refers. The statement declared relevant by the fifth clause is a statement relating to the existence of any relationship between persons living or dead, as to whose relationship the person making the statement had special means of knowledge such as the statement of deceased relatives, servants and dependants of the family.<sup>14</sup> The statement mentioned in the sixth clause is a statement relating to the existence of relationship between deceased persons only. This last clause does not embrace the case of a statement of relationship between a deceased person and a living person.<sup>15</sup> It does not deal with the question by whom the statement is to be made nor does it require that it should have been made by a person who had special means of knowledge, possibly on the ground that it is improbable that any person would insert in a solemn deed, will, etc., any matter the truth of which he did not know or had not satisfactorily ascertained but stated that it must be contained in the documents or other material things therein mentioned. On the other hand the language of clause 5 requires only that the statement tendered in evidence must be one made by a person having special means of knowing the relationship to which it relates, and that it must have been made *ante litem motam*. These are the only prerequisites to the admission of the statement,<sup>16</sup> and it is not necessary that it should be contained in any document. It may be written or verbal. Again, it is not necessary that the statement should be relevant to the matter in issue in respect of which it was made. It is to be observed that the Legislature does not say that the statement should have been made in a judicial case, where alone the question of relevancy can arise. The language, unrestricted as it is by any such condition, embraces every statement

12. *Kandulom v. Satuluri*, 1925 Mad. 823; 88 I.C. 646; 1925 M. W. N. 117; 22 L. W. 73; 48 M. L. T. 467.

13. *Bejai v. Bhupindar*, (1895) 17 A. 456. (P.C.) see S. 50 post.

14. *Garurudhwaja v. Surarundhwaja*, (1900) 27 I. A. 238; 23 A. 37; *Oriental Life Assurance Co. v. Narasimha*, 25 M. 183, 207, 209, in which the statements of the deceased himself, his sister and others were tendered: or as admitted to the report of panchayet, as evidence of pedigree, see

*Ajabsingh v. Nanabhau*, (1898) 96 I. A. 48; 25 B. 1; 3 C. W. N. 130.

15. *Ramnarain v. Monce*, (1883) 9 C. 613, 614.

16. *Mst. Biro v. Atma Ram*, 1937 P.C. 101; 64 I.A. 92; 167 I.C. 346; 1937 A. L. T. 462; 39 Bom. L. R. 726; 65 C. L. J. 309; 41 C. W. N. 645; (1937) 1 M. L. J. 646; 1937 M. W. N. 424; 45 L. W. 451; 1937 P. W. N. 424; 18 P. L. T. 377; 59 P. L. R. 429; 31 S. L. R. 262.

as to relationship made *ante litem motam* by a person having special means of knowledge of it ; and it is immaterial whether it was made in a judicial proceeding or otherwise. It is clear that for an extra-judicial statement there can be no issue with reference to which the question of relevancy may be determined.<sup>17</sup> It has been held that a family pedigree kept by the family chronicler as prepared by him, from time to time, from information supplied by members of the family was admissible both under the second clause as also under the sixth clause as having been kept by a person engaged by the members of the family to keep a record of the family events.<sup>18</sup> A statement made by a deceased as to the person who will be his successor is not admissible under this section.<sup>19</sup>

**2. Conditions for the application of clauses (5) and (6).** The following four conditions must be fulfilled for the application of clause (5) of this Section, namely :—

- (1) the statement, written or verbal, of relevant facts must have been made by a person who is dead, or who cannot be found etc., as mentioned in the opening part of the Section ;
- (2) the statement must relate to the existence of any relationship by blood, marriage or adoption ;
- (3) the person making the statement must have had special means of knowledge as to the relationship in question ; and
- (4) the statement must have been made before the question in dispute was raised.<sup>20</sup>

And the following conditions must be fulfilled for the application of clause (6), namely :—

- (1) the statement, written or verbal, of relevant facts must have been made by a person who is dead, or who cannot be found, etc., as mentioned in the opening part of the Section ;
- (2) the statement must relate to the existence of any relationship by blood, marriage or adoption, between deceased persons ;
- (3) the statement must have been made :
  - (a) in any will or deed relating to the affairs of the family to which any such deceased person belonged, or
  - (b) in any family pedigree, or
  - (c) upon any tomb-stone, family portrait or other things on which such statements are usually made ; and
- (4) the statement must have been made before the question in dispute was raised.

17. Mst. Biro v. Atma Ram, 1937 P.C. 101.
18. Mohansingh v. Dalpatsingh, 1922 Bom. 51; I. L. R. 46 Bom. 753; 67 I. C. 235; 24 Bom. L. R. 289.
19. Prayag v. Siva, 1926 Cal. 1; (1925) 42 C. L. J. 280.
20. K. Venkata Subbaraju v. C. Subbaraju, (1968) 2 S. C. R. 292; (1968) 2 S. C. A. 195; 1968 S. C. D.

- 683; (1968) 2 S. C. J. 513; (1968) 1 S. C. W. R. 940; (1968) 2 Andh. W. R. (S.C.) 75; (1968) 2 M. L. J. (S.C.) 75; A. I. R. 1968 S. C. 947, 953 (in this case statement *post litem motum* and therefore inadmissible) See Dolgovinda v. Nimaicharan, (1960) 1 S. C. A. 39; A. I. R. 1959 S. C. 914; 26 Cut. L. T. 130.

The requirement under both the Clauses (5) and (6) is that in order to be admissible the statement must be made *ante litem motam* by persons who are dead, i.e., before the commencement of any controversy, actual or legal, upon the same point. The words 'before the question in dispute was raised' do not necessarily mean before it was raised in the particular litigation in which such a statement is adduced in evidence. The restriction is based on the principle that bias should be obviated.<sup>21</sup> Thus, the statement of the defendant's mother that the plaintiff was not her son by her second marriage made after dispute has arisen between the parties, is not admissible under Cl. (5).<sup>22</sup>

**3. Form of declaration.** (a) *General.* Beside the documents and other material things mentioned in the sixth clause, family Bibles, coffin-plates, mural monuments, hatchments, rings, armorial bearings, birthday books<sup>23</sup> and the like, amongst Christians, and books kept up by family bards<sup>24</sup> of domestic events in the families to which they are attached,<sup>25</sup> or pandas and horoscopes<sup>1</sup> among Hindus, are examples of other documents and things on the basis of which such statements are usually made.<sup>2</sup>

(b) *Horoscopes.* A horoscope is inadmissible unless its correctness is vouched either by its writer, or by a person with special means of knowledge.<sup>3</sup> Horoscopes have been held inadmissible in two earlier cases: (1) *Ram Narain Kallia v. Monee Bibee*,<sup>4</sup> the chief ground on which the evidence was rejected in this case was that it was not shown that the attendance of the writer was not procurable; (2) *Satis v. Mohendra*.<sup>5</sup> A distinction is to be observed between horoscopes tendered under Sec. 32, clause (6), and under Sec. 32, clause (5), as the statements of persons having special means of knowledge, and as being an admission under Secs. 17 and 18.<sup>6</sup> On questions of age or minority, a

21. *K. Venkata Subbaraju v. C. Subbaraju*, (1968) 2 S. C. R. 292; (1968) 2 S.C.A. 195; 1968 S.C.D. 683; (1968) 2 S. C. J. 513; (1968) 1 S. C. W. R. 940; (1968) 2 Andh. W. R. (S.C.) 75; A.I.R. 1968 S.C. 947, 953 (in this case statement *post litem motam* and therefore inadmissible); see *Dolgovinda v. Nimaicharan*, (1960) 1 S. C. A. 39; A. I. R. 1959 S. C. 914; 26 Cut. L. T. 130; *C. Audilakshnammma v. A. Rama Rao*, (1972) 2 Andh. W. R. 346; A. I. R. 1973 A. P. 149.
22. *Jaggan v. Basantu*, 1966 A. L. J. 318; 1966 A. W. R. (H.C.) 772.
23. *Chuah Hooi v. Khaw Sim Bee*, 1915 P. C. 45; 31 I.C. 637; 19 C.W. N. 787.
24. Gangabasis in the instant case; I.L.R. (1971) 1 All. 254.
25. *Mst. Anandi v. Nand Lal*, 1924 All. 575; I. L. R. 46 A. 665; 83 I. C. 618; 22 A. L. J. 657.
1. *Ramanathan Chetty v. Murugappa Chetty*, 33 I. C. 969; A. I. R. 1917 Mad. 980; *Nirmalanalini v. Kamalabala*, 1933 Cal. 51; 142 I. C. 36; 56 C. L. J. 253; 36 C. W. N. 838.
2. See generally Taylor, Ev., ss. 650–657.
3. *Krishnamachariar v. Krishnamachariar*, 1915 Mad. 815; I. L. R. 38 Mad. 166; 19 I. C. 452; *Noni Gopal Ganguly v. Trustees for the Improvement of Calcutta*, 1938 Cal. 43; 174 I. C. 756; *Vishnu v. Kuruvilla*, I. L. R. 1957 Ker. 367; A. I. R. 1957 Ker. 103.
4. (1883) 9 C. 613.
5. (1893) 17 C. 849. Quaere as to this case: assuming the horoscope to have been tendered, as stated, under cl. (6), that clause does not require that the maker of the statement should have had any special means of knowledge, and if tendered under cl. (5); *Ramnarain v. Monee*, which this case purported to follow, does not seem in point. Further upon the question whether the evidence is limited to cases where the question in issue is one of relationship v. post, and whether the words "relates to the existence of relationship" cover statement as to the commencement of relationship in point of time v. post.
6. See as to their use as admissions. *Goundan v. Goundan*, (1893) 17 M. 134; see *Rattonbai v. Chabildas*, (1888) 18 B. 7.

horoscope is not of very great evidentiary value<sup>7</sup> though the birth register is.<sup>8</sup> In order to be admissible under this section the statement in horoscope need not have been made at about the time of birth.<sup>9</sup>

(c) *Wills and deeds*: *Inscriptions on tomb-stones or paintings*. As to statements in wills<sup>10</sup> and deeds,<sup>11</sup> see the cases noted below. Inscriptions on tomb-stones, mural inscriptions and the like may be proved by any secondary evidence.<sup>12</sup>

(d) *Register of baptism*. A register of baptism, while evidence of that fact and of the date of it, furnishes, even if it states the date of a person's birth, no proof of the age of that person further than that at the date of such ceremony, the person referred to was already born. Evidence regarding the date of a man's birth has been held under certain circumstances to be admissible under the fifth clause; but in the case of entry in the register in question there is nothing to show by whom the statement entered was made, much less than the person making the statement had any special means of knowledge.<sup>13</sup>

(e) *School registers*. It has been held that where the question is as to the age of a person, the entry of the date of his birth in the school register based upon the statements of his deceased father is admissible in evidence under clause (5) of this section and also under Sec. 35, Evidence Act, the entry being in a public register stating the fact in issue and made by a public servant in the discharge of his official duties.<sup>14</sup> There is a presumption that when a

7. Secretary of State v. Hari Rao, A. I. R. 1978 Mad. 42; 91 L. W. 4: (1978) 1 M. L. J. 460.
8. Bharat Basi Naik v. Gopinath Naik, 1941 All. 385; 197 I. C. 866; 1941 A. L. J. 560; Ram v. Collector, 1959 M. W. R. (H.C.) 140; Paras Ram v. Dayal Das, A. I. R. 1965 H. P. 32 (horoscope not decisive or conclusive as to age); Secretary to Govt. v. Hari Rao, A. I. R. 1978 Mad. 42.
9. Secretary to Govt. v. Hari Rao, A. I. R. 1978 Mad. 42; 91 L. W. 4: (1978) 1 M. L. J. 460.
10. Nilmonee v. Zuheerunnissa, (1867) 8 W. R. 371; (where the incident mention of a child's age in the recital of a will was held to be no proof of the exact age of such child; the report does not show whether the child was dead at the time the evidence was offered. If dead, the case is no longer law); Chamanbu v. Multanchand, (1895) 20 B. 562; Hitnarain Singh v. Rambarai Rai, 1928 Pat. 459; I. L. R. 7 Pat. 733; 9 P. L. T. 484 (statement in will admissible even if probate has not been taken, but see Moheshwar Panda v. Sundar Narain Patnaik, 38 I. C. 342; 22 C. L. J. 551.
11. Timma v. Daramma, (1887) 10 M. 362 (in which it was ruled that a statement as to relationship in a deed held to be invalid was admissible in evidence).
12. S. 65, cl. (d), post; see definition of "Document" in S. 3, ante.
13. As to proof of date of birth after of years, see Shah Ara Begam v. Nanhi Begam alias Roshan Begam, 29 All. 29; 34 I. A. 1; 9 Bom. 130; 17 M. L. J. 32; 1 M. L. T. 429; L. R. 80; 5 C. L. J. 4; 11 C. W. N. 130 (P.C.).
14. Munna Lal v. Kameshwari Dat, 1929 Oudh 113; 114 I.C. 801; Latafat Hussain v. Onkar Mal, 1935 Oudh 41; I. L. R. 10 Luck. 423; 152 I.C. 1042; see also Maharaj Bhanudas v. Krishnabai, 1927 Bom. 11; I. L. R. 50, Bom. 716; 99 I.C. 307; 28 Bom. L. R. 1125; Indian Cotton Co., Ltd. v. Raghunath, 1931 Bom. 178; 130 I. C. 598; 38 Bom. L. R. 11; Bhim v. Magaram, A. I. R. 1961 Pat. 21; Naima v. Basant Singh, I. L. R. 56 A. 766; A. I. R. 1934 A. 406 (F.B.); Shiv Ram v. Shiv Charan, I. L. R. 1964 Raj. 26; A. I. R. 1964 Raj. 126.

boy was admitted into a school he was accompanied by some close relative of his who must have been aware of his age. Therefore, the entry of the boy's age in the school register is admissible.<sup>15</sup> But such entries cannot be implicitly relied upon. It would have to be seen whether the person who informed the school of the date of birth could have known the date and whether he was reliable.<sup>16</sup> Even slightest evidence to the contrary may negative the evidentiary value of such entry.<sup>17</sup> Even an entry in a pocket book in which a father is said to have made entries regarding the births of his various sons has been held to be admissible to prove the age of one of the sons.<sup>18</sup>

Clause (5) requires only that a statement tendered in evidence must be one made by a person having special means of knowing the relationship to which it relates, and that it must have been made before the question in dispute was raised. The clause does not lay down that the statement should be relevant to the matter in issue in respect of which it was made.<sup>19</sup> The clause admits a statement which "relates to the existence of any relationship," when all the other conditions mentioned in it are fulfilled. The illustration (i) puts the question thus : "what was the date of birth of A"? It answers that "a letter from A's deceased father to a friend, in announcing the birth of A on a given day, is a relevant fact." In *Syedol Ariffin v. Yeoh Ooi Gark*,<sup>20</sup> it was held that there is no repugnance between a statement which relates to the existence of a relationship and the illustration by a statement as to when A was born, that is, when the relationship began. The time of one's birth relates to the commencement of one's relationship by blood, and the statement, therefore, of one's age made by a person having special means of knowledge, relates to the existence of such relationship as that referred to in clause (5).<sup>21</sup> Therefore, if the parent of the plaintiff can come under one of the four classes of persons envisaged in the opening paragraph of this section, then the entry of age made in a record on his or her statement is admissible under clause (5).<sup>22</sup>

An entry in a birth or death register, which are public documents, regarding age, may be good evidence as to age.<sup>23</sup> As evidence of age a birth register entry is more reliable than school records. A birth certificate, unless disproved is conclusive evidence of age if identity is established.<sup>24</sup> But the Court is not bound to act upon a document in proof of age. It may require other evidence.<sup>25</sup>

**4. Pedigree.** Pedigrees may be admissible both under clause (5) and under clause (6). Proof of special means of knowledge is a pre-requisite to the admission of a pedigree under clause (5).<sup>1</sup> But for the admission of a

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- 15. *Kala Ram v. Fazal Bari*, 1941 Pesh. 38: 194 I. C. 824; 1941 Pesh. L. J. 38.
- 16. *Lachhmi Ram v. State of H. P.*, 1971 Simla L. J. 329.
- 17. *B. D. Singla v. Harchand Singh*, I. L. R. (1971) 1 Punjab 637: 42 Ele. L.R. 439; A. I. R. 1971 Punjab 65.
- 18. *Kala Ram v. Fazal Bari*, 1941 Pesh. 38: 194 I.C. 824: 1941 Pesh. L. J. 38.
- 19. *Biro v. Atma Ram*, L. R. 64 I. A. 92: 167 I. C. 346; A. I. R. 1937 P.C. 101.
- 20. L. R. 43 I. A. 256; A. I. R. 1916 P.C. 242.
- 21. *Ibid.*
- 22. *Bhim v. Magaram*, A. I. R. 1961 Pat. 21.
- 23. *Shiv Ram v. Shiv Charan*, I. L. R. 1964 Raj. 26; A. I. R. 1964 Raj. 126; *Bujhawan Singh v. Shyama*, A. I. R. 1964 Pat. 301.
- 24. *Hayath v. State of Mysore*, 1972 Mad. L. J. (Cri.) 177 (Mys.).
- 25. See *Nadessin v. Bharathi Mills*, I. L. R. (1964) 2 M. 468; A. I. R. 1964 M. 417; 77 L. W. 299.
- 1. *Bhima Singh v. Mst. Sundar*, 1922 Oudh 218: 69 I. C. 421; 26 O. C. 109; *Mohammad Azim Khan v. Mohammad Saadat Ali Khan*, 1931 Oudh 177: 8 O. W. N. 349.

family pedigree under clause (6), it is not necessary to prove that the writer of the pedigree had special means of knowledge, nor is it necessary that the possession of the pedigree should be with the family concerned.<sup>2</sup>

Referring to certain pedigrees before them, their Lordships of the Privy Council observed in *Kalka Prasad v. Mathura Prasad*,<sup>3</sup> "they are not ancient family records handed from generation to generation, and added to as a member of the family dies or is born, but documents drawn up on a particular occasion for a specific purpose by members of the family, and must accordingly be treated as mere declarations made by the persons who respectively drew them up or adopted them." But this cannot be taken to be an exhaustive definition of a "family pedigree" within the meaning of clause (6). The expression "family pedigree" as used in clause (6) is not confined to a document coming strictly within the description contained in that ruling, viz., "an ancient family record handed down from generation to generation and added to as a member of the family dies or is born."<sup>4</sup>

A pedigree admissible under clause (6) is a "family pedigree", but it may be a pedigree kept by a member of the family or by another person on its behalf, and, as pointed out in *Mohan Singh v. Dalpat Singh Hanbaji*,<sup>5</sup> it can be admitted in evidence, if it is written by a family bard for the purpose of keeping a record of the family events for his use, and for the use of the family.<sup>6</sup> But, in a latter Oudh case, it has been held that a pedigree cannot be admissible under clause (5), or clause (6), unless it is shown to be a statement of some member of the family or maintained in the family as a family pedigree.<sup>7</sup> Clause (6) enables a family pedigree to be admitted in evidence so long as the members of the family depend upon a particular person to keep a record of the family events before them.<sup>8</sup> Where a pedigree satisfies all the conditions prescribed by clause (6), and also of Sec. 90, the Court may make a presumption in favour of the genuineness, even if there is no evidence to show who had actually written it.<sup>9</sup>

Statements, whether they are tendered under the fifth clause or the sixth clause, must in order to be relevant have been made *ante litem motam*.<sup>10</sup> Statement by a mother on her behalf and on behalf of her three sons as to a pedigree, is admissible against the surviving sons, if it was *ante litem motam*.<sup>11</sup> For the admissibility of statements under either of these clauses, it must be shown

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- 2. *Lahanu v. Moti Ram*, A. I. R. 1921 Nag. 49: 63 I. C. 968: 4 N. L. J. 33.
- 3. 30 All. 510: 35 I. A. 166: 1 I.C. 175 (P.C.).
- 4. *Namdeo v. Ganoba*, 1925 Nag. 271: 86 I. C. 847: 8 N. L. J. 29; *Jang Bahadur Singh v. Arjun Singh*, 1928 Oudh 125: I. L. R. 3 Luck. 256: 110 I. C. 466.
- 5. A. I. R. 1922 Bom. 51: 46 Bom. 753: 67 I. C. 235: 24 Bom. L. R. 289.
- 6. (Mst.) *Anandi v. Nandlal*, 1924 All. 575: I. L. R. 46 All. 665: 83 I. C. 618; see also *Shyamanand v. Rama*, 32 Cal. 6.
- 7. *Kanhaiya Bux Singh v. Mst. Ram Dei Kuer*, 1944 Oudh 162: 1944 O. W. N. 83.
- 8. *Mohan Singh v. Dalpat Singh*, 1922 Bom. 51: I. L. R. 46 Bom. 753: 67 I. C. 235: 24 Bom. L. R. 289.
- 9. *Jagdeo v. Vithoba*, 1928 Nag. 20: 105 I. C. 81; *Jahangir v. Sheoraj Singh*, 37 All. 600: 30 I. C. 505: A. I. R. 1915 A. 334; *Lahanu v. Moti Ram*, *supra*.
- 10. v. *pest*.
- 11. *Dogobinda v. Nimai*, (1960) 1 S.C. A. 39; A. I. R. 1959 S.C. 914: 26 Cut. L. T. 130; *Mangal Singh v. Manphul Singh*, A. I. R. 1961 Punj. 251.

that the attendance of the person who made the statement is not procurable.<sup>12</sup> So, where a plaintiff tendered in evidence a horoscope under the sixth clause, but was unable to say who wrote it, and, therefore, unable to say whether the writer was dead, or could not be found, etc., the document was on this, and on other grounds, held to be inadmissible.<sup>13</sup> It will, in no way, affect the admissibility of this class of evidence that witnesses might have been called to prove the very facts to whom it relates.<sup>14</sup> Evidence regarding pedigree or *gotra* taken from public records, recorded in accordance with law, is good evidence, even if a particular link in the chain is not found.<sup>15</sup> But it has been held in the undermentioned case that every link in the chain of relationship in genealogical tables, must be proved.<sup>16</sup>

In questions of pedigree, the statements of deceased members of the family, made *ante litem motam*, before there was anything to throw doubt upon them, are evidence to prove the pedigree. Such statements by deceased members of the family may be proved not only by showing that they actually made the statements but also by showing that they acted upon them, or assented to them, or did anything that amounted to showing that they recognised them. If any member of the family, as a person who presumably would know all about the family, states pedigree, that evidence is receivable, its weight depending upon other circumstances.<sup>17</sup> And statements made *ante litem motam* as to relationship of persons, by those who have special means of knowledge of such relationship, is admissible even though the witnesses themselves are not nearly related to the persons, about whose relationship they depose.<sup>18</sup>

**5. Issue on which declarations are admissible.** (a) *English Law.* According to English law,<sup>19</sup> declarations made by deceased relatives are admissible if made, *ante litem motam* to prove matters of pedigree only. They are relevant only in cases in which the pedigree to which they relate is in issue, but not to cases in which it is only relevant to the issue.<sup>20</sup> Thus, where the question was whether, A, sued for the price of horses, and pleading infancy, was on a given day an infant or not the fact that his father stated in an affidavit in a Chancery suit to which the plaintiff was not a party that A was born on a certain day, was held to be irrelevant.<sup>21</sup> The terms "matters of pedigree" or "genealogical purpose" appear to be confined :

(a) primarily to issues involving family succession (testate or intestate), descent, relationship and legitimacy or as it is said, to cases in which the pedigree to which the declarations relate is in issue and not

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- 12. *Ramnarain v. Monee*, (1889) 9 C. 613; *Surjan v. Sardar*, (1900) 23 All. 72; 27 I. A. 183.
- 13. *Ib.*
- 14. *Taylor, Ev.*, s. 641.
- 15. *Ganga v. Basant*, 62 P. L. R. 425.
- 16. *S. M. Dawood Bibi v. A. B. Pula-war*, 85 Mad. L. W. 225; (1972) 1 Mad. L. J. 491; *A. I. R.* 1972 Mad. 228.
- 17. See *Abdul Ghafur v. Hussain Bibi*, I. L. R. 12 L. 33; *A. I. R.* 1931 P. C. 45; *Mangal Singh v. Manphul Singh*, *A. I. R.* 1961 Punj. 251: 63 P. L. R. 177.
- 18. *Mangal Singh v. Manphul Singh*,
- 19. *supra*.
- 20. *Taylor, Ev.*, ss. 523–557; *Roscoe, N. P. Ev.*, 44–48; *Phipson, Ev.*, 11th Ed., 420–428; *Steph. Dig.* 31; *Best, Ev.*, s. 498; *Powell, Ev.*, 9th Ed., 349–357; *Wills Ev.*, 3rd Ed., 217–236.
- 21. *Steph. Dig. Art.* 31; *Powell, Ev.*, 202 when they are not required for some genealogical purpose, they will be rejected; see next case.
- 22. *Haines v. Guthrie*, (1884) L. R. 13 Q. B. D. 818; this case (in which all the authorities on this point are fully considered) is not law in India, see note 7.

to cases in which it is only relevant to the issue. Proceedings under the Legitimacy Act, 1926, were held to be within the rule in *Re Davy*, [1935] P. 1] although the petitioner was *ex concessis* illegitimate at birth; followed in *Battle v. Att. Gen.*, (1949 P. 359); and

(b) secondarily (contrary to the rule applicable to public and general rights, *ante*), to such particular incidents of family history "as are immediately connected with and required for the proof of those issues, e. g., the birth, marriage, and death of members of the family, with the respective dates, either absolutely or relatively, and places of those events; age, celibacy, issue or failure of issue; as well probably, as occupation, residence, and similar incidents of domestic history necessary to identify the individuals in question."<sup>22</sup>

The principle upon which such evidence has been admitted has, as regards the date of birth, been stated to be that the time of one's birth relates to the commencement of one's relationship by blood, and a statement therefore, of one's age, made by a deceased person having special means of knowledge, relates to the existence of such relationship within the meaning of the fifth clause of this section.<sup>23</sup>

(b) *American law.* In regard to pedigree declarations, the following extracts from Wharton's Criminal Evidence, 12th Edn., Vol. I, p. 593, setting out the American Law of Evidence on the subject will be found interesting.

"Certain declarations as to pedigree are admitted as exceptions to the hearsay evidence rule. The declarations must have been made by a qualified declarant who is dead at the time of the trial or is otherwise unavailable as a witness, and who made the statement *ante litem motam*. Hearsay evidence as to pedigree is confined to legitimate relationship, and cannot be admitted to establish an unlawful one.

22. Phipson, Ev., 11th Ed., 42; Taylor Ev., ss. 643, 646; Steph. Dig. Art. 31; Hubback's Ev., of Succession, 204, 468, 648–650, citing *Hood v. Lady Beauchamp.*, (1836) 8 Sim. 26; *Shields v. Boucher*, (1847) 1 D. C. & S. 40; *Rishton v. Nesbitt*, (1844) 2 M. & R. 554; *Lovat Peerage*, (1885) 10 Ap. Cas. 763; see also *Powell*, Ev., 201; *Taylor* Ev., s. 642; *Wills* Ev., 3rd Ed. 217, it was at one time a moot point in English law whether evidence as to date, and the place of birth, was admissible even in "pedigree cases," but the weight of opinion was in favour of its admissibility. (*Taylor*, Ev., s. 642), and this view has been adopted by the framers of the Act [S. 32 illus. (1) (m)]; *Bipin v. Sreedam*, (1886) 13 C. 42; *Ram v. Jageswar*, (1893) 20 C. 758; *Oriental Life Assurance Co. v. Narasimha*, (1902) 25 M. 183, 209, 210: 11 M.L.J. 379; the words "relates to the existence of relationship" being wide enough to

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cover statements, as to the commencement of relationship in point of time, and as to the locality when it commenced or existed. As to the admissibility of the evidence in cases other than "pedigree" cases, v. post. *Oriental Life Assurance Co. v. Narasimha*, (1902) 25 M. 183, 210: 11 M. L. J. 379; see also *Mahomed Syedol Ariffin v. Yeoh Ooi Gark*, 1916 P. C. 242: 43 I. A. 256: 39 I. C. 401: 19 Bom. L. R. 157: 21 C. W. N. 257: 1917 M. W. N. 162; *Jagat v. Jageswar*, (1902) 25 A. 143, 152 in which the question was whether one P. S. from whom the respondents descended was born before Z. S. from whom the appellants had descended; (*Mst. Naima Khatun v. Basant Singh*, 1934 All. 406: I. L. R. 56 All. 766: 149 I. C. 781: 1934 A. L. J. 318 (F.B.); *Syed Khadam Hussain v. Syed Mohammad Hussain*, 1941 Lah. 73; I. L. R. 1941 Lah. 872: 195 I. C. 873.

"As the general rule requires that the declarant be dead, the declaration as to pedigree is reproduced in court either by means of living witnesses who had heard an oral declaration, or by the production in court of a writing containing the declaration. Inscriptions on tomb-stones, inscriptions on jewellery, ancient family records and memorials, entries in the family Bible, and recitals in properly authenticated wills, deeds and letters of persons qualified to make such declarations, are admissible.

"Pedigree cannot be shown by general reputation in the community or neighbourhood.

"The declarant must be shown to have possessed testimonial qualifications. His relationship, or the fact relied upon as giving him special knowledge, must be shown preliminary to the admission of the declarations. When a question arises as to pedigree based upon the relationship between two families, it is sufficient if the declarant be shown to be related to one or the other, but not necessarily to both. Relationship of a deceased person must be proved by evidence other than his own declarations.

"In a question of title, when declarations are offered to prove legitimacy, it is essential to their admissibility that they should have been made by lawful relatives. Statements by illegitimate members of the family or by those related by affinity will not be received. Sufficiency of proof of the relationship to admit the declarations is a question for the court. Family conduct, tacit recognition, and disposition and devolution of property, are admissible from which the opinion and belief of the family as to the fact in question may be inferred. Thus, if the father is shown to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate.

"It is not necessary to show that the witnesses were present at the birth, marriage, or death, in order to render them competent to testify as to relationship. The theory is that the constant, though casual, mention and discussion of important family affairs, whether of present or past generations, puts it in the power of members of the family circle to become fully acquainted with the original knowledge and the consequent tradition upon the subject.

"A witness is competent to testify as to his own age and the date of birth. The testimony is admissible although knowledge of the witness is derived from the statement of parents of the witness or from family reputation or from reading writings in the possession of the family and preserved in the records of the family history. A pedigree declaration may be made, however, of the age of a child as a matter of family history.

"Marriage cannot be established by evidence consisting of the reputation within the community when the existence of such marriage would impose criminal liability. Hence, marriage must be shown to be actual, as distinguished from reputation of marriage in prosecutions for bigamy, polygamy, adultery, etc.

"With some limitations hearsay evidence of the death of a person is admitted as being in the same class with evidence of pedigree. Death may be shown by general reputation in the community to which the party belongs and by general belief in the family. But when reputation is offered as testimony, it must be general, and not limited or special, with reference to the particular fact sought to be proved."

(c) *Indian law.* But, under this Act, the declarations are admissible on any issue provided they relate to a fact relevant to the case.<sup>24</sup>

(i) *Minority, age and date of birth.* Where, in a case, one of the questions was, whether the plaintiff was a minor when he signed a certain deed, the plaint in a former suit verified by a deceased member of the family, was held to be admissible under the fifth clause to prove the order in which certain persons were born and their ages.<sup>25</sup> In *Dhanmull v. Ram*, supra, Petheram, C. J., observed :

"It was contended on the part of the plaintiff, on the authority of the English cases, that, as the question at issue in this case did not relate to the existence of any relationship by blood, marriage, or adoption, the section did not apply, and the statements were excluded by the ordinary rules of evidence. I think that on this point, the law in India under the Evidence Act is different from the law of England, and the effect of the section is to make a statement, made by such a person, relating to the existence of such relationship, admissible to prove the facts contained in the statement on any issue, and that the plaint was admissible here to prove the order in which the sons of S. were born and their ages, and when admitted it to my mind satisfactorily proves that the defendant was the son who was born on the 6th June, 1868."

Statements made by deceased members of the family about certain facts of family history and statements regarding the seniority of members of the family admissible in evidence under Sec. 32, cl. (5) of the Act.<sup>1</sup> A statement whether an ancestor of the person making the statements was related to him as an elder uncle or a younger uncle, or an elder brother or a younger brother or an elder son or a younger son, is a statement as to relationship within the meaning of cl. (5).<sup>2</sup> So also, a statement under this clause, was admitted to prove the date of the plaintiff's birth for the purpose of the decision of a question of limitation.<sup>3</sup> Not only are such declarations admissible in proof of relationship upon any issue, whether of pedigree or not but they are also admissible in cases other than those of pedigree to prove the commencement of the relationship in point of time, or the date of the birth of the person in question.<sup>4</sup>

According to the Supreme Court, a literal construction of section 32 (5) is not proper and a statement regarding the age of a person must be treated

24. *Dhanmull v. Ram*, (1890) 24 C. 265; overruling *Bipin v. Sreedam*, (1886) 13 C. 42, followed in *Ram v. Jogeswar*, (1893) 20 C. 758, 760; *Gokul v. Baldeo*, 1928 Pat. 113; I.L.R. 7 Pat. 90; 105 I.C. 26; 9 P.L.T. 180.

25. *Dhanmull v. Ram*, (1890) 24 C. 265, at p. 269; see also *Chuah Hooi v. Khaw Sim Bee*, 1915 P. C. 45; 31 I.C. 637; 19 C.W.N. 787; *Muktapada v. Aklema*, 1950 Cal. 533; *Abdus Subhan Khan v. Nusrat Ali Khan*, 1937 Oudh 170; I.L.R. 12 Luck. 606; 165 I.C. 523; 1936 O.W.N. 1167; Mst. *Naima Khatun v.*

Basant Singh, A.I.R. 1934 A. 406; I.L.R. 56 A. 766; 149 I.C. 781; 1934 A.L.J. 318 (F.B.); *Hara Kumar Dey v. Jogendra Krishna Roy*, 1924 Cal. 526; 71 I.C. 386; 38 C.L.J. 186, and cases cited therein.

1. *Krishna Pal Singh v. Sri Raj Kuar*, 1927 Oudh 278; 104 I.C. 299.
2. *Kanhaiya Bux Singh v. Mst. Ram Dei Kuer*, 1944 Oudh 162; 1944 O.W.N. 83.
3. *Ram v. Jogeswar*, (1893) 20 Cal. 758; *Bhim v. Magaram*, A.I.R. 1961 Pat. 21.
4. Ib., *Dhan Mull v. Ram*, (1890) 24 C. 265.

as one relating to 'the existence of any relationship by blood, marriage or adoption.'<sup>5</sup> Therefore a statement by an adoptive mother as regards the age of the adopted boy although it would not show her relationship with him, is admissible in evidence.<sup>6</sup>

A statement in a guardianship application as to the date of birth as admissible if the person who had made it is dead and had special means of knowledge of the relationship. Hence, the statement made by a person in his will that he was 19 years of age at the time of its execution is admissible and can be relied upon to establish that the person was a major and was competent to make the will.<sup>7</sup>

The statement of a father, who is dead, as to his child's age, is admissible under cl. (5).<sup>8</sup>

(ii) *Date of Death.* Even statements of the date of death have been admitted.<sup>9</sup>

(iii) *Legitimacy, parentage and names of relations.* Declarations have also been admitted on questions of legitimacy,<sup>10</sup> parentage<sup>11</sup> and of names or relations.<sup>12</sup> It would appear according to English law that hearsay evidence must be confined to such facts as are immediately connected with the questions of pedigree, and that incidents, which, although inferentially tending to prove, are not immediately connected with the question of pedigree are rejected.<sup>13</sup>

6. **The existence of any relationship by "blood, marriage or adoption."** (a) *General.* The description of a person, denoting the relationship, is not admissible within the meaning of clause (5) in the absence of any mate-

5. K. Venkata Subbaraju v. C. Subbaraju, (1968) 2 S. C. R. 292; (1968) 2 S. C. A. 195; 1968 S. C. D. 688; (1968) 2 S. C. J. 513; (1968) 1 S.C. W. R. 940; (1968) 2 Andh. W. R. (S.C.) 75; (1968) 2 M. L. J. (S.C.) 75; A. I. R. 1968 S. C. 947, 952; Oriental Government Security Life Assurance Co., Ltd. v. Narasimha Chari, (1902) I. L. R. 25 Mad. 189, where Bhashyam Ayyangar, J. following Ram Chandra Dutt v. Jogeshwar Narain Deo, (1893) I. L. R. 20 Cal. 758 [statement as to age of member of family by his deceased sister admissible under Cl. (5)] approved by the Privy Council in Mohammad Syedol Ariffin v. Y. O. Gark, 43 Ind. App. 256; A. I. R. 1916 P. C. 242 (question of age in such a case indicates commencement of relationship); Gulab Thakur v. Jadali, 68 I. C. 566; A. I. R. 1921 Nag. 153 (proof of fact of adoption); Naima Khatun v. Basant Singh, A. I. R. 1934 All. 406 following Md. Syedol Ariffin v. Y. O. Gark, A. I. R. 1916 P. C. 242 (statement as to age tantamount to

- statement as to existence of relationship).
6. K. Venkata Subbaraju v. C. Subbaraju, *supra*.
7. *Ibid.*
8. Shivashankar Singh v. Raghubansh Singh, 1966 B. L. J. R. 406; A. I. R. 1967 Pat. 172, 174.
9. Sayeruddin Akonda v. Samiruddin Akonda, 1923 Cal. 378; 72 I. C. 985; Lachuman Lal Pathak v. Kumar Kamakshya Narayan Singh, 1981 Pat. 224; 131 I. C. 788; 12 P. L. T. 891; see also Mst. Naima Khatun v. Basant Singh, I. L. R. 56 All. 766; 1934 A. L. J. 518; 149 I. C. 781; 1934 All. 406 (F.B.).
10. Baqar Ali Khan v. Anjuman Ara Begam, 25 All. 236; 39 I. A. 94 (P.C.); Parbati v. Maharaj Singh, 10 I. C. 188; Gopala Swami Chetti v. Arunachalam Chetti, 27 Mad. 32.
11. Santu v. Tara, 1925 Oudh 557; 85 I. C. 407; see also illustration (k).
12. Wahid Bux Bhutto v. Emperor, 1929 Sind 250; 120 I. C. 81; 30 Cr. L. J. 1121.
13. Taylor, Ev., s. 644.

rial that either the executant or the scribe of that document had any special means of knowledge about that relationship by blood, marriage or adoption. A statement about such relationship between two persons by another person, who is not shown to have any special means of knowledge, cannot be relevant and, therefore, has to be excluded completely from consideration.<sup>14</sup> "The existence of any relationship" within the meaning of the clause includes the non-existence of such relationship. If a statement relating to the existence of such relationship is evidence under that clause, any statement which implies that there is no existence of such relationship between two persons also comes under the clause. Where the question is, whether a person died issueless or left a son, the statement that he died issueless relates to the existence of a relationship by blood. The question, whether the person left a son, involves a question as to blood relationship between him and the person who claims to be his son.<sup>15</sup> The statement of a plaintiff that his deceased mother gave him names of persons shown in the pedigree for performing a ceremony does not as such come within the scope of Clause (5) and is purely hearsay unless it is proved independently of that plaintiff.<sup>16</sup>

(b) *By blood.* In India, the rule governing cases under Sec. 32 (5) is wider than in England, where it applies only to blood relations and their consorts. In India, there can be direct evidence about the relationship by blood. A witness may depose that he knows a particular relationship between some persons and his evidence may be from this knowledge; but if the witness has no direct knowledge, he can give evidence about the statements relating to the existence of any relationship by blood between two or more persons, heard by him from persons who made such statements, provided those persons had special means of knowledge about such relationship and such statements were made before the question in dispute was raised. Evidence about such statements only becomes relevant, if persons making such statements are dead, or cannot be found, etc., as mentioned in this clause. It is only in these limited cases that a witness having no direct knowledge about the relationship by blood can give evidence of statements known by him from other persons about such relationship.<sup>17</sup> A witness can also give his opinion in evidence as to the relationship of one person to another that is in controversy, provided that opinion is expressed by his conduct; and if he, as a member of that family or otherwise, has special means of knowledge of that relationship according to Section 50 of the Act. Subject to the limitation as stated above, the statement of the opinion deposed to by a witness on the question of relationship will be relevant.<sup>18</sup> Useful reference in this connection may be made to *Sitaji v. Bijendra Narain*<sup>19</sup> and *Dolgobinda v. Nimai Charan*<sup>20</sup> and *S. M. Dawood Bibi v. A. B. Pulawar*.<sup>21</sup>

For the purpose of proving relationship, statements of deceased relatives, servants, and dependants of the family are admissible, and, in every instance,

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| 14. Bujhawan Singh v. Shyama, A. I. R. 1964 Pat. 301.                            | Pat. 187: 1964 B. L. J. R. 152.  |
| 15. Suba Raut v. Dindeyal Choudhury, 1941 Pat. 205: 191 I. C. 674: 7 B. R. 274.  | Ibid.  |
| 16. Kamalambal v. Srinivasa Odayar, 81 M. L. W. 421: (1968) 2 M. L. J. 487, 489. | A. I. R. 1954 S. C. 601.   |
| 17. Sheojee v. Prema, A. I. R. 1964  | 20. 1959 (Supp.) 2 S. C. R. 814: 26 Cut. L. T. 130: 1960 (1) S. C. A. 39: A. I. R. 1959 S. C. 914. |
|  | 21. 85 Mad. L. W. 225: (1972) 1 Mad. L. J. 491: A. I. R. 1972 Mad. 223.                            |

it must be a question of fact as to whether the person who made the statement had special means of knowledge.<sup>22</sup> The number of heirs, who are entitled to succeed to the property of a deceased Hindu, is indeed very large as will be found in any book of Hindu law. The statement made by a deceased Hindu that, in his family, there was no person alive, whether near or remote, cannot, therefore be construed as statements showing that he intended to mean that he had considered the entire list of bandhus who might be entitled to succeed to his inheritance and that he did not find any heir in his family.<sup>23</sup> Relationship by fosterage cannot be said to be relationship by "blood, marriage or adoption".<sup>24</sup>

(c) *By marriage.* Statements relating to the performance of marriage ceremonies is not a statement relating to the existence of any relationship. These ceremonies are antecedent to the coming into existence of the relationship by marriage.<sup>25</sup>

The word 'marriage' in clauses (5) and (6) would include a muta marriage which is recognized as a lawful marriage in Shia law.<sup>1</sup>

The law regarding proof and presumption has been made applicable both in regard to the legality of a marriage which has in fact taken place, and also with regard to the performance of the ceremonies. But a marriage cannot be proved merely by statements which relate to the existence of any relationship, or by the opinion of any person given out or even expressed by conduct, as to the existence of such relationship of any person, although that person has special means of knowledge on the subject, or by the admissions made by the parties to the marriage, who may, at times be actuated by ulterior motives. But if, in addition thereto or independently, any evidence of the parents of the parties regarding celebration or solemnisation of a marriage is available, it would go a long way in establishing the factum of marriage.<sup>2</sup>

Admission of marriage by the accused is not evidence of it for the purpose of proving marriage in an adultery or bigamy case.<sup>3</sup>

If a gift deed by R, since deceased, in favour of M states that M is his wife and the deed is not vitiated by undue influence the admission of relationship in the deed is entitled to proper weight in deciding the question of relationship between R and M.<sup>4</sup>

22. Ramakrishna Pillai v. Tirunarayanan Pillai, 1932 Mad. 198; I. L. R. 55 Mad. 40; 62 M. L. J. 116; 1932 M. W. N. 31; 35 L. W. 73 relying on Garuradhwaja Prasad v. Superundhwaja Prasad, 23 All. 37; 27 I. A. 238 (P.C.).

23. Secretary of State v. Kanhaiya Lal, 1941 Oudh 337; I. L. R. 16 Luck. 551; 192 I. C. 131; 1941 A. W. R. (C.C.) 37; 1941 O. W. N. 25.

24. Suraiya v. Qudsia Begam, 24 I. C. 643; A. I. R. 1914 Oudh 1.

25. Jadav Kumar v. Pushpabai, 1944 Bom. 29; 211 I. C. 315; 45 Bom. L. R. 924.

1. Anjuman Ara Begam v. Sadik Ali Khan, 2 O. C. 115, overruled on another point in Baker Ali Khan v. Anjuman Ara Begam, 25 All. 236; 30 I. A. 94 (P.C.).

2. Mutyalal v. Subbalakshmi, A. I. R. 1962 A. P. 311; (1962) 1 Andh. W. R. 91.

3. Kanwal Ram v. Himachal Pradesh Administration, 1966 S. C. D. 174; (1966) 1 S. C. J. 210; (1966) 1 S.C. W.R. 64; A. I. R. 1966 S.C. 614; Narandas Jechand v. State of Gujarat, 8 Guj. L. R. 832, 833.

4. Veikuntam Manikyamma v. Puppalala, A. I. R. 1971 Orissa 49, 51.

(d) *By adoption.* In the majority of cases, execution of a deed of adoption forms a part of the transaction of adoption itself, and is relevant under Section 6 of the Act. Apart from it, the deed of adoption is the record of the fact of adoption and can be used to corroborate the testimony of witnesses. Further the deed may contain the statement of a person, who being dead, could not be called in the witness-box. The statement, relating to the relationship by adoption, is also admissible under clause (5).<sup>5</sup> Where the adoptive father has made a statement regarding adoption, but subsequently he becomes infirm and incapable of giving evidence, his previous statement may be held admissible to prove the factum of adoption in subsequent litigation.<sup>6</sup> Where, however, a statement is made about adoption at a time, after the controversy has already arisen, the statement has not much evidentiary value.<sup>7</sup>

Not only the Hindu law but the Buddhist law provides for relationship by adoption. Amongst Burmese Buddhists, who are incapable of making wills a declaration as to the evolution of property may be a declaration as to some degree of relationship and a declaration by a deceased Buddhist that after his death his property would go to his adopted son is admissible under clause (5).<sup>8</sup> The relationship between a mahant and his chela is a relation by adoption.<sup>9</sup> Evidence of incidents, bearing more or less directly on the fact or otherwise of an adoption and its validity, would be admissible under clause (5) subject of course to careful scrutiny as to its value.<sup>10</sup> A statement made in the report of a Panchayat, mentioning a person as having been adopted by another, has been held to be admissible under this clause.<sup>11</sup>

**7. Persons from whom declarations are receivable.** (a) *Persons having special means of knowledge.*—In England such declarations are only admissible when made by deceased relatives by blood or marriage, and further the declarants must be legitimately related.<sup>12</sup> But under the Act the statement may be made by any person, provided only that such person had special means

5. Punjab Rao v. Sheshrao, I. L. R. 1960 B. 847: A. I. R. 1962 B. 175: 63 Bom. L. R. 726.
6. Subbarao v. Venkata Rama Rao, A. I. R. 1964 A. P. 53: (1963) 2 Andh. W. R. 307.
7. Maheswar v. Maiana, A. I. R. 1964 Orissa 174.
8. Ma Nyun Yin v. Ma Kyin, 1941 Rang. 276: 198 I. C. 42.
9. Achyutananda Das v. Jagan Nath Das, 27 I. C. 739: 21 C. L. J. 96: 20 C. W. N. 122.
10. Haridas v. Manmatha Nath, 1936 Cal. 1: 160 I. C. 332; Danakoti Amal v. Balasundara Mudaliar, 36 Mad. 19: 18 I. C. 989.
11. Ajab Singh v. Nanabhau, 26 I. A. 48: I. L. R. 25 Bom. 1: 3 C. W. N. 130.
12. Taylor, Ev., ss. 635–638; Doe v. Barton, (1887) 2 M. & R. 28; see Doe v. Davies, (1947) 10 Q.B. 314. As to declarations by a deceased person as to his own illegitimacy, see Phipson, Ev., 11th Ed., 423, and cases there cited. Under the Act

such a declaration would be relevant as against strangers: ib; S. 47 of the repealed Act, II of 1885 rescinded the English rule on this subject; and admitted the declarations not only of illegitimate members of the family, but also of persons who, though not related by blood or marriage, were yet intimately acquainted with the members and state of the family. The latter portion of this section would have included servants, friends and neighbour who are excluded. (Johnson v. Lawson, (1824), 2 Bing. 86, under English Law). The rule laid down by this Act is still more general in its terms than the Act of 1855, as it renders admissible not merely the statements of persons deceased, but also of persons whose evidence is not procurable for other reasons. As to a person claiming as illegitimate son establishing his alleged paternity, see Gopalaswami v. Arunachellam, (1938) 27 M. 32, 34, 25.

of knowledge of the relationship to which the statement relates. Proof of this special means of knowledge is a prerequisite to the admission of the evidence and this proof must be given by the party who wishes to give such evidence.<sup>13</sup>

(b) *Evidence of general reputation not admissible.* The Act does not contain any express provision making evidence of general reputation admissible as proof of relationship. Where the trial Judge permitted witnesses to give their testimony as to matters which could not be within their own knowledge without first stating the source of their information, their Lordships of the Privy Council observed :

"Time, trouble, and expense would have been saved had clause 5, Sec. 32, Evidence Act, been properly applied and witnesses required to prove the statements relied upon with proper particularity and with due attention to the requirement that the person making the statement had special means of knowledge..... It cannot rightly be left to time or chance or cross-examination to disclose whether a statement has any basis which could give it value or admissibility."

But their Lordships also added :

"Their Lordships are not prepared to hold that any standard of special strictness is applicable to the proof of collateral relationships in India."<sup>14</sup>

Direct evidence cannot be obtained of things which occurred before the memory of man, and persons having special means of knowledge are, therefore, permitted to testify to their existence from such knowledge, as they might possess of what has been practised in their community, or from what they might have heard from persons having special means of knowledge of what was practised before.<sup>15</sup> In *Lekraj Kuar v. Mahpal Singh*<sup>16</sup> their Lordships of the Privy Council, referring to certain entries in a wajib-ul-arz, stated that even if those entries were not to be treated as records describing the custom, they could at all events be treated as recording the opinions of persons likely to know it, and as such the record of those opinions could be admitted in evidence. In *Garuradhwaja Prasad v. Superundhwaja Prasad*<sup>17</sup> evidence based on a tradition about a custom of the family was admitted under Sec. 32, clause 5, and Sec. 49, Evidence Act, on the ground that the tradition was derived from persons who were dead and that the persons who gave the evidence had special means of knowledge about them.

(c) *Proof of special means of knowledge.* The special means of knowledge may be shown by proof that the declarant was a member of the family, or was intimately connected with it, or had any special means of knowledge of

13. S. 104 post; see Taylor, Ev., 's. 640; Wills, Ev., 2nd Ed., 213-214.  
 14. Rokkam Lakshmi Reddi v. Rokkam Venkata Reddi, 1937 P. C. 201; 168 I.C. 881; 39 Bom. L. R. 1005; 1937 M. W. N. 1271; 46 I. W. 88 (P.C.); see also *Shivlal v. Jootha*, I. L. R. 1952 Raj. 231; 1952 Raj. 167;

15. *Kunjilal v. Subalal*, 1952 M. B. 12, 15; *Ikbal Narain v. Rajendra Narain*, 1918 Oudh 449; 48 I.C. 767.  
 16. (1880) 5 Cal. 744; 7 I. A. 63 (P.C.).  
 17. (1900) 23 All. 37; 27 I. A. 238 (P.C.).

the family concerns.<sup>18</sup> On a question of relationship, the special knowledge required by clause (5) of this section should be presumed in the case of the members of the family<sup>19</sup> including all those who claim relationship with the ancestor of the parties and observe mourning, if there is a death in the family of any of them.<sup>20</sup> In England, when a deceased declarant, himself competent, has spoken of another person as being his relative, it will be presumed that he intended thereby a legitimate relative.<sup>21</sup> Indeed, it seems doubtful whether the legitimate members of a family may by their declaration impeach the legitimacy of their reputed relations. Thus, declarations by a deceased uncle, that his nephew was illegitimate, have been rejected on the ground that they concerned one who though *de facto* related was *de jure* a stranger.<sup>22</sup> The declarations of deceased illegitimate relatives are wholly inadmissible to prove the condition of their family, since a bastard, being *filius nullius*, can have no relations.<sup>23</sup> It is very doubtful, whether the declarations of a deceased person, even as to his own illegitimacy, are receivable, except as admission against himself, or those who claim under him by title subsequent to the declarations.<sup>24</sup> But the peculiar state of India, however, and more particularly that of its native inhabitancy, has given rise to the adoption of a different principle there, and the Indian Evidence Act enacts that in cases of pedigrees, the declarations of illegitimate members of the family, and also of persons who though not related by blood or marriage to the family, were intimately acquainted with its members and estate shall be admissible in evidence after the death of the declarant, in the same manner and to the same extent as those of deceased members of the family.<sup>25</sup>

In India, the statements made by servants, friends, and neighbours, as to relationship, and statements made by a deceased person asserting his own illegitimacy, would be admissible.<sup>1</sup>

The argument that a deceased person could know of his own illegitimacy only from information received from others, and that, a bastard being *filius nullius* and having no relations, the hearsay must have been derived from strangers, and is, hence, inadmissible, has no application in India, where the hearsay, not only of relations, but also of strangers, if they have had special means of knowledge, is admissible. There would appear to be little doubt, therefore, that the statement of a deceased person, asserting his own illegitimacy, is relevant against strangers under the Act.

- 18. Sangram v. Rajan, 12 C. 219, 222; 12 I. A. 183 (P.C.); see also Bejai v. Bhupindar, (1895) 17 A. 456.
- 19. Sarfaraz Khan v. Mst. Rajana, 1929 Oudh 129; I. L. R. 4 Luck. 39; 112 I. C. 834; Mohammad Asad Ali Khan v. Sadiq Ali Khan, 1943 Oudh 91; I. L. R. 18 Luck. 346; 205 I. C. 433.
- 20. Prabhakar Vithoba v. Sarubai, 1943 Nag. 253; I. L. R. 1943 Nag. 779; 208 I. C. 211; 1943 N. I. J. 320; see Latafat Hussain v. Onkarmal, 1935 Oudh 41; I. L. R. 10 Luck. 423; 152 I. C. 1042; (Mst.) Naima Khatun v. Basant Singh, 1934 All. 406; I. L. R. 56 All. 766; 149 I.C. 781 (F.B.) (adoptive mother); Ma Nyun Yin v. Kyin, 1941 Rang. 276; 198 I. C. 42 (adoptive parent's sister).
- 21. Smith v. Tebbitt, (1867) L. R. 1 P & D. 354.
- 22. Crispin v. Doglioni, (1863) 32 L. J. P. & M. 109; Plant v. Taylor, (1863) 7 H. & N. 211.
- 23. Doe v. Barton, (1837) 2 M. & R. 28; Doe v. Davies, (1847) 10 Q. B. 314.
- 24. Phipson, Ev., 11th Ed., p. 423.
- 25. Goodeve, Ev., 449.
- 1. Whitley Stokes, Vol. II. p. 828.

(d) *Bards and Family priests.* A family priest is a person having special means of knowledge as to the relationship of members of the family.<sup>2</sup> It is the business of a mirasi, who is a hereditary family bard, to acquaint himself with the details of the family history, whose glories he recites in song on ceremonial occasions, and the fact that he must speak from hearsay does not render his evidence valueless because of clause (6) of this section.<sup>3</sup>

(e) *Mukhtears, Wasiqadars.* A mukhtear as such is not a person having special means of knowledge as to the relationship of members of family.<sup>4</sup> The fact that a man is the general agent of another does not by itself justify the conclusion that he has special means of knowledge with regard to the members of his employer's family. But if his father was also the general agent and there were terms of friendship between the two families for a long period, and they were living close to the master's house, it may be said that the man had special means of knowledge of the relationship existing between different members of the family.<sup>5</sup>

A series of statements extending from 1860 to 1890 by a wasiqadar made in accordance with the practice of the wasiqa office, a department under Government, as to who were her heirs, and made at a time when no controversy on the subject was in contemplation, and letters written by her in reply to enquiries by the wasiqa officer, explaining and confirming such statements was held to be admissible in evidence in support of the legitimacy of such heirs, and under the circumstances to be conclusive in their favour.<sup>6</sup>

(f) *Other statements.* A statement relating to the existence of any relationship contained in a document signed by several persons, some only of whom are dead, is admissible in evidence under the fifth clause of this section.<sup>7</sup> In one case it was held by the Privy Council that a statement on a point of relationship which was made with special means of knowledge five years *ante litem motam*, in a will executed by a Hindu widow since deceased, and was corroborated by other relatives against their interest and was not contradicted by reliable evidence, was conclusive where other evidence conflicted.<sup>8</sup> And in another case, where a material issue was, whether the plaintiffs were sons of a paternal uncle of a deceased lady, it was held by the Allahabad High Court,

2. Sham v. Radha, 4 C. L. R. 173; Collector of Farrukhabad v. Gajraj Singh, 15 I. C. 625; Balak Ram High School v. Nunumal, 1930 Lah. 579; I. L. R. 11 Lah. 503; 128 I.C. 532; Acharaj Ram v. Ganesh Das, 1934 Pesh. 78: 151 I. C. 622.
3. Abdul Ghafur v. Mst. Hussain Bibi, 1931 P.C. 45; 58 I. A. 188; 130 I. C. 612; I. L. R. 12 Lah. 336; 33 Bom. L. R. 420; 53 C. L. J. 213; 60 M. L. J. 583; 33 L. W. 434; 1931 M. W. N. 373; (Mst). Ratni v. Harwant Singh, 1949 E. P. 158; Mangal Singh v. Manphul, A. I. R. 1961 Punj. 251.
4. Sangram v. Rajan, 12 C. 219; 12 I. A. 183 (P.C.).
5. Pratap Kunwar v. Raj Bahadur Singh, 1943 Oudh 316: 209 I. C. 310; 1943 O. W. N. 140.
6. Baqar Ali Khan v. Anjuman Ara Begam, (1903) 25 A. 236 (P.C.).
7. Chandra v. Nilmadhab, (1898) 26 C. 236; Bindeshwari Singh v. Ramraj Singh, 1939 All. 61: 179 I. C. 974; 1939 A. L. J. 128: 1938 A. W. R. 776; Natabar Parichha v. Nimal Charan Misra, 1952 Orissa 75.
8. Kidar v. Mathu, (1913) 40 C. 555; 18 I. C. 946; 15 Bom. L. R. 467; 17 C. W. N. 797: 25 M. L. J. 17: 1913 M. W. N. 430 (P.C.); see also Chandreshwar Prasad v. Bisheeshwar Pratab, 1927 Pat., 61: I. L. R. 5 Pat. 777; 101 I. C. 289; 8 P. L. T. 510.

that a plaint in a suit filed by her *anis litem motam* in which she so described them was admissible.<sup>9</sup> Even a statement as to relationship in a final order in a mutation proceeding has been held to be admissible under clause (5).<sup>10</sup>

**8. Personal knowledge.** According to English law it is not necessary that declarant should have had personal knowledge of the facts stated ; it is sufficient, if his information purported to have been derived from other relatives, or from general family repute, or even simply from "what he has heard", provided such "hearsay upon hearsay" as it has been called, does not directly appear to have been derived from strangers.<sup>11</sup> But if the declarant's information purports to have been derived either wholly or in part from incompetent sources, the declarations so founded will be excluded.<sup>12</sup> In other words, this evidence cannot be successfully objected to on the ground that it is "hearsay upon hearsay", provided that all the statements come from persons whose declarations on the subject are admissible.<sup>13</sup> "If this were not so, the main object of relaxing the ordinary rules of evidence would be frustrated, since it seldom happens that the declarations of deceased relative embrace matters within their own personal knowledge.<sup>14</sup> A similar rule will be followed in cases under the Act : Provided all the statements come from persons whose declarations on the subject are admissible (that is, persons who are shown to have had special means of knowledge) the evidence will not be rejected merely on the ground that the declarant had no personal knowledge of the facts stated. In a case<sup>15</sup> their Lordships of the Supreme Court referring to a witness proving a genealogy observed :

"He proves the entire genealogy. It is true he has not got personal knowledge of every step in the sense that he knew each one of the persons named ; that would be impossible as many died before he was born. But personal knowledge is not necessary in these cases.

"A member of the family can speak in the witness-box of what he has been told, and what he has learned about his own ancestors, provided what he says is an expression of his own independent opinion (even though it is based on hearsay derived, from deceased, not living persons), and is not merely repetition of the hearsay opinion of others, and provided the opinion is expressed by conduct. His sources of information and the time at which he acquired the knowledge (for example whether before the dispute or not) would affect its weight, but not its admissibility. This is therefore legally admissible evidence which, if believed, is legally sufficient to support the finding."

There is nothing in the language of this Section which would bar a statement on the ground of hearsay, if the statement is otherwise admissible under

- 9. Mauladad v. Abdul, 1917 All. 35: 39 A. 426: 15 A. L. J. 349.
- 10. Fazal Haq v. Mst. Said. Nur, 1948 Lah. 113.
- 11. Taylor, Ev., s. 639; Shedd v. Attorney General, (1861) 30 L. J. P. & M. 217; Phipson, Ev., 11th Ed. 424; Wills, Ev., 3rd Ed., 224; see Mohan Singh v. Dalpat Singh, 1922 Bom. 51; I. L. R. 46 Bom. 753: 24 Bom. L. R. 289: 67 I. C. 235.
- 12. Davies v. Lowndes, (1843) 6 M. & G. 525.
- 13. Thus the declarations of a deceased widow respecting a statement which her husband had made to her as to who his cousins were, have been received; see Taylor, Ev., s. 639.
- 14. Taylor, Ev., s. 639 and cases there cited.
- 15. Sitaji v. Bijendra Narain, 1954 S.C. 601 at pp. 602, 603.

its provisions.<sup>16</sup> In *Debi Prasad v. Radha Chowdhrai*,<sup>17</sup> it has been held by the Privy Council that statements of strangers who heard the parents of the plaintiff reciting the names of their ancestors at sharadh ceremony are admissible in evidence to prove the pedigree of the plaintiff, as statements of persons who are dead. Though no reference to Sec. 32 (5) appears in this judgment, such statement could not have been held admissible otherwise than under it. It goes without saying that, in any case, the statements could not have been free from the fault of being hearsay, because the persons who stated based their information on the statements made by the ancestors of the plaintiff. But, it has been held in an Oudh case that where a witness states that he was adopted by adoptive mother without the permission of her husband and that he heard of this fact from his natural father, the statement is not admissible in evidence either under Sec. 32 or under any provision of the Evidence Act.<sup>18</sup> Where, on a question of relationship, the statements of certain witnesses, who were supposed to be speaking from information derived from others, were sought to be made admissible, but these witnesses did not state the persons from whom they derived that information nor at what period of time they derived it, the evidence was rejected.<sup>19</sup> In other words, where the witness is speaking from hearsay, he must show that his knowledge comes from a person whose statements are admissible. The statement which is relied on must be shown to be the statement of a person whose statement is admissible under this section. The Act does not contain any express provision making evidence of general reputation admissible as evidence of relationship.<sup>20</sup>

The statement of a witness on the question of relationship can be held to be admissible either under Sec. 32 (5) or Sec. 50 of the Act. If any particular statement does not fall within the purview of one or the other of these provisions, it should be ruled out as inadmissible. Where the statement relates to the existence of relationship between two persons, one or both of whom could not have been seen by the witness, it cannot be presumed that he heard of the relationship from his own deceased ancestor. It is the duty of the party producing a witness, on the question of pedigree, to elicit from him, if it is a fact, that he heard it from a person deceased, so as to fulfil the requirements of Sec. 32 (5). In the absence of evidence, that the witness is reproducing the statement of a person deceased, having special means of knowledge, and fulfilling other requirements of Sec. 32 (5), his evidence may be admissible, if it amounts to "the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, had special means of knowledge on the subject."<sup>21</sup> Where, therefore, the statement of a witness giving the pedigree connecting two living persons is found to be inadmissible under Sec. 32 (5), but he deposes to facts which establish such treatment as is contemplated by Sec. 50, it should be admitted to that extent.<sup>22</sup> But, in the *Shrewsbury Peerage* case,<sup>23</sup> Lord Wenslydale

16. Ramanathan v. Murugappa, 1917 Mad. 930: 33 I.C. 969; 3 L.W. 216; Madan Singh v. The State, 1954 Raj. 38; I.L.R. 1952 Raj. 775.
17. 32 Cal. 84; 31 I.A. 160 (P.C.).
18. (Mst.) Prem Jagat Kuer v. Harihar Baksh Singh, 1946 Oudh 163; I.L.R. 21 Luck. 1: 223 I.C. 573.
19. Shafiqunnisa v. Shaban, (1904) 9 C.W.N. 105; 30 I.A. 21; 26 A. 581 (P.C.).
20. Rokkam Lakshmi Reddi v. Venkata

- Reddi, 1937 P.C. 201: 168 I.C. 881: 39 Bom. L.R. 1005; 1937 M.W.N. 1271; 46 L.W. 88 (P.C.); see also Chandulal v. Bibi Khatemonnaessa, 1943 Cal. 76: I.L.R. (1942) 2 Cal. 299: 205 I.C. 344.
21. S. 50, Evidence Act.
22. (Mst.) Chunna Kunwar v. Mukat Behari, 1934 All. 117, 124: 151 I.C. 338.
23. (1858) 7 H.L.Cas 1.

held, that a certain document which did not bear the signature of the party "must be received as the statement of the party making it, and being found upon the files of the Court, it must be presumed that it got there by proper authority," and so the document objected to was admitted in evidence in that case. Statements not signed by the person making it, and signed and filed by a pleader, have been admitted in several cases.<sup>24</sup> In the undermentioned case, the alleged author of a document R. G. S. had died before the trial but the exhibit in question was merely a genealogical table filed on behalf of G in a claim made by him for certain villages. The document, however, was in no way brought home, to G except as being an exhibit binding upon him for the purposes of that suit. The Privy Council held that the document was inadmissible, and observed as follows :

"His (G's) relation to the document is therefore something entirely different from the personal knowledge and belief which must be found or presumed in any statement of a deceased person which is admissible in evidence. For aught that appears, the genealogical table in question might never have been seen or heard of by G personally, but have been entirely the work of his pleader."<sup>25</sup>

Where a kursinatha was produced purporting to have been made by an ancestress "by the pen of gomasta" and alleged to have been filed by her in a suit to establish the same fact in 1804, the Privy Council held that it was admissible.<sup>1</sup> In approaching a pedigree problem, it is well to recall the words of Lord Blackburn in *Sturla v. Freccia*.<sup>2</sup>

The noble Lord said :

"It has been established for a long while that in questions of pedigree, I suppose upon the ground that they were matters relating to a time long past and that it was really necessary to relax the strict rules of evidence there for the purpose of doing justice, but for whatever reason the statement of deceased members of the family made *ante litem motam*, before there was anything to throw doubt upon them, are evidence to prove pedigree. And such statements by deceased members of the family may be proved not only by showing that they actually made the statements but by showing that they acted upon them, or assented to them, or did anything that amounted to showing that they recognized them. If any member of the family, as a person who presumably would know all about the family, had stated such and such a pedigree, that evidence would be receivable, its weight depending upon other circumstances."

24. See *Rani Srimati v. Khagendra Narain Singh*, 31 I. A. 127; I. L. R. 31 Cal. 871 (P.C.); *Chandeshwar v. Bisheshwar*, 1927 Pat. 61; I. L. R. 5 Pat. 777; *Ramakrishna v. Tirunarayana*, 1932 Mad. 198; I. L. R. 55 Mad. 40; 139 I. C. 684; (Ch.) *Kanhaiya Bux Singh v. Mst. Ram Dei Kuer*, 1944 Oudh 162; 1944 O. W. N. 83; 1944 A. W. R. (C. C.) 27.

25. *Jagatpal v. Jageshwar*, 25 A. 143; 30 I. A. 27 (P.C.); *Ganesh Baksh Singh v. Ajudhia Baksh Singh*, 1937 P.C. 310; 170 I. C. 335; 1937 A.L. J. 1022; (1937) 2 M. L. J. 772; 1937 O. W. N. 845.  
1. *Shahazadi v. Secretary of State*, 34 C. 1059; 34 I. A. 194.  
2. (1880) 5 A. C. 623; 50 L. J. Ch. 86; 43 L. T. 200; 29 W. R. 217; 14 J. P. 811.

According to English law in the case of marriage, repute and conduct need not be confined to the family ; general reputation among, and treatment by friends and neighbours, being receivable, except in certain criminal cases when stricter proof is required, as evidence of marriage.<sup>2</sup> But the testimony must be general ; if it is based merely on the statements of some particular person, it ceases to be admissible as general reputation, and can only be tendered on a question of pedigree, and in England as the statement of a deceased relation,<sup>4</sup> or in India as the statement of a person having special means of knowledge made *ante litem motam*.<sup>5</sup> The grounds upon which general reputation, when relevant, is receivable are partly the difficulty of obtaining better evidence in such cases, and partly because "the concurrence of many voices," amongst those most favourably situated for knowing, raises a reasonable presumption that the facts concurred in are true.<sup>6</sup> While, however, provision has been made by the Act in Sec. 50 for the reception in evidence of conduct as proof of relationship, there appears to be none for the admission of the general reputation above mentioned. But, in a later case, it has been held by the Privy Council, that, in the absence of direct proof, consent to a marriage in Burma may be inferred from the conduct of the parties as established by general reputation.<sup>7</sup>

**9. Contemporaneousness.** The declarations need not refer to contemporaneous events, thus statements as to matters occurring six generations before have been received,<sup>8</sup> for such a restriction "would defeat the purpose for which hearsay in pedigree is let in, by preventing it from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence."<sup>9</sup> Where a pedigree *prima facie* satisfies all the conditions prescribed by Sec. 32 (6) and Sec. 90, the Court ought to make a presumption of its genuineness.<sup>10</sup> Where an ancient document purporting to be a family pedigree was produced by a person who stated that he had received it from his grandfather, but there was no evidence to show who had prepared it, the document was held admissible under this section and it was said that this section does not make it necessary to show by whom such statements were made.<sup>11</sup>

3. Taylor, Ev., s. 578; Phipson, Ev., 11th Ed., 427; Wills, Ev., 3rd Ed., 216; as to conduct, see note to S. 59 post.
4. Shedd v. Patrick, (1861) 30 L. J. P. M. & A. 217, 281, 282; "There is no doubt that general reputation of marriage may be given *valeat quantum*. A person living in a particular neighbourhood—say in New York—may be called to say that the reputation in New York was that A and B were man and wife; but you cannot ask what any particular individual not being a member of the family said on the subject; that is getting into a different class of evidence" ib., per Sir C. Cresswell; see also Wills, Ev., 3rd Ed. 216.
5. S. 32, cl. (5) *ante*; as to opinion expressed by conduct, see S. 50. post.
6. Taylor, Ev., ss. 577, 578; Phipson, Ev., 11th Ed., 400.
7. Mi Me v. Mi Shwe, (1912) 39 Cal. 492; 39 I. A. 57 (P.C.).
8. Monkton v. Attorney-General, (1831) R. & Myl. 157; Davies v. Lowndes, (1843) 6 M. & G., 525; Phipson, Ev., 11th Ed., 424 citing the aforesaid cases; Taylor Ev., s. 639.
9. Taylor, Ev., s. 639, quoting Lord Brougham in Lovat Peerage case, (1885) 10 App. Cas 763 (H.L.); see also Debi Prasad v. Radha Chaudhury, 32 Cal. 84; 31 I. A. 160; 9 C. W. N. 161; Bhojraj v. Sitaram, 1936 P. C. 60; 160 I.C. 45; 1936 A. L. J. 755; 38 Bom. L. R. 344.
10. Jagdeo v. Vithoba, 1928 Nag. 20; 103 I. C. 81.
11. Jahangir v. Sheoraj, 1915 All. 334; I. L. R. 37 A. 600; 30 I.C. 505; Sitaji v. Bijendra, 1951 Pat. 356; I. L. R. 28 Pat. 447.

**10. Particular facts.** It has been already observed that, in matters of public or general interest, declarations as to particular facts are excluded. But the same rule does not apply in cases of pedigree. "In cases of general rights, which depends upon immemorial usage, living witnesses can only speak of their own knowledge to what passed in their own time; and to supply the deficiency, the law receives the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he has heard the dead man say, respecting the reputation of the right of way, or of common, or the like. A declaration, with regard to a particular fact, which would support or negative the right, is inadmissible. In matters of pedigree, it being impossible to prove by living witnesses the relationship of past generations, the declarations of deceased members of the family are admitted; but here, as the reputation must proceed on particular facts, such as marriage, births, and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighbourhood and the family transactions among the relations of the parties. Therefore, what is thus dropped in conversation upon such subjects may be presumed to be true."<sup>12</sup>

**11. Lis mota.** As in the case of statements with regard to public and general rights, declarations as to relationship must have been made before the question in dispute, in relation to which they are proved, was raised,<sup>13</sup> but they do not cease to be relevant, because they were made for the purpose of preventing the question from arising.<sup>14</sup> A statement made after the question had been raised in a previous litigation is not admissible.<sup>15</sup> Where in a previous settlement proceeding, the relationship of certain persons as well as the seniority of the line was in dispute and the same matters were in controversy in a subsequent suit not *inter partes*, it was held that the statements, made in the settlement proceedings, were not admissible in the subsequent litigation.<sup>16</sup> The expression "before the question in dispute was raised" does not necessarily mean simply before a suit has been filed; but before the dispute which afterwards culminates in a suit has arisen.<sup>17</sup> Further, the fifth clause of Section 52 does not apply to statements made by interested parties in denial in the course of litigation of pedigrees set up by their opponents.<sup>18</sup> The law dealing with the admissibility of declarations of deceased persons on the question of pedigree as embodied in Section 32(5) of the Evidence Act reproduces the following well-known principles of English law :

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- 12. Berkeley Peerage Case, (1811) 4 Camp. 401 per Sir James Mansfield.
- 13. S. 32, cl. (5) and (6); v. ante; Kishan Lal v. Sohanlal, I. L. R. 1955 Raj. 191; A. I. R. 1955 Raj. 45.
- 14. Steph. Dig. Art. 31; Berkeley Peerage Case, (1811) 4 Camp. 401–417; and see Lovat Peerage Case, L. R. (1885) 10 Ap. Cas. 763; Wills Ev., 3rd Ed. 223; Sukhdarshan Singh v. Chanan Singh, 1951 Pepsu 81.
- 15. Rup Kishore v. Patrani, 1927 All. 818; 25 A. L. J. 861; I. L. R. 50 All. 152; Bayava Desai v. Paravateva, 1933 Bom. 126; 144 I. C. 442; 35 Bom. L. R. 118; Brij Mohan v. Kishunlal, 1938 All. 443; 176 I. C. 441; 1938 A. L. J. 670.
- 16. Mata Baksh v. Ajodhya Baksh, 1936 Oudh 340; 163 I. C. 770; but see Gokhul v. Baldeo, 1928 Pat. 118; I. L. R. 7 Pat. 90; 105 I. C. 26 which does not seem to be good law. The observations of Petheram, C. J., in Dhamnull v. Ram Chunder, 24 Cal. 265; 1 C. W. N. 270 on which it purports to be based, do not support the decision.
- 17. Rupkishore v. Patrani, 1927 All. 818; I. L. R. 50 A. 152; 25 A. L. J. 861; Mohammad Azim Khan v. Mohammad Saadat Ali Khan, 1931 Oudh 177; 8 O. W. N. 349; Moti Lal v. Sardar Mal, A. I. R. 1976 Raj. 40.
- 18. Naraini v. Chandi, (1886) 9 A. 467

"The declarations must have been made *ante litem motam*. The mere existence of the situation out of which the dispute subsequently arises does not render declaration inadmissible; nor on the other hand is actual litigation necessary to exclude it; but so soon as a controversy has actually arisen which would naturally create a bias in the mind of one standing in the relation of the declarant, all subsequent declarations become inadmissible.....But declarations made before any dispute has arisen, although with the express view of precluding controversy, are not on that account inadmissible. But the previous controversy, to render the declaration inadmissible, must have been on precisely the same point."<sup>19</sup>

To quote Williams, J. in *Shedden v. Patrick*,<sup>20</sup> "The controversy which is to exclude such evidence must be controversy in respect of the very point in dispute, it is quite immaterial that there has been controversy, even litigation on kindred matters, if the point itself has not been raised." Following some English authorities, Varadachariar, J. (as he then was), in *Subbiah v. Gopala*,<sup>21</sup> observed :

"The condition of *ante litem motam* involves the idea that the dispute, if any, on the former occasion must not be the same in substance as the dispute in the later suit. The expression used in one of the cases is that the statement now sought to be used will not be excluded if it merely relates to some matter foreign or collateral to the matter in controversy on the former occasion."

In *Bahadur v. Mohar*,<sup>22</sup> where it was objected that the statements were inadmissible as having been made *post litem*, the Privy Council held that the heirship of the then claimant was not really in dispute at that time, and that the construction of the Act contended for would practically exclude any attainable evidence in that case. In another case, it has been held by the Privy Council, that a pedigree (not an ancient family record handed down from generation to generation, and added to as a member of the family died or was born, but a document drawn up on a particular occasion for a specific purpose by a member of the family) was to be treated as a mere declaration made by the person who made or adopted it. It was also held in the same case that to make a statement inadmissible as *post litem motam* the same thing must be in controversy before and after such statement is made; and that this pedigree was admissible as a declaration made and adopted by a deceased member of the family, and touching the family reputation, on the subject of its descent, and not shown to be *post litem motam*.<sup>23</sup> In the case of joint statements, some of the persons making that statement being dead, it has been held that the statement was as much a statement of the deceased deponents as

19. Wills on Evidence, 3rd Ed., p. 223.  
20. (1880) 164 E. R. 958 at p. 966.

21. 1936 Mad. 808; 1936 M.W.N. 218;  
see also Bindeshwari Singh v. Ramraj Singh, 1939 All. 61; 179 I. C. 974; 1939 A. L. J. 128; Natabar v. Nimai, 1952 Orissa 75.

22. 24 A. 90, 107; 29 I. A. 1 (P.C.)

23. Kalka v. Mathura, (1908) 35 I. A. 166 (P.C.); I. L. R. 30 A. 510; 1 I.C. 175; 11 O.C. 362 (P.C.); see

also (Mst.) Biro v. Atma Ram, 1937 P. C. 101; 64 I. A. 92; 167 I. C. 346; 1937 A. L. J. 462; 99 Bom. L. R. 726; 65 C. L. J. 309; 41 C.W. N. 645; (1937) 1 M.L.J. 646; 1937 M. W. N. 424; 45 L. W. 451; 31 S. L. R. 262; T. S. Chendikamba v. K. I. K. Viswananthamayya, 1939 Mad. 446; (1939) 1 M. L. J. 227; 49 L. W. 273; 1939 M. W. N. 275.

a statement of the others who were alive and was admissible under Section 32 (5).<sup>24</sup>

**12. Objection to admissibility.** The proper time to object to the admissibility of evidence is at the trial, when the evidence is tendered, and it is then that the Court should rule as to the admissibility or inadmissibility of the evidence. When the objection is taken at the proper time, the party wishing to produce the evidence may be able to take steps to make the evidence admissible.<sup>25</sup>

## CLAUSE 7

### SYNOPSIS

|                                |                                    |
|--------------------------------|------------------------------------|
| 1. Scope.                      | 3. Evidence of ancient possession. |
| 2. Private rights and customs. |                                    |

**1. Scope.** Statements contained in any deed, will or other document which relates to any such transaction as is mentioned in clause (a) of the thirteenth section, that is, any transaction by which any right or custom was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence, may be proved under this clause. The thirteenth section, which should be read together with the present clause, relates to both public and private rights and customs.<sup>1</sup> The present clause, therefore, relates to private as well as public rights and customs.<sup>2</sup>

According to English law, declarations, written or verbal, made by deceased persons are admissible in proof of rights of a public or general nature, but to prove a right strictly private, such evidence is not generally receivable.<sup>3</sup>

The fourth clause ante, and the present clause, deal, the former with verbal and written, and the latter with written statements relating to public or general rights and customs in general in accordance with the English law upon the same subject, so far as the latter extends. The first-mentioned clause admits the verbal or written statement giving the opinion of some particular persons to the existence of such rights. But hearsay as to matters of general interest is not confined to such declarations. It may be proved under this clause by recitals and descriptions of the public or general right, in wills, deeds, leases, maps, surveys, assessment and the like,<sup>4</sup> however recent such documents may

24. Dolgobinda v. Nimai Charan, (1959) Supp. (2) S. C. R. 814; (1960) 1 S. C. A. 39; 26 Cut. L. T. 130; A. I. R. 1959 S. C. 914.

25. Bindeshwari Singh v. Ram Raj Singh, 1939 All. 61; 179 I. C. 974; 1939 A. L. J. 128; 1938 A. W. R. 776; see also Jahangir v. Sheoraj Singh, 1915 All. 334; I. L. R. 37 All. 600; 30 I. C. 505; 13 A. L. J. 817; Shahzadi Begum v. Secretary of State, I. L. R. 34 Cal. 1059; 34 I. A. 194; 6 C. L. J. 678 (P.C.).

1. v. ante, S. 13.

2. See Hurronath v. Nittanund, (1872) L.E.—131

10 B. L. R. 263, in which the custom was a family custom.  
3. v. ante, cl. (4) and post.  
4. S. 32 cl. (7); Norton, Ev., 190; see Phipson, Ev., 11th Ed., 408-410; Roscoe, N. P. Ev., 48-51; Powell, Ev., 9th Ed., 237-249; Brett, Ev., s. 497; Steph. Dig. Art. 30; Taylbr, Ev., ss. 607-634; Brett v. Beales, (1829) M. & M. 416; Curzon v. Lomax, (1803) 5 Esp. 60; Plaxton v. Dare, (1829) 10 B. & C. 17; Doe v. Wittcomb, (1853) 4 H. L. C. 425; Comba v. Coether, (1829) M. & M. 398; Roscoe N. P. Ev., 214; Private

be. The clause does make relevant statements made in deeds, wills<sup>5</sup> and such other documents which relate to transactions by which a right or custom in question was created, claimed, modified, recognised, asserted or denied. It does not allow introduction of oral evidence, but such oral evidence may be relevant under clause (5) of this Section, which, however, requires that such a statement should have been made before the question in dispute was raised.<sup>6</sup> A statement, made in a deed of gift by a Hindu widow, that the properties mentioned therein were already gifted away by her father-in-law and her husband, attracts the provisions both of clauses (3) and (7), as they are against her proprietary interest and relate to a transaction as is mentioned in Section 13.<sup>7</sup>

In a suit by a zemindar to recover certain forest tracts from Government, the plaintiff relied on certain accounts, called ayakut accounts, as furnishing proof of the inclusion of the said tracts within the limits of his zemindari; it was held that inasmuch as they were, from time to time, prepared for administrative purposes by village officers, and were produced from proper custody and otherwise sufficiently proved to be genuine, they were admissible as evidence of reputation.<sup>8</sup>

The party, against whom a statement contained in a document is sought to be used under this clause, need not have been a party to the transaction to which the document relates. Section 13(a), standing by itself, refers to a transaction, as between parties, in relation to any right or custom as to the existence of which the question for consideration has arisen, but so far as this clause is concerned, it only takes the help of Section 13(a), in order to indicate the nature of the transaction to which the document containing the statement relates; not that it will necessarily be in relation to what can be called to be a transaction as between parties for the purpose of its admissibility without the help of Section 32. For the purpose of this clause, clause (a) of Section 13 has to be read independently of the other portions of Section 13.<sup>9</sup>

A statement by a deceased person, in a deed of family settlement, that there was a separation in the family, was held to be inadmissible under this clause to prove the separation, as it was an interested statement and the person making it could not have made use of such admission in his own favour.<sup>10</sup>

Acts: Curzon v. Lomax, (1803) 5 Esp. 60; Carnarvon v. Villebois, (1844) 15 M. & M. 313; Beaufort v. Smith, (1849) 4 Ex. 450; Roscoe N. P. Ev., 188; Manor Books and Presents: Phipson, Ev., 11th Ed., 410; Private Maps: Attorney-General v. Horaner, (1913) 2 Ch. 140 C.A.; R. v. Milton, (1843) 1 C. & K. 58; Hammond v. Bradstreet, (1854) 10 Ex., 390; Pipe v. Fulcher, (1858) 38 L.J.Q.B. 12; Daniel v. Wilkin, (1852) 7 Ex. 429: Ancient public surveys: Freeman v. Read, (1863) 4 B. & S. 174; Smith v. Brownlow, (1869) L. R. 9 Ex. 241; Modern public surveys: Bidder v. Bridges, (1885) 34 W. R. (Eng.) 514; 54 L. T. 529: Affirmed, 1886 W. N. 148: Ancient public assessments: Phipson Ev., 11th Ed., 409; Cooke v. Banks, (1826) 2 C.

& P. 478; Ely v. Caldecott, (1891) 7 Bing. 433.

5. Norton, Ev., 192: the words of the clause are "in any deed, will etc." but v. post: as to judgments, orders and decrees which are admissible in matters of public and general interest only see S. 42, post.
6. Dwarka Nath v. Lalchand, A. I. R. 1965 S.C. 1549: (1965) 1 S. C. W. R. 947: 1966 All. L. J. 129.
7. Purnananda v. Purnanandam, A. I. R. 1961 A. P. 435: 1961 Andh. L. T. 150
8. Sivasubramanya v. Secretary of State, (1884) 9 M. 285.
9. Khudiram Ojha v. Smt. Amode Bala Debi, 1948 Pat. 426, 428.
10. Raj Narain v. Maharaj Narain, 1937 Oudh 133; 165 I. C. 785: 1936 O. W. N. 1203.

This clause requires that the statement must have been made in relation to a transaction where it was necessary to make that statement. The section aims at keeping out gratuitous statements, which were either not necessary to be made at the time and on the occasion when they were made, or which it was not the duty of the party who made them to make.<sup>11</sup> Statement of deceased to a doctor regarding his age, when the doctor was not examined regarding the age point of view, was held inadmissible.<sup>12</sup> Where there is no evidence whatever which falls to be considered under this Section the document cannot be considered as relevant under this clause. The following conditions are necessary for the admissibility of a statement under this clause, viz.—

- (i) the statement should be contained in a document,
- (ii) it should have been made by a person who is dead, and
- (iii) the document should relate to what can be called a transaction within the meaning of Section 13(a) of the Act.

The word 'transaction' in Section 13 means a business or dealing which is carried on or transacted between two or more persons. In the realm of law, it bears the sense of any act affecting legal rights, which is not confined to a dealing with property between two persons, *viva voce*, but can, without any strain of language, be taken to include testamentary dealing with the property. The recital in a will can be taken as a statement made in the court of a transaction under Section 13 of the Evidence Act.<sup>13</sup> A non-probated will is not admissible in evidence under this Clause and Section 13(a), except on proof by an attesting witness.<sup>14</sup> A statement by a Sub-Registrar in the house of a testator, before registering the will, is admissible under this clause.<sup>15</sup>

A transaction or instance in which there is a mere assertion of a right or custom is admissible by which the right or custom is asserted or denied.<sup>16</sup> The word 'claim' denotes demand or assertion in relation to a thing or attribute as against or from some person or persons showing the existence of a right to it in the claimant. A bare statement may or may not be a claim according to the attending circumstances in which it is made. It may amount to a claim or a mere statement of claim though in some circumstances a statement may amount to a claim. This clause, read with Section 13(a), makes statements by deceased persons in respect of relevant facts themselves relevant and admissible, if those statements are contained in a document which relates to a transaction by which an assertion is made of a right or title which is a relevant question in the suit. So also a statement by a deceased person that he purchased certain shops in the names of other persons as it contains an assertion of right.<sup>17</sup> The assertion by a widow in the adoption deed of authority to

11. Khudiram Ojha v. Smt. Amode Bala Debi; 1948 Pat. 426, 428.
12. Governor General of India v. Bhanwari, A. I. R. 1961 All. 14.
13. Periasami v. Varadappa, A. I. R. 1950 Mad. 486.
14. Moheswar v. Sunder, 22 C. L. J. 551; 33 I. C. 342; See however Hitnarain Singh v. Ram Bayai, A. I. R. 1928 Pat. 459; I. L. R. 7 Pat.

- 733.
15. Muthukrishna v. Ramachandra, 47 I. C. 611.
16. Brojendra v. Mohim, A. I. R. 1927 Cal. 1; 99 I. C. 189.
17. Mathra Singh v. Gurbachan Singh, (1967) 69 Punj. L. R. 119, 124; A. Rangaswami Pillai v. S. S. Pillai, (1974) 1 M. L. J. 442; A. I. R. 1975 Mad. 141.

adopt given by her husband is admissible under Section 13 (a) as well as sub-sections (3) and (7) of this Section.<sup>18</sup>

This clause applies to public as well as private rights. The transaction must be one by which and not in which the right or custom was created, asserted,<sup>19</sup> etc. The assertion of title in a mortgage-deed by a deceased mortgagor is admissible in proof of ownership if corroborated by other evidence.<sup>20</sup> Other instances of assertion will be found discussed under Section 13.

**2. Private rights and customs.** Further, this section deals with rights and customs generally, private rights and customs being therein included, and, in respect of such last mentioned rights, effects a departure from the English rule. According to the latter, hearsay is not, as has been already mentioned, admissible in questions concerning merely private and personal rights, except by evidence of ancient possession in cases where a controversy refers to a time so remote that it is unreasonable to expect a higher species of evidence. It is, therefore, a rule that ancient documents (i.e. documents more than 30 years old) purporting to be a part of the transactions to which they relate, and not a mere narrative of them, are receivable in evidence that those transactions actually occurred, provided they be produced from proper custody.<sup>21</sup>

**3. Evidence of ancient possession.** But to prove or disprove a right or custom it is not enough to adduce evidence of a transaction in which or in the course of which the right or custom was asserted or denied, though the transaction will be relevant under Section 13, clause (a), if it be one by which the right or custom was asserted or denied. When the question was whether a tenant held lands under the *makdi* or *bhaoli* systems of rent, and the Court based its decision on a statement contained in a *hebanama* (gift deed) executed by the deceased grandfather of the tenant, it was held, that the *hebanama* was not admissible under this clause read with Section 13, clause (a).<sup>22</sup> But, it has been held, that an entry relating to a promissory note in a settlement deed could be employed, as secondary evidence, to prove the promissory note under this clause, read with Section 13 (a), since the settlement deed constituted a transaction by which a right was asserted.<sup>23</sup>

The law upon the subject has been thus summarised; "Ancient documents by which any right of property purports to have been exercised (e.g. leases, licences, and grants) are admissible, even in favour of the grantor or his successors, in proof of ancient possession. The grounds of admission are twofold necessity, ancient possession being incapable of direct proof by witnesses, and the fact that such documents are themselves acts of ownership, real transactions between man and man, only intelligible upon the footing of

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- 18. Chitra v. Padhumani, I. L. R. (1974) Cut. 368; A. I. R. 1975 Orissa 24; Andhi Kuer v. Rajeshwar Singh, 1972 B. L. J. R. 842; I. L. R. (1972) 51 Pat. 859; A. I. R. 1972 Pat. 325.
- 19. Visalakshi Ammal v. Dorasinga, 29 I. C. 974; Nallasiwa Mudaliar v. Ravan Bibi, A. I. R. 1921 Mad. 385.
- 20. Powell Ed., 9th Ed., 285-288.
- 21. Banshi v. Mir, (1907) 11 C. W. N. 703; Brojendra v. Mohim Chandra, 1927 Cal. 1: 99 I. C. 189.
- 22. Subbarayulu v. Vengama, 1930 Mad. 742; 123 I. C. 197; see Venkatarayagopal Raju v. Narasayya, 1915 Mad. 746; 26 I. C. 747; 1914 M. W. N. 779 for an illustration of the significance of the word "by" occurring in S. 13 (a).

title, or at least of a *bona fide* belief in title, since in the ordinary course of things men do not execute such documents without acting upon them.<sup>23</sup> (a) The documents should purport to constitute the transactions which they effect; mere prior directions to do the acts, or subsequent narratives of them, being inadmissible.<sup>24</sup> Thus though expired leases (or even counterparts)<sup>25</sup> may be tendered to show ancient possession of the property demised, or reserved from the demise, recitals in such lease of other documents or facts will be rejected except as admissions.<sup>1</sup> (b) Deeds of this nature must, to ensure genuineness be like other ancient documents, produced from proper custody; and should, to be of any weight, be corroborated by proof within living memory of payments made, or enjoyment had, in pursuance of them. The absence of evidence of modern enjoyment, however, goes merely to weight and not to admissibility. (c) Ancient documents, admissible as acts of ownership, may be tendered on questions either of public or private right; and must be distinguished from those ancient documents which are received as evidence of reputation, which latter may consist of bare assertions, or recitals, of the right, but are confined to questions of public and general interest.

"Modern possession being susceptible of proof by witnesses, cannot be established by modern grants and leases, etc. though supported by evidence of payments made thereunder."<sup>2</sup>

In the first place, it is to be observed, with reference to the law prevailing in India that while the fourth clause admits parol evidence of reputation in proof of public or general rights and customs, the present clause does not provide for the admissibility of parol evidence of reputation in the cases to which it applies.<sup>3</sup> The Act, therefore (being in this respect in accord with English law), does not admit parol evidence of reputation in proof of private rights and customs. It, however, declares that reputation to be relevant in proof both of public and private rights (in respect of such last-mentioned rights departing from the English rule) which consists of statements contained in any deed, will or other documents relating to any transaction by which any right or custom was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence. In this respect it appears to deal with both public and private rights upon the same footing. Further, the present section includes any deed,<sup>4</sup> will<sup>5</sup> or other documents,<sup>6</sup> so that the rule as

23. Malcolmson v. O'Dea, (1862) 10 H. L. C. 593; Bristow v. Cormican, (1878) 3 Ap. Cas. 641; see also The Lord Advocate v. Lord Lovat, (1880) 5 App. 273, cited, ante; see also S. 13, ante, commentary to same *passim* and as to proof of ancient documents S. 90 post.

24. Ib.

25. Taylor, Ev., s. 421.

1. Bristow v. Cormican, (1878) 3 Ap. Cas 641, at p. 653, per Lord Cairns.

2. Bristow v. Cormican, (1878) 3 App. Cas 648, 668 per Lord Blackburn; Clarkson v. Woodhouse, 3 Doug, 189; the passage in quotation marks is from Phipson, Ev., 11th Ed., 151, 152; Taylor, Ev., ss. 658, 667; Roscoe N. P. Ev., 53, 54; Powell, Ev., 9th Ed., 285-288; Wharton Ev., ss. 194-199.

3. The statement made relevant by cl.

(7) 'must be written, and the word 'verbal' at the commencement of this section has no application to this clause.

4. See Nagammal v. Sankarappa Naidu, 1931 Mad. 264; I. L. R. 54 Mad. 576; 131 I. C. 9; 33 L. W. 269—adoption deed; Nallasiva Mudaliar v. Ravan Bibi, 1921 Mad. 383; 70 I. C. 389; 14 L. W. 327—mortgage-deed.

5. Kotikelapudi Venkataramayya v. Digavalli Seshamma, 1937 Mad. 538; I. L. R. 1937 Mad. 1012; 170 I. C. 107; 45 L. W. 422; see also Hittanarain v. Rambarai, 1928 Pat. 459 at 462; I. L. R. 7 Pat. 733; 9 P. L. T. 484, where no probate was taken of the will.

6. P. Subrahmanya Somayajulu v. V. Seethayya, 1923 Mad. 1; I. L. R. 46 Mad. 92; 70 I. C. 729; 16 L.W.

to ancient documents receivable either as evidence of reputation or as acts of ownership is in terms extended and enlarged; for under this clause a statement in any relevant document, though not more than thirty years old, and however recent, is admissible.<sup>7</sup>

Where in a criminal case the plaintiffs asserted the right to the land in dispute, and the defendants denied the same, and the parties agreed to appoint a mukhtar as an arbitrator and the mukhtar having made due enquiry made a report to the Court whereby it was stated that the land was in the possession of the plaintiffs, it was held that the document was admissible under this clause, though not under clause (2) of this section.<sup>8</sup> In practice, however, the rule under the Act in this last-mentioned respect must remain much the same as that under English law since, in the case of modern documents, direct proof by witness will in most cases be procurable, and the conditions under which this form of hearsay testimony is alone admissible will not be bound to exist. Moreover, even where such conditions exist, recent documents may often, for various causes, be of little weight.<sup>9</sup>

## CLAUSE 8

### SYNOPSIS

#### 1. Scope.

#### 2. Generally.

**1. Scope.** Statements made by a number of persons, and expressing feelings or impressions on their part relevant to the matter in question are relevant, and may be proved by the testimony of persons, other than those who made them, when such persons are dead, or cannot be found, or have become incapable of giving evidence, or when their attendance cannot be procured, without an amount of delay or expense, which, under the circumstances of the case, appears to the Court unreasonable.<sup>10</sup> Some or all of these conditions will necessarily be bound to occur, at any rate in by far the greater number of cases, when relevant evidence of this character is tendered. The meaning of this clause has been said to be "that when a number of persons assemble together to give vent to one common statement, which statement expresses the feelings or impressions made in their mind at the time of making it, that statement may be repeated by the witnesses and is evidence."<sup>11</sup> The relevancy of individual feelings and opinions is dealt with by Secs. 14 and 45–51. This clause relates to statements expressing feelings or impressions, not of an individual, but an aggregate of individuals as the exclamations of a crowd; and the evidence is receivable on account of the difficulty or impossibility of procuring the attendance of all the individuals who composed such crowd or aggregate

462 (F.B.) confirmed on appeal in *Seethayya v. P. Subrahmanyam Somayajulu*, 1929 P.C. 115; 56 I.A. 146; I.L.R. 52 Mad. 453; 29 L.W. 804 grant.

7. *Norton*, Ev., 192; in *Huronath v. Nittanund*, (1872) 10 B.L.R. 263 the document in question was executed only 18 months before suit was brought. As to the admissibility of reports accompanying orders

as hearsay evidence of reputed possession; see *Dinomini v. Brojo*, (1901) 29 C. 187, 193.

8. *Guru Charan v. Mafijuddin Molla*, 1938 Cal. 150; 174 I.C. 511; 65 C.L.J. 603.

9. *Huronath v. Nittanund*, (1872) 10 B.L.R. 263.

10. S. 32, cl. (8), illustration (n).

11. *R. v. Ram Dutt*, (1874) 23 W.R. Cr. 35, 38 per Jackson, J.

of persons.<sup>12</sup> So to prove that a caricature destroyed before the trial was meant to represent two of the relations of the defendant, explanations of recognition by spectators in a public picture-gallery, where the caricature was exhibited, were held to be admissible.<sup>13</sup> And to prove that libel referred to the plaintiff, and the consequences which had necessarily resulted to him from its publication, evidence that he was publicly jeered at in consequence of the libel was held to be admissible.<sup>14</sup> And it was held that, on a prosecution for conspiring to procure large meetings to assemble for the purpose of inspiring terror in the community, a witness might be called to prove that several persons, who were not examined at the trial, had complained to him that they were alarmed at these meetings and had requested him to send for military assistance.<sup>15</sup> But the section has no application to the case of a police officer, who goes round and collects a great number of statements from persons in different places, nor can he be permitted to give the result of these statements as evidence.<sup>16</sup>

**2. Generally.** In *Chase v. Lowell*,<sup>17</sup> notice of the rottenness of a tree's roots was in issue. It was held, that the acts of persons in looking at the roots were important part of the evidence, as from this it might be inferred that they noticed the decayed conditions of the roots and that the remarks made at the time by them rendered it certain that the view of the roots gave notice of the defect to those who then saw them. The statements made to a Magistrate to whom representations were made asking for military protection against a certain assembly, formed with the object of putting the people into terror, were held admissible in evidence to show the state of alarm that was prevailing in the community at that time.<sup>18</sup>

With regard to illustration (n) the following observations of textbook writers will be found useful. Markby observes: "I may observe that the case does not belong to Section 32 at all. The evidence would be equally admissible whether the bystanders could be called or not as witnesses." Then he shows it by an example. Taylor appears to consider the statements admissible as they are the "natural or inseparable concomitants of the principal facts in the controversy."<sup>19</sup> Wigmore says that the remarks of the spectators that "Doe ought to bring an action against the painter Roe", are admissible circumstantially as revealing that the picture was believed by them to represent Doe, though as assertions of what Doe ought to do or what Roe had done, the remarks would be admissible as hearsay.<sup>20</sup> Cunningham says: "Compare illustration (f). It will be observed that, in the clause as in the illustration, the reference is made to a number or crowd of persons. If these persons were known to the witness and could be called, his statement could not be admitted under the section. If they were not known or could not be found, it is not easy to see how the fact that there were many of them is material."<sup>21</sup>

- 12. Norton, Ev., 193; Field Ev. 6th Ed., 144; Taylor, Ev., ss. 576, 579.
- 13. Du Bost v. Beresford, (1810) 2 Camp. 511; see Norton, Ev., 192, 193; Taylor, Ev., s. 579.
- 14. Cook v. Ward, (1830) 4 M. & P. 99; Phipson, Ev., 11th Ed., 507.
- 15. R. v. Vincent, (1839) 9 C. & P. 275; Redford v. Birley, (1822) 3 Stark 76.
- 16. R. v. Ram Dutt, (1874) 23 W. R. Cr. 35.
- 17. 151 Mass. 422.
- 18. Redford v. Birley, (1822) 3 Stark 76.
- 19. Tay, ss. 576, 579; see also sec. 14 ante.
- 20. Wigmore, s. 1715.
- 21. Cunn. p. 95.

33. *Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.* Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable :

Provided—

that the proceeding was between the same parties or their representatives-in-interest ;

that the adverse party in the first proceeding had the right and opportunity to cross-examine ;

that the questions in issue were substantially the same in the first as in the second proceeding.

*Explanation.* A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

s. 3 ("Evidence.")

s. 3 ("Court.")

s. 3 ("Relevant.")

s. 57, cl. 7 (Judicial notice of public officers).

ss. 74, 76, 77, 79 (Public documents; certified copies).

s. 80 (Presumption as to record of

evidence).

s. 91 [Except (j)]. (Appointment of public officer).

s. 104 (Burden of proof).

ss. 107, 108 (Burden of proof, death).

s. 158 (Matters which may be proved in connection with statements under this section.)

Steph. Dig., Art. 32, and see Chap. XVII; Roscoe, N. P. Ev., 201-202; Best, Ev. Sec. 496; Powell, Ev., 9th Ed., 88, 89, 326-337; Taylor, Ev. Secs. 455-459 and Chap. V., *passim* 546-549; Starkie, Ev., 408 et seq.; Phipson, Ev., 11th Ed., 584-588; Norton, Ev., 193-198; Wills, Ev., 3rd Ed., 254-268; Act X of 1873, Secs. 5, 13 (Indian Oaths); Cr. P. C., 1898, Secs. 353-365, 503, 509, 512, 263, 264; Civ. P. Code, Order XVIII, 2nd Ed. pp. 842-849; Cr. P. C., 1898, Sec. 512 (abandoning accused), Sec. 288 (evidence taken before Committing Magistrate); Civ. P. Code, Order XXVI, Rules 1-8; Cr. P. Code, Secs. 503-507 (Evidence on commission). See section, as also Acts and Statutes cited, post.

### SYNOPSIS

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|--|---|
| 1. Principle.  | 5. Evidence taken on commission.          |
| 2. Scope.  | 6. Evidence under Fugitive Offenders Act. |
| 3. Circumstances under which evidence is admissible. | 7. Discretion of Court.                   |
| 4. Medical witness,                                  | 8. Strict proof necessary.                |

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| 9. Consent and waiver.                                 | parties or their representatives."                                   |
| (a) Civil cases.                                       | 20. Proviso (2): "Right and opportunity to cross-examine."           |
| (b) Criminal cases.                                    | 21. Right to cross-examine.  |
| 10. Mode of proof.                                     | 22. Opportunity to cross-examine.                                    |
| 11. Use of previous statements.                        | 23. Death or illness of witness before cross-examination, effect of. |
| 12. In a later stage of the same judicial proceedings. | 24. Evidence on commission.  |
| 13. Contradiction; Corroboration.                      | 25. Proviso (3): Questions in issue.                                 |
| 14. "Death."   | 26. Explanation to the section.                                      |
| 15. "Cannot be found."                                 | 27. Miscellaneous.   |
| 16. "Incapacity."                                      | 28. Identity of parties.   |
| 17. "Kept out of the way"                              | 29. Foreign judgment.  |
| 18. "Delay or expense."                                |  |
| 19. Proviso (1); "Between the same                     |  |

**1. Principle.** In Anglo-Saxon Jurisprudence, all depositions of witnesses must satisfy the following tests, namely : (1) they must be taken under oath or solemn affirmation, and (2) when deposing the witness must be brought face to face to the party against whom he is deposing in open court, so that he may be cross-examined by the latter. This security is termed by Bentham as confrontation.<sup>22</sup> This was established long ago. "The other side ought not to be deprived of the opportunity of confronting the witnesses and examining them publicly, which has always been found the most effectual method of discovering truth."<sup>23</sup> The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination which cannot be had except by the direct and personal putting of questions and obtaining of immediate answers. There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the judge and jury are enabled to obtain the elusive and, incommunicable evidence of a witness's deportment while testifying, and a certain subjective moral effect is produced upon the witness.

When, therefore, a statement has already been subjected to cross-examination and is hence admitted as in this case, it comes in because the rule is satisfied and not because an exception to the rule is allowed. The statement may have been made before the present trial, but if it has been already subjected to proper cross-examination, it has satisfied the rule and needs no exception in its favour.<sup>24</sup>

The rule contained in this section is an administrative expedient for doing justice between litigants in a particular situation as a rational compromise between two well-known canons of judicial administration. A presiding judge will require that a party furnishes evidence of the primary grade, if it is within his power to do so. So long, therefore, as the proponent can reasonably be required to cause a witness to repeat to a tribunal his evidence regarding admissible facts given on a former occasion, the presiding Judge will insist that the witness himself be produced. In other words, primary evidence will be insisted on until a satisfactory forensic necessity for offering secondary evidence

22. Bentham's *Rationale of Judicial Evidence*, Book III, Ch. XIX.

23. *Duke of Dorset v. Girdler*, (1720) L.E.—132

Finch's *Pre.*, Ch. 531.

24. Wigmore, s. 1370; Phipson, *Evidence*, 11th Ed., 586.

is brought to the attention of the tribunal. At this point, a second administrative canon, yet non-fundamental, comes into operation. It is the administrative duty of the court to protect the substantive right of the party to prove his contention, so far, at least, as is reasonably within his power. When the proponent's necessity for producing a secondary grade of evidence is established, the right to submit it will be recognised by the court.<sup>25</sup> The general rule is that the best evidence must be given: no evidence will be received which is merely substitutionary in its nature so long as the original evidence is attainable. Thus, depositions are in general admissible only after proof that the parties who made them cannot themselves be produced.<sup>1</sup> The present section states the circumstances under which secondary evidence of oral testimony may be given.<sup>2</sup> Under these circumstances, the production of primary evidence is either wholly (as if the witness is dead or cannot be found, or is incapable, or is kept away) or partially (as in the case of delay or expense), out of the party's power. In the last-mentioned case, there is the further ground of convenience. But the use of such secondary evidence is limited by certain provisos based on the following principles. The first is enacted on the grounds of reciprocity, because the right to use evidence, other than admissions, being co-extensive with the liability to be bound thereby, the adversary in the second suit has no power to offer evidence in his own favour which, had it been tendered against him would have been clearly inadmissible,<sup>3</sup> the second because it is certainly the right of every litigant, unless he waives it, to have the opportunity of cross-examining witnesses, whose testimony is to be used against him; it follows that evidence given, when the party never had the opportunity to cross-examine, is not legally admissible as evidence for or against him, unless (in civil cases) he consents that it should be so used.<sup>4</sup> The principle involved in the third proviso, in requiring identity of the matter in issue, is to secure that, in the former proceeding, the parties were not without the opportunity of examining and cross-examining to the very point upon which their evidence is adduced in the subsequent proceeding.<sup>5</sup> The admission of such evidence has been said to be based on the consideration that the parties and the issues being the same, and full opportunity of cross-examination having been allowed, the second trial is virtually a continuation of the first.<sup>6</sup> Where the condition mentioned do not exist then the evidence is not relevant.<sup>7</sup> The use of depositions under this section must be distinguished from the case where sections applicable are those relating to admissions.<sup>8</sup>

## 2. Scope. The Section only makes relevant—

- (a) evidence given by a witness  
in a judicial proceeding, or  
before any person authorised by law to take it,

25. Chamberlayne's Evidence, s. 1620.
1. Taylor, Ev., s. 391. As to English and Indian law, see Lanka Lakshmanna v. Vardhanamma, 1919 Mad. 540; I. L. R. 42 Mad. 103; 49 I.C. 638.
2. Cf. Taylor, Ev., s. 464.
3. Taylor Ev., s. 469; Doe v. Derby, (1834) I.A. & E. 783, 786; Norton, Ev., 196; Lawrence v. French Drew 472; Morgan v. Nichol, (1866) L.R. 2 C. P. 117.
4. Gorachand v. Ram, (1868) 9 W.R. 587; see also Gregory v. Dobley, (1870) 14 W. R. 17 App. Ori. Jur.
5. Rami Reddi, In re (1881) 3 M. 48 at p. 52; Bal Gangadhar Tilak v. Shrinivas, 1915 P.C. 7; I. L. R. 39 Bom. 441; 42 I. A. 135; 29 I. C. 639.
6. Whart, s. 177, cited in Phipson, Ev., 11th Ed., 585.
7. Ponnuسامی v. Singaram, 1919 Mad. 848 (2); I. L. R. 41 M. 731; 46 I. C. 849; Prabhakar v. Sham Lal, (1972) 1 Mys. L. J. 475.
8. Ali Muhammad v. Maharaj, 1921 Cal. 781; 64 I.C. 266; 36 C. L. J. 186.

(b) only for the purpose of proving

in a subsequent judicial proceeding, or

in a later stage of a civil judicial proceeding,

the truth of the facts which it states, in the following cases, namely, when the witness—

(1) is dead, or

(2) cannot be found, or

(3) is incapable of giving evidence, or

(4) is kept out of the way by the adverse party, or

(5) when the presence of such witness cannot be obtained without an amount of delay or expense, which, under the circumstances of the case, the Court considers unreasonable.

The above statement is subject to the proviso that, in the case of evidence given by a witness in a judicial proceeding—

(1) the judicial proceeding must have been between the same parties, or their representatives in interest;

(2) the adverse party in the first proceeding must have had the right and opportunity to cross-examine; and

(3) the questions in issue in the first proceeding must have substantially been the same as in the subsequent proceeding.

The Section deals with relevancy, and not with mode of proof. If evidence is irrelevant, even consent of parties cannot make it relevant. Evidence can be relevant only when the conditions of this Section are fulfilled. In other words, the Court can hold evidence, given in a prior judicial proceeding, or before any person authorised by law to take it, relevant only, if it is satisfied that the requisite conditions mentioned in this Section are fulfilled. It is, no doubt, open to the parties to admit that the requisite conditions are fulfilled. But, if the parties do not admit this fact, evidence given in a former judicial proceeding, or before any person authorised by law to take it, cannot become relevant under the provisions of this Section, if the conditions stated in this Section are not fulfilled.<sup>9</sup>

The depositions of witnesses in other litigations carry little weight. They have weak evidentiary value. Even the depositions of parties, though admissible as admissions against persons making them, are not admissible against persons who are not parties to the previous litigation in which they were made.<sup>10</sup> Thus, in a bigamy case, the essential ceremonies constituting the second marriage as a fact, must be proved. An admission of marriage by the accused is

9. Nathubhai v. Chhotubhai, A.I.R. 1962 Guj. 68; 1962 Guj. L.R. 418.

(1965) 1 S.C.A. 35; A.I.R. 1966 S.C. 605; 1966 B.L.J.R. 147.

10. Ambika Prasad v. Ram Ekbal,

not evidence of it for the purpose of proving marriage in an adultery or bigamy case.<sup>11</sup>

The conditions on which the evidence is receivable are analogous to those relating to judgments, and whenever a decree in one case would be evidence of the facts decided, when tendered in another, then the testimony of a witness in the former trial, who was liable to cross-examination, but is incapable of being called, is receivable. Depositions of witnesses in a former suit are not admissible in evidence, when those witnesses are living and their oral evidence is procurable.<sup>12</sup> "This section gives the Court new powers which require to be exercised with great caution. There is no doubt that it is necessary (just as much as ever it was) to produce every witness at the trial, unless it is proved to be either actually impossible to produce him, or to be so difficult to do so that it is, under the circumstances, unreasonable to insist on his production."<sup>13</sup> Important witnesses in serious cases of murder, or attempt to murder, should be examined before the Sessions Judge, so that he may be able to form his own opinion about their veracity by observing their behaviour in the witness-box. Courts should be loath to admit evidence under this Section by observing only formalities of law; and the importance of examining witnesses before the Sessions Judge should, under no circumstances, be underrated. It is, however, difficult to lay down a hard and inflexible rule which should govern all cases in all matters. It is primarily for the Sessions Judge to satisfy himself that there are good and lawful grounds for admitting the evidence of witnesses examined earlier, under this Section.<sup>14</sup>

It may be pointed out that the Section does not enjoin upon the Court that the statement of such a witness must be believed. This section as already stated, only deals with relevancy. In other words, it only makes the statement of such a witness admissible in evidence. It would always be open to the person against whom the statement is produced to show that it should not be believed for reasons given by him.<sup>15</sup> The section contemplates that the evidence in the previous proceeding was itself relevant evidence.<sup>16</sup> In criminal cases, particularly where a man is being tried for a serious offence, and the evidence sought to be accepted is of signal importance, the Court must insist on strict proof before holding that the conditions required for admitting former depositions have been satisfied. It is an elementary right of an accused person that a witness who is to testify against him should give evidence before the Court trying him, and thus afford an opportunity to the Court to see the witness and observe his demeanour and form a better opinion as to his reliability than is possible from reading his statement. It is only in exceptional circum-

11. Kanwal Ram v. The Himachal Pradesh Administration, (1966) 1 S.C.J. 210; A.I.R. 1966 S.C. 614; 1966 M.W.N. 19; 1966 Cur. L.J. 191; 1966 Cr. L.J. 472; 1966 All. W.R. (H.C.) 99; 1966 M.L.J. (Cr.) 151.
12. Hurish v. Tara, (1868) 2 B.L.R. App. 4; Taylor, Ev., s., 464; Bhoobun v. Umbica, (1873) 23 W.R. 343. See generally as to conditions of Section Chakuri v. Suraj, (1904) 2 All. L.J. 91 in which the conditions of the section not being fulfilled the deposition was rejected.
13. R. v. Mawjan, (1873) 20 W.R.Cr. 69, per Macpherson, J., concurred in by White, J. Pyari Lall, In re. (1879) 4 C.L.R. 504 and see R. v. Mulu, (1880) 2 A. 646.
14. Gaya Prasad v. State, 1954 All. 59, 61; 1954 Cr.L.J. 68.
15. Poonamchand v. Motilal, 1955 Raj. 179, 183: 5 Raj. L.W. 434.
16. (Mst.) Ajodhi v. Emperor, 1920 Nag. 170: 56 I.C. 582: 16 N.L.R. 30.

stances, which should be strictly proved to exist, that a previous deposition of a witness should, in a serious case, be admitted under this section.<sup>17</sup>

The power given by this Section requires to be exercised with great caution, and the Court must insist on strict proof before holding that the requisite conditions have been satisfied. More especially is this necessary where a man is being tried for a serious crime and the evidence sought to be put in is of signal importance.<sup>18</sup> It is well settled that before the Sessions Judge can transfer a statement, he must record a finding that any of the circumstances enumerated in this Section existed, and unless he is so satisfied, on evidence led before him, the power vested in him under it cannot be exercised.<sup>19</sup>

**3. Circumstances under which evidence is admissible.** The grounds of admissibility in the present section depend not, as in the case of the previous section, on the character of the statement and the subject to which it refers, but on the circumstances under which it was made, and these circumstances (which must be shown to exist, in order to make the evidence admissible) are—

(a) That the evidence was given in a judicial proceeding,<sup>20</sup> or before a person authorized<sup>21</sup> by law<sup>22</sup> to take it; such as a Commissioner<sup>23</sup> or Coroner,<sup>24</sup>

17. Ranjit Singh v. State, 1954 Pepsu. 69, 70.
18. Nga Nyo v. Emperor, 1924 Rang. 209 : I.L.R. 1 Rang. 512 : 76 I.C. 817.
19. Kanhaiyalal v. State, 1953 M. B. 262, 263 : 1953 M.B.L.J. 647; see also Saudagar Singh v. Emperor, 1944 Lah. 377 : 46 P.L.R. 185; Budhu Bhanger v. State of Bihar, 1972 B.L.J.R. 397; Md. Murtaja v. State of Orissa, 1975 Cut.L.R. (Cr.) 1 (consent of counsel for accused is no substitute).
20. This can be generally proved by the production of the original record v. Ss. 80, 87, 91 Exception (1), post, or a certified copy see Ss. 74, 76, 77, 79 post; as to meaning of "Judicial proceeding" see notes under S. I, ante, "A true judicial decision pre-supposes an existing dispute between two or more parties and then involves four requisites: (1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) If the dispute between them is a question of fact the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) If the dispute between them is a question of law, the submission of legal argument by the parties, and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and application of the law of the land to the facts so found including where required a ruling upon any disputed question of law". Cooper v. Wilson, (1937) 2 K.B. 309 at p. 340 ; (1937) 106 L.J.K.B. 728 quoted with approval in Bharat Bank Limited v. Employees of the Bharat Bank Ltd., 1950 S.C. 188 : 86 C.L.J. 230 : Investigation by a Junior Inspector of Mines is not a judicial proceeding; Bhuanrgya Coal Co. Ltd. v. Saliebjan, 1956 Pat. 299. Proceedings under Tenancy Act are judicial proceedings; Mahant Rai v. Mst. Lachhmina Kunwar, 1927 P.C. 123 : 101 I.C. 363; 31 C.W.N. 1087; 1927 M.W.N. 456.
21. Khadim Hussain v. The Crown, 1950 Lah. 34 : 51 Cr.L.J. 419; R. v. Dossaji, (1878) 3 B. 334 (British Consul at Zanzibar).
22. Ratan v. State, 1959 S.C.R. 1336: I.L.R. 37 Pat. 1409; 1959 S.C.J. 222; A.I.R. 1959 S.C. 18: 1959 Cr.L.J. 108 : 1959 B.L.J.R. 1: 1960 Andh.L.T. 407 : 1959 A.L.J. 35 : 1959 M.P.C. 46.
23. As to evidence taken on commission see Civ. P. Code, O. XXVI.
24. R v. Rigg, (1866) 4 F. & F. 1085; and see Acts IV of 1871, V of 1889 and Ss. 174–176, Cr. P. Code, 1973.

or District Registrar dealing with an appeal under Section 72, Registration Act<sup>25</sup> or a Sub-Registrar holding an inquiry under the same Act,<sup>1</sup> or Special Registrar,<sup>2</sup> or Arbitrator. As to evidence given by affidavit, see notes to the first section, ante.<sup>3</sup> The evidence should also have been given on oath or solemn affirmation.<sup>4</sup> The evidence of a witness given in a proceeding before a Judge or Magistrate who had no jurisdiction, and which was thus pronounced to be *coram non judice*, cannot, therefore, be used under this section on a re-trial before a competent Court.<sup>5</sup> A proceeding before a Court, which has no jurisdiction to entertain it, is not a "judicial proceeding", and evidence given in such a proceeding cannot be admitted in evidence under this section.<sup>6</sup> Where the conviction recorded by the Magistrate was set aside in appeal and accused was directed to be committed to sessions the proceeding before the Magistrate does not become illegal as such statement recorded at trial by the Magistrate is admissible in Sessions Court if the witness is dead.<sup>7</sup> Where a plaintiff fails to appear, the court has no jurisdiction to hear the defendant's evidence before dismissing the suit for want of prosecution, and evidence so heard cannot be used under this section.<sup>8</sup> When *ex parte* decree is set aside testimony of the plaintiff recorded in absence of defendant on which the *ex parte* decree was passed is not legal evidence, and cannot be used in fresh trial even though the fresh trial be again *ex parte*.<sup>9</sup>

The deposition must have been made in a judicial proceeding or before any person authorised by law to take it. The deposition must have been made before a court, as that term is defined in Section 3 of the Act, or before an arbitrator or Commissioner. From the use of the words 'in a judicial proceeding or before any person' it might be inferred that a deposition given otherwise than in a judicial proceeding was intended to come within this section, but the expression 'subsequent judicial proceeding' and the terms of the proviso show that it was not so intended; and in fact the section has been construed 'as if the word 'or' is omitted. Evidence taken before a Magistrate, who had no jurisdiction, has been held not to be within the section, 'not' being taken before a person authorised to take it.<sup>10</sup>

- 25. Muthu Goundan v. Pachayammal, 1943 Mad. 749 : (1943) 2 M.L.J. 545 : 56 L.W. 533.
- 1. Lakshmann v. Vardhanamma, 1919 Mad. 54 : I.L.R. 42 Mad. 103 : 49 I.C. 636 : 9 L.W. 98.
- 2. Jeheto v. Jaibunessa, (1913) 18 C.W.N. 605 : 20 I.C. 66.
- 3. And see Civ. P. Code, O XIX.
- 4. Act X of 1873, S. 15 : but see S. 18 ib.
- 5. In re Rami Reddi, (1881) 3 M. 48; Sankappa v. Keraga, 1931 Mad. 575 : I.L.R. 54 Mad. 561 : 132 I.C. 122 : 61 M.L.J. 120 : 33 L.W. 419; Buta v. R., 1926 Lah. 582: I.L.R. 7 Lah. 396 : 97 I.C. 752.
- 6. Sudhindra Nath v. State, 56 C.W.N. 835 : A.I.R. 1953 C. 339; Emperor v. Ajit Kumar, 1945 Cal. 159 : 220 I.C. 237 : 78 C.L.J. 217 (Magistrate's appointment *ultra vires*); Jaggan v. Basantu, 1965 A.W.R.
- (H.C.) 772, 774.
- 7. State v. Suraj Bali, 1972 Cr.L.J. 1223 (All.); In re Rami Reddi, 3 Mad. 48; Buta Singh v. Emperor, A.I.R. 1926 Lah. 582; Sankappa v. Keraga Pujary, A.I.R. 1931 Mad. 575; Emperor v. Ajit Kumar Ghosh, A.I.R. 1945 Cal. 159; Sudhindra Nath v. The State, A.I.R. 1953 Cal. 339, distinguished; Empress of India v. Ilahi Bakhsh, 2 All. 910 and Sahdeo Ram v. Emperor, 1935 All. 579 followed.
- 8. Kesi v. National Jute Mills, 40 C. 119; distinguishing *ex parte* Jacobson, (1882) 22 Ch. D. 312.
- 9. Aziz Ahmed Khan v. A. Patel, I.L.R. (1972) Andh. Pra. 421 : A.I.R. 1974 Andh. Pra. 1 (F.B.) A.I.R. 1956 Mad. 633 (dissented from); Gangula Butchi Reddy v. G. Vasudeva Reddy, (1975) 1 A.P.L.J. 200.
- 10. Cunningham.

An enquiry in which evidence was legally taken is included in the term 'judicial proceeding'.<sup>11</sup> An enquiry about matters of fact where there is no discretion to be exercised and no judgment to be formed but something is to be done in a certain event as a duty is not a judicial but an administrative enquiry. Section 4 of the Indian Oaths Act includes an arbitrator in the expression "authorised by law to take it." Order XXVI, C. P. C., includes a Commissioner in the expression.

In general, the test, of any person authorised by law to take it, is the testimony taken before a tribunal or officer not empowered to compel or not any practice employing cross-examination as part of its procedure is inadmissible, and, conversely, the kind of tribunal is immaterial and testimony is admissible, if in fact cross-examination was practised under its procedure.<sup>12</sup>

(b) That the witness is dead, or that the other grounds mentioned by the section exist; this inconvenience to witnesses is no ground.<sup>13</sup> These grounds are (with the exception of the witness being kept away) the same as those enumerated in Section 32, ante.

(c) That the conditions required by the provisions have been fulfilled (v. post) and that the depositions were duly recorded,<sup>14</sup> in the manner prescribed by law.<sup>15</sup> In the absence of proof that the witness is dead, or cannot be found, or is incapable of giving evidence or is kept out of the way, the section cannot be invoked merely on the ground that summons had not to be served on him.<sup>16</sup> If the witness is alive and available his statement given in one proceeding cannot be admitted in other independent proceeding.<sup>17</sup> The burden of proving these facts lies on the person who tenders evidence under this section.<sup>18</sup>

Before admitting an earlier statement in evidence under this section, the court must be satisfied that the conditions laid down by it are fulfilled.<sup>19</sup>

**4. Medical witness.** Section 509 allows the deposition of a Civil Surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused, or taken on commission, to be given in evidence although the deponent is alive, but not called as a witness. The deposition is, however, admissible only in so far as it is expert evidence tendered by a medical witness as such. The portion of it which relates to non-medical matter is not admissible under the section.<sup>20</sup>

11. See sec. 4 (1) (m), Cr.P.C.

12. Wigmore, s. 1873; Taylor, s. 465.

13. R. v. Burke, (1884) 6 A. 224; as to S. 288, Cr.P. Code (old), v. post.

14. Dargahi v. R., 1925 Cal. 831 : I.L.R. 52 Cal. 499 : 88 I.C. 733.

15. Emperor v. Phagunia, 1926 Pat. 58; 89 I.C. 1043.

16. Supdt. and Remembrancer of Legal Affairs, Bengal v. Forhad, 1934 Cal.

766 : 153 I.C. 493; Ranjit Singh v.

State, 1954 Pepsu 69 : I.L.R. 1953 Pep. 435; 55 Cr.L.J. 592; Prabhakar

Lal v. Sham Lal, 1972 (1) Mys. L.

J. 473.

17. Asokan v. Narayanan, 1972 Mad.L.J. (Cr.) 680 : 1972 Ker.L.T. 728.

18. S. 104, post, Rup Singh v. State, 1961 M.P.L.J. (Notes) 54. Admission of evidence without such evidence of circumstances is illegal)

19. Munna Lal v. State, 1968 A.W.R. (H.C.) 812.

20. Waris Khan v. Emperor, 1940 Oudh 209 : I.L.R. 15 Luck. 429 : 1940 O. W.N. 177; Nand Singh v. Emperor, 1943 Lah. 101 : 206 I.C. 417.

**5. Evidence taken on commission.** Order XXVI of the Civil Procedure Code provides for the examination of witnesses on commission, but evidence taken on commission does not *ipso facto* become evidence in a case. It has to be accepted by the Court after hearing the opposite party, unless it can be read in evidence under the provisions of Order XXVI, Rule 8 of C. P.C. The mere fact that a commission has been ordered is no reason why the evidence taken on the commission should be read unless it be proved that the witness cannot give his evidence in the general way.<sup>21</sup> The evidence is admissible for the purpose of proving the truth of the facts which it states either in any entirely new judicial proceeding, or a subsequent stage of the same proceeding.

Section 503 of the Code of Criminal Procedure provides for the examination of witnesses on commission and sub-section (2) of Section 507 provides that any deposition so taken, if it satisfies the conditions prescribed by Section 33 of the Indian Evidence Act, 1872 (1 of 1872), may also be received in evidence at any subsequent stage of the case before another Court. Depositions taken on commission in criminal cases, although inadmissible under the Criminal Procedure Code, may be admitted under the present section, if the requirements of the proviso to it have been complied with.<sup>22</sup>

**6. Evidence under Fugitive Offenders Act.** Evidence recorded for the purpose of proceedings under the Fugitive Offenders Act<sup>23</sup> is relevant and admissible under this and the previous section.<sup>24</sup>

**7. Discretion of Court.** It is impossible to lay down any hard and fast rule for the application of this Section. Each case must depend upon its own facts and the matter is essentially one for the exercise of discretion on the part of the Judge.<sup>25</sup> The Court has no discretion as to admitting a deposition when the witness (i) is dead, or (ii) cannot be found, or (iii) is incapable of giving evidence, or (iv) is kept out of the way; the deposition of such witnesses is declared to be relevant and must therefore be admitted. The Court has such a discretion in the case of the circumstances mentioned at the close of the section<sup>1</sup> and the High Court will not interfere with the exercise of the discretion by the Judge unless it was exercised arbitrarily or against the well-established principles of law.<sup>2</sup> When the evidence of an absent witness is admitted under this section, the grounds for its admission should be stated fully and clearly, to enable the Court of Appeal to judge of the propriety of its admission.<sup>3</sup> Assuming that there are reasons why the Court thinks fit to dispense with the personal attendance of a witness, and circumstances are disclosed showing that his presence could not be obtained without an unreasonable

- 21. Phanindra v. Pramothanath, 1928 Cal. 421 : I.L.R. 55 Cal. 748 : 106 I.C. 880; Satish Chandra v. Kumar Satish Kantha, 1923 P. C. 73: 73 I.C. 391; see also the cases cited in note 20.
- 22. Queen-Empress v. Ramchandra, I.L.R. 19 Bom. 749; see also R. v. Burke, 6 All. 224.
- 23. 44 and 45 Vict. c., 69.
- 24. E.C.D. Wheeler v. Emperor, 1928

- Sind 161 : 112 I.C. 673.
- 25. Jati Mali v. Emperor, 1929 Cal. 765 : 33 C.W.N. 918. .
- 1. (In the matter of) Pyari, (1879) 4 C.L.R. 504.
- 2. Banwari Lal v. State, 1956 All. 385, 389
- 3. R. v. Mowjan, (1873) 20 W. R. Cr. 69; Kulbhushan Sharma v. State, 1976 Cr. L. J. 1433.

amount of expense and delay, the evidence to supply such reason and to prove such circumstances should be formally and regularly taken and recorded.<sup>4</sup>

**8. Strict proof necessary.** In criminal cases, particularly where a man is being tried for a serious crime, and the evidence sought to be accepted is of signal importance, the Court must insist on strict proof before holding that the conditions required for admitting former deposition have been satisfied. It is an elementary right of an accused person that a witness who is to testify against him should give evidence before the Court trying him and thus afford an opportunity to the Court to see the witness and observe his demeanour, and form a better opinion as to his reliability than is possible from reading his statement. It is only exceptional circumstances, which should be strictly proved to exist, that a previous deposition of a witness should be admitted under this section.<sup>5</sup>

The power given by this section requires to be exercised with great caution and the Court must insist on strict proof before holding that the requisite conditions have been satisfied. More especially is this necessary where a man is being tried for his life, and the evidence sought to be put in, is signal importance.<sup>6</sup> And it has also been held by the Privy Council that in the absence of proof of such circumstances, the admission in bulk in a Civil suit of the deposition recorded in a criminal trial was a serious irregularity.<sup>7</sup> This section does not justify a Magistrate, when proceeding under Section 491 of Act X of 1872 (Section 107 of Act 5 of 1898), Criminal Procedure Code, in using evidence taken in a previous criminal trial in supersession of evidence given in the presence of the accused.<sup>8</sup> It is well settled that before the Sessions Judge can admit a statement, he must record a finding that any of the circumstances enumerated in this Section existed and unless he is so satisfied on evidence led before him, the power vested in him under it cannot be exercised.<sup>9</sup> The Court must have arrived at the finding, on evidence formally and regularly taken and recorded, that one or other of the grounds specified in the section exists.<sup>10</sup>

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4. R. v. Mulu, (1880) 2 A. 646; see Emperor v. Gajendra Mohan, 1943 Cal. 222; I. L. R. (1943) 1 Cal. 405: 207 I. C. 106.
5. Ranjit Singh v. State, I. L. R. 1953 Pepsu 435; 1954 Pepsu 69, 70; see also R. v. Mowjan, (1878) 20 W. R. Cr. 69 (In the matter of) Pyari (1879) 4 C. L. R. 504 at pp. 505, 506, 509; R. v. Burke, (1884) 6 A. 224; Bismillah Khan v. State, I. L. R. (1958) 8 Raj. 858; A. I. R. 1959 Raj. 21; 1959 Cr.L.J. 84; Tulsiram v. State, A. I. R. 1956 Bhopal 52; Bakshish Singh v. State of Punjab, A. I. R. 1957 S.C. 904; 1958 All. L. J. 1; 1958 Andh. L. T. 66; 1958 B. L. J. R. 74; 1958 Mad. L. J. Cr. 38; I. L. R. 1958 Punj. 262; 1957 Cr. L. J. 1459; (1958) M.P.C. 23; Kulbhushan Sharma v. State (1976) 3 Cr. L. T. 281 (J. & K.): 1976 Cri. L. J. 1433.
6. Nga Nyo v. Emperor, 1924 Rang 209; I. L. R. 1 Rang. 512; 76 I.C. 817; K. Sharma v. State, 1976 Cri. L. J. 1433.
7. Bal v. Shrinivas, (1915) 39 B. 441: 42 I. A. 135; 29 I.C. 639; A.I.R. 1915 P. C. 7.
8. R. v. Prosونachandra, (1874) 22 W. R. Cr. 36.
9. Kanhaiya v. State, 1953 M. B. L. J. 647; 1953 M.B. 262; Saudagar Singh v. Emperor, 1944 Lah. 377: 46 P.L. R. 135; Emperor v. Gajendra Mohan, 1943 Cal. 222; I. L. R. (1943) 1 Cal. 405: 207 I. C. 106.
10. Satish Chandra v. Emperor, 1945 Cal. 137; I. L. R. (1944) 2 Cal. 76: 219 I. C. 310; Nga Chit Tin v. The King, 1939 Rang. 225; 183 I. C. 145; Khem Singh v. Emperor, 1925 Lah. 319; 88 I. C. 30: 26 P. L. R. 458.

A mere statement by the Public Prosecutor that the witness could not be found is not enough.<sup>11</sup> Where the evidence given by a witness before the committing Magistrate is admitted at the trial before the Sessions Court under this Section without calling the witness, the Sessions Court must record its reasons for holding that the necessary conditions laid down in it were satisfied, so that the Appellate Court can see whether the section was properly applied.<sup>12</sup> But the omission to record the reasons before admitting the evidence is an irregularity curable under Section 537 of the Criminal Procedure Code, unless it has prejudiced the accused, or has occasioned a failure of justice.<sup>13</sup>

**9. Consent and waiver.** (a) *Civil cases.* A civil suit is a proceeding *inter partes*, and as parties can by consent settle its final result by having a consent decree passed, there is no reason why they should not be permitted to consent to treat something as evidence of a relevant fact which it may not otherwise be; and when the trial Judge has admitted and acted upon evidence, it is not only proper evidence, but the parties ought not to be allowed to object to its admissibility in appeal.<sup>14</sup> But irrelevant and inadmissible evidence cannot be made relevant or admissible with the consent of a party. Consent or want of objection to the reception of evidence, which is irrelevant, cannot make the evidence relevant, but consent or want of objections to the wrong manner in which relevant evidence should be brought on record of the suit disentitles parties from objecting to such evidence subsequently. Unless a party can be found to have been estopped from objecting to the admissibility of the evidence, it cannot be said that evidence, not otherwise admissible or which would have been liable to rejection, if objection were taken to it, may be perfectly good evidence if admitted by the consent of parties.<sup>15</sup>

(b) *Criminal cases.* In Criminal cases, there can be no waiver on the part of the accused as regards the statutory requirements of the section. In a case, where the fact of the illness, and the consequent inability to attend Court, of a witness, whose deposition before the committing Magistrate was sought to be transferred to the Sessions file and read under this section, was sought

11. *Indar v. Emperor*, 1930 Lah. 1041: 129 I. C. 195: 31 P. L. R. 1021.

12. *Salvlimiya Miyabhai v. Emperor*, 1944 Bom. 338: 46 Bom. L. R. 589; *Budhu Bhangar v. State of Bihar*, 1972 B. L. J. R. 397.

13. *Nga Ba On v. King-Emperor*, 1927 Rang. 248: 104 I.C. 637; following *Abdul Rahman v. King-Emperor*, 1927 P. C. 44: 54 I. A. 96: I. L. R. 5 Rang. 53: 100 I. C. 227.

14. *Jainab Bibi v. Hyderally Saheb*, 1920 Mad. 547; I. L. R. 43 Mad. 609: 56 I. C. 957 (F.B.); *Radha Kishan v. Kedar Nath*, 1924 All. 845: I. L. R. 46 All. 815: 80 I.C. 874: 22 A. L. J. 761; *Bhusan Chandra v. Hiranmay Roy*, A. I. R. 1957 Tripura, 1—waiver by guardian ad litem; *Dalim Kumar v. Nandarani Dassi*, 73 C. W. N. 877, at pp. 884,

885: A. I. R. 1970 Cal. 292, 297 (rule of procedure can be waived—evidence before deceased judge made admissible before judge in new trial).

15. *Ayyavar Thevar v. Secretary of State*, 1942 Mad. 528: 202 I. C. 274: (1942) 1 M. L. J. 485; see also cases cited therein; *Dwarka v. R.*, 1922 Oudh 254: 74 I. C. 860; *Brajaballav v. Akhoy*, 1926 Cal. 705: 98 I. C. 115: 30 C. W. N. 254; *Radha Kishan v. Kedar Nath*, 1924 All. 845: I. L. R. 46 A. 815: 80 I. C. 874: the first part of the headnote is too broadly stated. Following *Lakshman v. Amrit*, (1900) 24 B. 591; *Jainab Bibi v. Hyderally*, A. I. R. 1920 Mad. 547: I. L. R. 43 Mad. 609: 56 I. C. 954 (F.B.).

to be proved by the evidence of a police officer who was deputed to serve the summons on the witness, their Lordships of the Privy Council observed :

"Where it is desired to have recourse to this section on the ground that a witness is incapable of giving evidence that fact must be proved, and proved strictly. It is an elementary right of an accused person or a litigant in a civil suit that a witness who is to testify against him should give his evidence before the Court trying the case, which then has the opportunity of seeing the witness and observing his demeanour and can thus form a far better opinion as to his reliability than is possible from reading a statement or deposition. It is necessary that provision should be made for exceptional cases where it is impossible for the witness to be before the Court, and it is only by a statutory provision that this can be achieved. But the Court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to be read are strictly proved. In a civil case a party can if he chooses, waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence. In the present case the only evidence was that of the police officer already mentioned and his visit was 13 days before the trial. The officer was not a proper person to prove from what disease the witness was suffering; he could only say what someone told him. If such evidence as he gave were sufficient, it would mean that any reluctant witness could take to his bed when he found there was a likelihood of being served with a witness summons and get excused from attendance by telling the server that he was suffering from some serious complaint. Their Lordships do not mean to lay down that in every case there must be evidence of a medical man where excuse is sought on the ground of physical incapacity. That is not the law in England,<sup>16</sup> and there is no reason for a different rule to apply in India. There may be many cases in which the facts are such that the incapacity can be proved by a lay witness. Here, there was no evidence at all except that the policeman found the witness was ill 13 days before the trial and as he was not competent to speak to the illness, their Lordships are of opinion that there was no evidence before that Court that he was incapable of giving evidence on 19th January. The learned Additional Judge was no doubt largely influenced by counsel for the accused consenting to the evidence being read, but in their Lordships' opinion that does not do away with the necessity of the Court being satisfied by proof. Neither counsel nor his client could have had any personal knowledge on the subject, unless indeed counsel had recently seen the witness in which case he could have so informed the Court and not merely given a consent. It may be that there are some matters, as to which it would be possible for a prisoner to consent to be taken as proved though no strict evidence was given; if there are, as to which their Lordships express no opinion, they could only be such as might reasonably be supposed to be particularly within the knowledge of the accused. Their Lordships accordingly consider that this previous statement was wrongly admitted. Their Lordships would also observe that though in this case the accused was represented before the committing Magistrate and the witness was therefore cross-examined,

16. See R. v. Nokes, (1917) 1 K.B. 581; 86 L. J. K. B. 594; 116 L. T. 705.

in very many of these cases the accused is not represented at this stage, so while he has the opportunity to cross-examine it is not often that this would be effectively done. This is another reason for exercising great care before admitting a statement.<sup>17</sup>

The consent or want of objection on the part of the accused,<sup>18</sup> or on the part of the Advocate appearing for him,<sup>19</sup> to the deposition of an absent witness being brought on the record under this section cannot make it admissible, if it is not otherwise so. Consent can, however, lead to some inference on a point of fact. If it is alleged on behalf of the prosecution that a certain witness is seriously ill, and evidence is led to prove the illness of the witness and no cross-examination is directed on this point, the consent of the accused may lead to the inference that he does not challenge the validity of the assertion that the witness was very unwell and the Court can take into consideration this circumstance in accepting the evidence on a question of fact. Similarly, if the whereabouts of some witnesses are not known and evidence is led to prove that fact, the consent of the accused to the admission of the evidence and the absence of cross-examination on the evidence led to prove a question of fact with regard to the whereabouts of the witness, may lend support to the evidence led by the prosecution to prove that the whereabouts were not known.<sup>20</sup> And it has also been held by the Privy Council that, in the absence of proof of such circumstances, the admission in bulk in civil suit of the deposition recorded in a criminal trial was a serious irregularity.<sup>21</sup> This section does not justify a Magistrate when proceeding under Sec 491,<sup>22</sup> Criminal Procedure Code, in using evidence taken in a previous criminal trial in supersession of evidence given in the presence of the accused.<sup>23</sup>

**10. Mode of proof.** The evidence given in the previous proceeding must have been recorded in the manner prescribed by law.<sup>24</sup> Subject to the other provisions of this Act, oral evidence is as receivable under this section as when it has been reduced to a formal deposition.<sup>25</sup> When the law requires that the entire statements<sup>1</sup> made by witnesses or parties called as witnesses, should be reduced into writing, no evidence can be given in proof of such statements except the written depositions made in accordance with that law, or secondary evidence in cases in which such evidence is admissible.<sup>2</sup>

17. Chainchal Singh v. Emperor, 1946 P. C. I, S: 72 I. A. 270; I. L. R. 1945 Lah. 451; 222 I. C. 189; Ratna Munda v. The State, 1951 Orissa 245; 16 Cut. L. T. 227.
18. Salvalimiya Miyabhai v. Emperor, 1944 Bom. 338; 46 Bom. L. R. 589; Gaya Prasad v. State, 1954 All. 59; 1955 Cr. L. J. 68.
19. Kesar Singh v. State, 1954 Punj. 286; 1956 Cr. L. J. 86; Mehr Lila Meraman v. State, 1954 Sau. 159; Ghulam Haidar v. Emperor, 1929 Lah. 542; I. L. R. 10 Lah. 837; 116 I. C. 329; 30 Cr. L. J. 623; 30 P. L. R. 192; S. C. Mitter v. State, 1950 Cal. 435; 86 C. L. J. 21; Md. Murtaja v. State of Orissa, 1975 Cut. L. R. (Cri.) 1.
20. Gaya Prasad v. State, 1954 All. 59 (62); 1955 Cr. L. J. 68.
21. Bal v. Shrinivas, A. I. R. 1915 P. C. 7; 39 B. 441; 42 I. A. 135; 29 I. C. 639.
22. Cf. Act X of 1872 corresponding to S. 138 of the present Cr. P. C. of 1973.
23. R. v. Prosonochundra, (1874) 22 W. R. Cr. 36.
24. See Cr. P. Code, Ss. 262-264; 273, 283, 291; C. P. Code, O. XVIII, Rules 4, 17, and O. XXVI.
25. Norton, Ev., 194.
1. C. P. Code, Order XVI, Rule 21; Order XVIII, Rule 5, Cr. P. Code, Sections 275, 276, 277, 278, 281, 284.
2. v. post, S. 91, and notes to same.

Depositions of witnesses taken by an officer of the Court are public documents within the meaning of that term as used in Sec. 74 of the Evidence Act, and Sec. 65 provides that when the original is a public document, "a certified copy of document, but no other kind of secondary evidence is admissible."

But this rule does not apply where the original has been lost or destroyed.<sup>3</sup> A certified copy of the deposition of a witness would not come in by itself. In any case, it will be necessary to adduce evidence proving the identity of the person who gave the deposition.<sup>4</sup> No presumption can be made under Sec. 80 as to the identity of the deponent.<sup>5</sup> A statement of a witness abstracted in a judgment given in a previous suit cannot be made use of in lieu of the original statement itself.<sup>6</sup> It has been held by their Lordships of the Privy Council that the description of the witness in the heading of his deposition is no part of the deposition proper, that is, no part of the evidence given by the witness on solemn affirmation. It may have been elicited by questions put by the Magistrate or it is just as likely that it was filled in by a subordinate official and on the paper when put into the hands of the Magistrate for him to take down the evidence of the witness. Again, it may have been read over to the witness by the Magistrate when the evidence of the witness was completed, or the Magistrate may have contented himself with reading over the narrative embodying the evidence, which was all he was bound to do under the Act.<sup>7</sup> But, in an Oudh case, the age of the deponent given in answer to a question by the Court was held to be admissible.<sup>8</sup>

Their Lordships of the Privy Council in *Mst. Maqbulan v. Ahmad Husain*,<sup>9</sup> did not state that an entry at the head of the deposition is inadmissible, but only that they could not attach weight to it. Though the case has not been specially provided for (except in the case mentioned in Sec. 463, Cr. P. C.),<sup>10</sup> and it does not appear to have been so actually decided, it is submitted that statements required by law to be recorded, but which are informally recorded, are not admissible under this section. But, it has been held by the Madras High Court in a case where a deposition, though irregularly taken, had been signed by the witness and admitted by him to be correct, that it could be used in evidence as against him, though it was open to him to prove that it was in fact incorrect.<sup>11</sup>

Failure to comply with the provisions of Order XVIII, Rules 5 and 6 (Civil Procedure Code), in a judicial proceeding, has been held to be an informality,

- 3. Chandreshwar Prasad v. Bisheshwar Pratap, 1927 Pat. 61; I. L. R. 5 Pat. 777; 101 I. C. 289; 8 P. L. T. 510; see also Kalandan v. Kunhunni Kidavu, 6 Mad. 80; Haranand Chetlangia v. Rain Gopal Chetlangia, I. L. R. 27 C. 639; 27 I. A. 1; 4 C. W. N. 429.
- 4. Brajaballav Ghose v. Akhoy Bagdi, 1926 Cal. 705; 93 I. C. 115.
- 5. Bhagwat Prasad v. Sher Khan, 1926 Oudh 489; 94 I. C. 985.
- 6. Saradambe v. Pattabhiramayya, 1931 Mad. 207; I. L. R. 53 Mad. 952; 129 I. C. 463; 60 M. L. J. 13; 1930 M. W. N. 601; 33 L. W. 20; see also Medavarapu Narasaya v. Meda-
- varapu Veeraya, 1935 Mad. 268; 154 I. C. 753; 40 L. W. 810.
- 7. Maqbulan v. Ahmad Husain, 26 All. 108; 31 I. A. 38; 6 Bom. L. R. 233; 8 C. W. N. 241; see also Ma Tin v. Ma E. Nyun, 1938 Rang. 81; 176 I. C. 242.
- 8. Jadunath Singh v. Thakur Bisheshar Singh, 1939 Oudh 17; 178 I. C. 950; 1938 O. W. N. 1267.
- 9. (1903) 26 All. 108; 31 I. A. 38; 8 P. C. J. 583 (P.C.).
- 10. See Noshai v. R., (1880) 5 C. 958 and notes to Ss. 80 and 91 post.
- 11. Bogra v. R., (1910) 34 M. 141, dissenting from Kamatchinathan v. R., (1904) 28 M. 308.

which renders the deposition of an accused inadmissible in evidence on a charge of giving false evidence on such deposition; and under Sec. 91, post, no other evidence of such deposition is admissible.<sup>12</sup> The usual presumption, however, in favour of the proceedings and depositions having been regular, is made unless the contrary be shown.<sup>13</sup> But, where the law either does not require the statements of witnesses to be reduced to writing,<sup>14</sup> or merely requires the substance of the evidence of witnesses,<sup>15</sup> or of parties called as witnesses,<sup>16</sup> to be recorded, in the first of these cases and it would seem also in the second (though it has not, it is believed, been so decided), oral evidence of such statements, as had not been recorded, would be admissible under this section.<sup>17</sup> What a witness has orally testified may be proved, either by any person who will swear from his own memory, or by notes taken at the time by any person who will swear to their accuracy, or possibly, from the necessity of the case, by the Judge's notes. How far it may be necessary to prove the precise words does not clearly appear. Perhaps, on occasions, when nothing of importance turns on the precise expression used, it will be considered sufficient, if the witness can speak with certainty to the substance of what was sworn at the former trial.<sup>18</sup> When a note of the evidence has been made by a reporter or shorthand writer, he could, of course, use the note to refresh his memory, and from such a source a shorthand writer might be able to swear to the very words.<sup>19</sup> Under English law, a stricter rule is applied in criminal than in civil proceedings.<sup>20</sup> But this section which is generally more extensive than the English law on the same subject,<sup>21</sup> applies alike to civil and criminal proceedings.

**11. Use of previous statements.** The distinction should be carefully preserved between the use of previous statements as evidence-in-chief or substantive evidence under this section, and the use of previous statement (whether on oath or not and whether in a judicial proceeding or not) only, to discredit or corroborate a witness, and as admissions when the witness in a former suit is party to a subsequent suit.<sup>22</sup>

This section does not apply to the deposition of a witness in a former suit, when the witness is himself a defendant in the subsequent suit, and the deposition is sought to be used against him, not as evidence given between the parties one of whom called him as a witness, but as a statement made by him, which

12. R. v. Mayadeb, (1881) 6 C. 762, and see cases cited in notes to Ss. 80, 91: Roscoe, Cr. Ev., 63, 66; Taylor Ev., s. 479; see notes to S. 91 post.
13. See S. 114, illust. (e).
14. S. 263, Cr. P. Code.
15. Ss. 264, 274 Cr. P. Code.
16. C. P. Code, Order XVI, Rule 21, Order XVIII, Rule 13.
17. See notes to S. 91, post.
18. Taylor, Ev., ss. 546, 547 and Krishnasami v. R., (1909) 32 M. 384.
19. Norton Ev., 104, 105.
20. Taylor, Ev., s. 479 for rule in civil case, see R. S. C. 1883, Order XXXVII, Rule 27, and as to notice

- required in Chancery, see (Re.) Chemell, (1877) 8 Ch. D. 492 and for use of deposition when inquiry was recommended before a second Magistrate owing to the illness of the first; see ex parte Bottomley, (1909) 2 K. B. 14.
21. See Taylor, Ev., s. 464, et seq: Roscoe, N. P. Ev., 185–189; Powell, Ev., 9th Ed. 326–337: Steph. Dig., Arts. 125, 140–142; Roscoe, Cr. Ev., 61 et seq: Norton Ev., 195: Wills, Ev., 3rd Ed., 259–268.
22. See Ss. 21, ante and 145, 155, 157, post: Roscoe, Cr. Ev., 61, 62; Soojan Bibee v. Achmut Ali 14 B.L.R. App. 3, post.

would be evidence against him whether he made it as a witness or on any other occasion. It is used against him as an admission.<sup>23</sup>

Depositions may also be used as dying declarations under the preceding section, or to refresh the memory of witnesses under Sec. 159, if the conditions set forth in that section exist. Depositions, though informally taken, are receivable like any other admissions, against the deponent whenever he is a party; or they may be used to contradict and impeach him, when he is afterwards examined as a witness. But, before they will be available as secondary evidence and as a substitute for *viva voce* testimony, they must be proved to have been regularly taken in a judicial proceeding or before an authorized person, and it must further appear that the witness himself cannot be personally produced.<sup>24</sup>

Again, the depositions of deceased witnesses may, under the preceding section, be admissible even against strangers; as for instance, if they relate to a custom, prescription or pedigree where reputation would be evidence; for, as the unsworn declaration of person deceased would be here received, their declarations on oath are *a fortiori* admissible.<sup>25</sup> When depositions are tendered in evidence, as secondary proof of oral testimony, they are, of course, open to all the objections which might have been raised, had the witness himself been personally present at the trial. Leading and other illegal questions are, therefore, constantly suppressed together with the answers to them; and this, too, whether the testimony has been taken *viva voce* or by written interrogatories.<sup>1-15</sup> But a party cannot repudiate an answer which has been given to an illegal question put on his own side.<sup>16</sup> And, if secondary evidence of documents is improperly given on commission and is accepted without objection being made, it will be too late for the party against whom the evidence is given subsequently to take the objection which he might have urged at the time.<sup>17</sup> When the statement of a witness previously made is used as evidence under the provisions of Secs. 32 and 33, then any other statement made by that witness can be used by virtue of Sec. 158, Evidence Act, for the purpose of corroborating or contradicting that witness, as if such witness had appeared in Court and was cross-examined on such previous statement, and, on question being asked, had denied the facts mentioned in the same.<sup>18</sup> A previous statement, which is not made in Court and at the trial, can be used only for the limited purpose of corroborating or contradicting a witness and does not become substantive evidence in the case.<sup>19</sup> Where the witnesses for the prosecution are not recalled under Sec. 256, Criminal Procedure Code, because they are dead or otherwise not available, the result of not re-calling them for cross-examination is not that their

23. Brajaballav Ghose v. Akhoy Bagdi 1926 Cal. 705; 93 I. C. 115; 30 C. W. N. 204; Soojan Bibee v. Achmut Ali, 21 W. R. 414; 14 B. L. R. App. 3, post; Ali Muhammad Khan v. Maharaj Bepari, 1921 Cal. 781; 61 I. C. 266; 36 C. L. J. 186.
24. Taylor, Ev., s. 1754.
25. Taylor, Ev., s. 1754.
- 1-15. Taylor, Ev., s. 548; Hutchinson v. Bernard, (1836) 2 M. & Rob 1; Norton, Ev., 198; R. v. Ramchandra, (1895) 19 B. 749, 760, 761.
16. Small v. Nairne, (1819) 13 Q. B.

- 840.
17. Robinson v. Davies, (1879) 5 Q. B. D. 26; Taylor, Ev., s. 548.
18. Niamat Khan v. Emperor, 1930 Lah. 409; 127 I. C. 850; 31 P. L. R. 411; Hari Ram v. Emperor, 1926 Lah. 122; 89 I. C. 897; 26 Cr. L. J. 1425.
19. Niamat Khan v. Emperor, 1930 I. C. 409; 127 I. C. 850; R. v. Cherath Choyi Kuttii, (1902) 26 Mad. 191; Bishen Datt v. Emperor, 1927 All. 705; 105 I. C. 677; 28 Cr. L. J. 965; 25 A. L. J. 994.

previous evidence can be expunged. The evidence they gave before the charge continues to be relevant under this section.<sup>20</sup>

**12. In a later stage of the same judicial proceedings.** The Section enacts that evidence given by a witness in a judicial proceeding is relevant for the purpose of proving in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found etc., provided the essential requirements of the section are fulfilled. Thus, it was held in *Gour Ghandra v. Public Prosecutor*,<sup>21</sup> that where the evidence of a person was taken by the High Court itself by way of taking additional evidence, which the Court, in its Criminal Revisional jurisdiction, had power to take, by virtue of Sec. 439 read with Sec. 428, Cr. P. C., the evidence of that person was admissible in the criminal case, as the evidence was taken in the same proceeding.

**13. Contradiction; Corroboration.** As to what matters may be proved in connection with statements under this section by way of contradiction, corroboration, or otherwise, see Sec. 158, post.<sup>22</sup>

In the case of dying declarations, they are exempted from the operation of Sec. 162, Cr. P. C. But, does the operation of Sec. 162 on statements other than dying declarations have the effect of prohibiting statements, so hit, from being used under the proviso to contradict depositions admitted under this Section, or statements admitted under Sec. 32 (3); for the reason that the witness has not been called by the prosecution? In *Chinna Thimmappa v. Taluk Unta Thimmappa*,<sup>23</sup> Jackson, J., held that they would be so hit because the witness is not called as provided in Sec. 162. This was followed in *Azimuddy v. Emperor*.<sup>24</sup> But a contrary view which appears to be the better view has been taken in *Hariram v. Emperor*,<sup>25</sup> and in *Niamat Khan v. Emperor*.<sup>1</sup> The principle underlying Sec. 33 can be formulated as that in cases where any statement relevant under Sec. 32 or 33 is proved, it must be deemed that the person who has made the statement is actually making it for the first time in Court (which he would have made, if he had been available) and that thereby a foundation is laid, and which would have been laid if he had testified, for all matters to be proved by way of impeachment or confirmation. This is the *ratio decidendi* of *Hariram v. Emperor*,<sup>2</sup> where it was held that the statement of a person made to the Police can be used to contradict his subsequent confession made under Sec. 164, Cr. P. C., if after his death that confession had been used as evidence under Sec. 32 (3). It has been so held in America in *Craft v. Con.*<sup>3</sup>

**14. "Death".** Some proof of death must be offered and proper enquiries be shown to have been made.<sup>4</sup> In proof of this fact reference should

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- 20. *Jaman Singh v. State*, 1956 Raj L. W. 35; 1957 Cr. L. J. 232;
- 21. A. I. R. 1962 Orissa 197; 27 Cut. L. T. 489.
- 22. See *Foolkissory Dassee v. Nobin*, (1895) 23 C. 441.
- 23. A. I. R. 1928 Mad. 1028; 112 I.C. 682; 29 Cr. L. J. 1098; 55 M. L. J. 351; 51 Mad. 967 (F.B.).
- 24. A. I. R. 1927 Cal. 398; 101 I.C. 661; 28 Cr. L. J. 485.
- 25. A. I. R. 1926 Lah. 122; 26 Cr. L. J. 1425; 89 I. C. 897.
- 1. A. I. R. 1930 Lah. 409; 127 I.C. 850.
- 2. A. I. R. 1926 Lah. 122.
- 3. 81 Ky. 252.
- 4. *Benson v. Olive*, (1732) 2 Str. 919; see also *Chard v. Chard*, (otherwise Northcott), (1955) 3 All E. R. 721 at p. 728 for presumption of death on proof of the necessary facts.

be made to the provisions of Secs. 107 and 108, post. As to the discretion of the Court and proceeding *coram non judice*, vide *ante*.<sup>5</sup>

Where a witness dies after his evidence was recorded by the committing Magistrate and his deposition was admitted at the Sessions trial, the question whether the evidence of the investigation officer that it was learnt that the witness had died, was sufficient proof of the death in order to admit the deposition in the committal court under this section, was left open by the Supreme Court.<sup>6</sup>

15. "Cannot be found." It must be shown that reasonable exertion has been made to find the witness.<sup>7</sup> A deposition may be rejected, if there was nothing on the record to show that, by ordinary care and the use of ordinary means, the witness could not have been produced.<sup>8</sup>

If, in spite of his best efforts, the constable deputed to serve the summons could not find a clue to the whereabouts of the witness,<sup>9</sup> and the witness is untraceable,<sup>10</sup> his previous statement can be admitted under this section. But a mere statement of a police constable that he went thrice to the house of the witnesses to serve the summons, but could not find them, may be held to be not sufficient.<sup>11</sup> Merely because summons could not be served on a witness because of floods in the village of his usual residence, the Court of Session cannot record a finding that the witness could not be found. The statement made by such a witness in the committing court cannot be admitted in the Court of Session under section 33.<sup>12</sup> Where the whereabouts of the witness are known to the prosecution agency and the failure of the witness to appear is due to the failure of the prosecuting agency to issue a summons for the witness in good time, the use of this section is improper.<sup>13</sup> Where a subpoena was issued for the attendance of the witness, but without waiting for the return of it or taking proper steps to secure the attendance of the witness, the Sessions Judge admitted the deposition of the witness before the committing Magistrate, it was held that the requirements of the section were not fulfilled, and the Sessions Judge was in error in admitting the deposition in evidence.<sup>14</sup> All that was proved in a case was that he had gone away to 'Disawar'. That alone is not enough to prove that the witness could not be found.<sup>15</sup> But, it has been held

5. In the matter of Pyari, 4 C. L. R. 504; R. v. Rami Reddi, I. L. R. (1881) 3 Mad. 48; Taylor, Ev., 472.
6. Hori Lal v. State of U. P., 1970 M. L. J. (Cr.) 321; (1970) 2 S.C.J. 223, 225.
7. R. v. Lucky Narain, (1875) 24 W.R. (Cr.) 18, 19; R. v. Mulu, (1880) 2 A. 646; Noshai v. R., (1880) 5 C. 958; Rami Reddi *In re*, I.L.R. (1881) 3 M. 48; R. v. Lukhun, (1874) 21 W. R. (Cr.) 56; Abdul Gaffoor v. Govind Prasad, 1928 Rang. 284; Ghulam Haider v. Emperor, 1929 Lah. 542; I. L. R. 10 Lah. 837; 116 I. C. 329; 30 Cr. L. J. 623; 30 P. L. R. 192; Tulsi Ram v. State, 1956 Bhopal 52; Rup Singh v. State, 1961 M.P.L.J. (Notes) 54.
8. R. v. Mowjan, (1873) 20 W. R. (Cr.) 69.
9. Harumal v. State, 1951 Ajmer 25.
10. (Mst.) Ajodhi v. Emperor, 1920 Nag. 170; 56 I. C. 582; 21 Cr. L. J. 486; 16 N. L. R. 30.
11. Dwarka Singh v. Emperor, 1922 Oudh 254; 74 I. C. 860; 24 Cr. L. J. 828; see also Hari Prasad v. State, 1958 All. 660; 1954 Cr. L. J. 1496; 1953 A. L. J. 318.
12. Dandun v. State, (1969) 35 Cut. L. T. 301, 303 and 304.
13. Nasib Singh v. Emperor, 1943 Lah. 89; 207 I. C. 32; 44 Cr. L. J. 552; 45 P. L. R. 82.
14. Ghulam Haider v. Emperor, 1929 Lah. 542; I. L. R. 10 Lah. 837; 116 I. C. 329; 30 Cr. L. J. 623; 30 P. L. R. 192.
15. Kishan Lal v. Sohanlal, 1955 Raj. 45.

that previous statements of witnesses, could be admitted under the section, when it is found that those witnesses, owing to the disturbances created in the locality, have migrated to the Dominion of India, and hence can no longer be brought before the trial Court without an inordinate amount of delay and expense such as would have been unreasonable under the circumstances of the case.<sup>16</sup>

When a summons was properly taken out to be served on one JA at the Cutcherry-house, in which he lived, but the peon in his return stated that, as he was unable to find JA and serve him personally, he hung up the summons on the Cutcherry-house, and there was evidence to show that JA suddenly disappeared from the Cutcherry-house, and it was further shown that enquiry was made in his native village whether he had returned there, but the result of the enquiry was that nothing had been heard of him and it was, therefore, impossible to say where JA was, or to serve him with a summons, it was held that JA's deposition was properly admitted.<sup>17</sup>

How far answers to enquiries respecting the witness are admissible to prove that he cannot be found is not very clearly defined by the decisions. That such answers will be rejected as hearsay, if tendered in proof of the fact that the witness is abroad, is beyond all doubt,<sup>18</sup> but where the question is simply whether a diligent and unsuccessful search has been made for the witness, it would seem both on principle and authority, that the answers should be received as forming a prominent part of the very point to be ascertained.<sup>19</sup> In order to show that enquiries have been duly made at the house of the witness, his declarations as to where he lived cannot be received,<sup>20</sup> neither will his statement in the deposition itself, that he is about to go abroad, render it unnecessary to prove that he has put his purpose into execution.<sup>21</sup> Where a warrant is not produced and there is no proof of an endeavour to serve it, a statement by the police that one has been issued is not sufficient proof that the person cannot be found.<sup>22</sup> Neither is a statement to that effect by a Public Prosecutor.<sup>23</sup> Evidence, purporting to have been recorded under Sec. 512 of the Criminal Procedure Code, 1898 cannot be used, unless there is proof that the Court, before recording it, has received satisfactory evidence that the person had absconded and there was no immediate prospect of arresting him.<sup>24</sup>

16. Khadim Hussain v. The Crown, 1950 Lah. 34; 51 Cr. L. J. 419; Pak. Cas. 1950 Lah. 198; Pak. L. R. 1950 Lah. 121.

17. R. v. Rochia, (1881) 7 C. 42; see also Jati Mali v. Emperor, 1929 Cal. 765; I. L. R. 57 Cal. 248; 125 I.C. 599; 33 C. W. N. 918; where also the police officer's statement that all efforts to trace the witness failed was believed; Ozzard Low v. Ozzard Low and Wonham, (1953) P. 272; (1953) 2 All E. R. 550 (statement by Burmese servants who could not be traced admitted).

18. Taylor, Ev., s. 475; Robinson v. Markis, (1841) 2 M. & Rob. 375;

Doe v. Powell, (1836) 7 C. & P. 617.  
19. Ib. Wyatt v. Bateman, (1836) 7 C. & P. 586; Burt v. Walker, (1821) 4 B. & A. 697; Austin v. Rumsey, (1849) 2 C. & Kir. 736; R. v. Rochia Ante.  
20. Doe v. Powell, (1836) 7 C. & P. 617.  
21. Proctor v. Lainson, (1836) 7 C. & P. 631.  
22. R. v. Kangal, 1915 Cal. 256; I. L. R. 41 Cal. 601; 26 I. C. 161.  
23. Annavi v. Emperor, 1916 Mad. 851 (2); I. L. R. 39 Mad. 449; 28 I. C. 518.  
24. Rustom v. R., 1915 All. 411; I. L. R. 38 All. 29; 31 I. C. 817.

**16. "Incapacity".** The words "incapable of giving evidence" denote an incapacity of a permanent, and not of a temporary kind; and where a witness is proved to be incapable of giving evidence, the Court has no discretion as to admitting his deposition. But where the absence of a witness is casual or due to a temporary cause, the Court has such a discretion, if his presence cannot be obtained without an amount of delay or expense, which under the circumstances the Court considers unreasonable.<sup>25</sup> In a subsequent case,<sup>1</sup> however, it was said that the incapacity to give evidence, contemplated by this section, is not necessarily a permanent incapacity.<sup>2</sup> But, if the illness is temporary, the Court should consider whether the last condition mentioned in the section should be applied. It should come to a finding, whether it was unreasonable in the circumstances on account of the delay or expense which might be involved to postpone the trial in order that the investigating officer might be examined.<sup>3</sup> If a short adjournment could secure the presence of the witness, the previous deposition cannot be admitted.<sup>4</sup> To bring a case within the section, in order to admit the deposition of a witness, alleged to be unable to attend by reason of illness, it is not sufficient that such witness should be stated to be ill, and confined to the house; but precise evidence should be required by the Court as to the nature of the illness and the incapacity to attend.<sup>5</sup>

Thus incapacity to give evidence need not be a permanent incapacity. A person may not be stricken with illness of a permanent character but yet be incapable of attending Court and giving evidence. If the state of the illness is such as to preclude reasonable hope of his appearing in Court in the near future, it would justify the reception of his evidence under this Section.<sup>6</sup>

If the witness be proved at the trial to be insane, his deposition, recorded at a time when he was sane, may be admissible.<sup>7</sup> If from the nature of the illness, or other infirmity, no reasonable hope remains that the witness will be able to appear in Court on any future occasion, his deposition is certainly admissible.<sup>8</sup> Of course, a doctor's certificate, however authentic in itself, is not legal evidence of the state of the witness. His condition must be proved on oath to the satisfaction of the Judge who tries the case. In the case of a witness, alleged to be ill, the doctor, if he be attended by one, should be called to prove his condition,<sup>9</sup> or, the Court may act on a certificate, purporting to be the cer-

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- 25. (In the matter of) Pyari, 4 C. L. R. 504.
- 1. (In the matter of) Asgar, (1881) 8 C. L. R. 124; 6 C. 774.
- 2. Per Pontifex and Field, JJ. The dictum is obiter, as it was not necessary to decide that question in the case: vide Roscoe, Cr. Ev., 16th Ed. 63; Taylor, Ev., ss. 472, 478.
- 3. Emperor v. Gajendra Mohan, 1943 Cal. 222; I. L. R. (1943) 1 Cal. 405; 207 I. C. 106; Hari Prasad v. State, 1953 All. 660.
- 4. Hari Prasad v. State, 1953 All. 660; 1953 A. L. J. 318.
- 5. (In the matter of) Asgar, (1881) 8 C. L. R. 124 (S.C.); 6 C. 774; Abdul Gaffoor v. Govind Prasad, 1928 Rang. 284.
- 6. Chainchal Singh v. Emperor, 72 I. A. 270; 222 I. C. 189; A. I. R. 1946 P. C. I.; (1946) 1 M. L. J. 125; Ratna Munda v. State, A. I. R. 1951 Orissa 245; 52 Cr. L. J. 685; Dalip Singh v. Crown, 1 Pepsu L. R. 356.
- 7. Taylor, Ev., ss. 472-478; Roscoe, Cr. Ev., 16th Ed., 57; Doe v. Powell, (1836) 7 C. & P. 617; Norton, Ev., 196.
- 8. Taylor, Ev., ss. 472-478 and cases there cited: as to blindness vide S. 47 note.
- 9. Roscoe, Cr. Ev., 16th Ed., 63—"As a general rule it will be prudent, though it is not absolutely necessary to have the testimony of a medical man;" Taylor, Ev., s. 488.

tificate of a registered medical practitioner.<sup>10</sup> Incapacity to give evidence must, however, be strictly proved.<sup>11</sup>

Facilities for obtaining qualified doctors in England are very different from those in India, and thus it cannot be accepted as a proposition of law that it is absolutely necessary to examine a qualified medical practitioner before evidence can be accepted under this Section, when the witness is ill and thus unable to attend.<sup>12</sup> In *Chainchal Singh* case,<sup>13</sup> where a police officer was produced to prove the illness of the witness their Lordships of the Privy Council observed :

"The officer was not a proper person to prove from what disease the witness was suffering ; he could only say what someone told him. If such evidence as he gave were sufficient it would mean that any reluctant witness could take to his bed when he found there was a likelihood of being served with a witness summons and get excused from attendance by telling the server that he was suffering from some serious complaint. Their Lordships do not mean to lay down that in every case there must be evidence of a medical man, where excuse is sought on the ground of physical incapacity. That is not the law in England,<sup>14</sup> and there is no reason for a different rule to apply in India. There may be many cases in which the facts are such that the incapacity can be proved by a lay witness. Here there was no evidence at all except that the policeman found the witness was ill 13 days before the trial and as he was not competent to speak to the illness their Lordships are of opinion that there was no evidence before the Court that he was incapable of giving evidence on 19th January."

Where the witness was before the Court and after questioning him the Court came to the conclusion that he was not in a fit state of mind, it was held that the Court could have acted on its own judgment, and if the Court further fortified itself by the opinion of a doctor, it must be held that the witness has been proved to be incapable of giving evidence.<sup>15</sup>

Where the attorney for the prosecution was put into the box to prove that the witness was unable to attend, and stated that the witness's residence was 23 miles off, and that he had seen him that morning in bed with his head shaved, Earle, J., said :

"The evidence, no doubt, is as strong as it can be short of that of a medical man ; but the case may be easily imagined of a person extremely unwilling to appear as a witness, and so well feigning himself to be ill as

10. S. 1 (5), English Evidence Act, 1838; see also *Dick v. Piller*, 1943 K. B. 497 at 500 (C.A.) (1943) 1 All E. R. 627 at 629.
11. *Chainchal Singh v. Emperor*, A. I. R. 1946 P. C. 1; *Kesar Singh v. State*, 1954 Punj. 286 (S.C.); *Mitter v. State*, 1950 Cal. 435; 1975 Kashmir L. J. 391.
12. *Sheiki Ali Jan v. King-Emperor*, 1927 Cal. 679; 103 I. C. 846; 31 C.

13. *W. N. 908.*
14. *Chainchal Singh v. Emperor*, supra 703 citing *R. v. Noakes*, (1917) 1 K. B. 581; 86 L. J. K. B. 594; 116 L. T. 705.
15. *State v. Gajraj*, I. L. R. 1952 Raj. 910; 1953 Raj. 66. It is a question whether the Court should not have postponed the hearing until the witness was cured of his illness if it was of a temporary nature.

to deceive anyone but a medical man": and the evidence was rejected.<sup>16</sup> But Lord Coleridge, C. J., in giving judgment in *R. v. Farrell*,<sup>17</sup> said:

"It would be dangerous to admit any such latitude of construction as would bring this case within the words of the statute."

**17. "Kept out of the way."** The proposition that if a witness be kept out of the way by the adversary, his former statement will be admissible, rests chiefly on the broad principle of justice, which will not permit a party to take advantage of his own wrong.<sup>18</sup> The mere fact that a person did not appear as a witness when cited on behalf of the plaintiff, or that he appeared as a witness on behalf of the defendant on one occasion, but was not examined, when it has been distinctly found that he was not kept out of the way by the defendant would not be a ground for admitting the deposition under this section.<sup>19</sup> Where a Police Inspector gave evidence that since the completion of the enquiry by the committing Magistrate, a witness for the prosecution had been absconding, and it appeared that the witness was a relation of the accused, and did not appear in the Sessions Court although personal recognisance was taken from him for appearance when called upon, it was held that the matter came within the words "cannot be found" or "is kept out of the way by the adverse party" in this section.<sup>20</sup>

In a case where three prisoners were indicted for felony, and a witness for the prosecution was proved to be absent through the procurement of one of them, the Court held that his deposition might be read in evidence as against the man who had kept him out of the way, but that it could not be received against the other two men.<sup>21</sup>

**18. "Delay or expense."** The last ground for admitting the deposition of an absent witness is governed by three considerations.—

- (1) the delay,
- (2) the expense, and
- (3) the circumstances of the case.<sup>22</sup>

The Judge has to satisfy himself that the presence of the witness cannot be obtained without an amount of delay or expense which he considers to be unreasonable. It is not enough to have the statement of the Public Prosecutor to that effect. There must be independent evidence before him before he can exercise the powers given to him under the Act.<sup>23</sup> This ground of admissibility

16. *R. v. Philips* (1858) 1 F. & F. 105; and see *R. v. Williams*, (1865) 4 F. & F. 515.
17. (1874) L. R. 2 C.C.R. 116; see also *R. v. Welton*, 9 Cox. 296; *R. v. Bull*, (1871) 12 Cox. C. C. 31.
18. *Taylor*, Ev., s. 478.
19. *Brajaballav v. Akhoy*, 1926 Cal. 705.
20. *Abbas Mandal v. Emperor*, A. I. R. 1931 C. 473; 131 I. C. 855; 35 C.

21. *R. v. Scaife*, (1851) 17 C. B. 238; 5 Cox. 243.
22. *Asiatic Steam Navigation Co. v. Bengal Coal Co.*, 35 Cal. 751.
23. *Annavi v. Emperor*, 1916 M. 851 (2); *Nathu Ram v. State*, 1951 H. P. I. See also *Emperor v. Gajendra Mohan*, 1943 Cal. 222; I. L. R. (1971) 2 Ker. 445.

lity rests on the broad principle of justice that a party should not be permitted to take advantage of his own wrong. But, at the same time, care should be taken that the party calling the witness is not keeping him out of the way with the sinister motive of bringing on record his evidence under this section without running the risk of a devastating cross-examination. The Court must exercise a sound discretion, having regard to the relationship between the witness and the party, the nature of evidence to be given by him and the possibility of his being tampered with by the opposite party. It lies on the prosecution to prove strictly that the witnesses could not be found in spite of attempts to trace and serve them. The consent of the counsel does not do away with the necessity of proof.<sup>24</sup> But a Sessions Judge may use the statement made by a Doctor at the preliminary enquiry, when it had been proved by the serving officer that his whereabouts were not known.<sup>25</sup> The Judge must record his reasons to show that he was satisfied that the presence of the witness could not be procured without undue expense or delay.<sup>1</sup> Of the circumstances one of the chief, which the Judge has and ought to weigh, is the nature and importance of the statements contained in the deposition. It would be unreasonable to incur much delay and expense when the facts spoken to in the deposition are of the nature of formal evidence for the prosecution, or supply some link in the case for the prosecution as to which little or no dispute exists, or are facts to which other witnesses speak besides the deponent, and which witnesses are produced at the trial. On the other hand, it might be very reasonable to submit to much delay and considerable expense, when the evidence of the deponent is vital to the success of the prosecution, or has a very important bearing upon the guilt of the accused.<sup>2</sup>

A deposition cannot be admitted merely on the ground that it would be expensive to retain the assessors until the witness is served.<sup>3</sup> Where the delay likely to have been occasioned was probably about a fortnight, and the witness lived or was staying within a short distance of the Court, the witness's deposition was rejected.<sup>4</sup> When the witnesses were at a considerable distance from the place of trial, and their attendance was not easily procurable, their depositions were admitted.<sup>5</sup> Where the witness changed his lodging after the order was given for his appearance in the Sessions Court, and the Sessions Judge admitted his deposition "as much delay would be involved in searching for him at his own house or elsewhere," it was held inadmissible as there was nothing to show that this witness could not have been found if reasonable exertion had been made to find him.<sup>6</sup> It is only in extreme cases of expense or delay, that the personal attendance of a witness should be dispensed with.<sup>7</sup>

In the undenoted case, it was said :

"In my opinion, it was intended that the provisions of the section as to emergency (delay or expense) were only to be sparingly applied, and

24. Bismillah v. State, A. I. R. 1959 Raj. 21.
25. Bakshish Singh v. State of Punjab, 1958 S. C. R. 409; 1958 S. C. A. 391; 1958 S. C. J. 106; 1958 A. L. J. 1; 1958 A. W. R. (H.C.) 94; 1958 Andh. L. T. 66; 1958 B. L. J. R. 74; 1957 Cr. L. J. 1459; 1958 M. P. C. 23; 1958 M. L. J. (Cr.) 38; I. L. R. 1958 Punj. 262; A. I. R. 1957 S.G. 904.
1. Savlimiya Miyabhai v. Emperor, 1944 Bom. 338; 46 Bom. L.R. 589.
2. (In the matter of) Pyari, 4 C. L. R. 504, per White, J., at pp. 509, 510.
3. Lal v. Emperor, 1943 Lah. 118: 207 I. C. 243; 45 P. L. R. 151.
4. In the matter of Pyari, supra.
5. R. v. Rami Reddi, (1881) 3 M. 48.
6. R. v. Lukhy Narain, (1875) 24 W. R. Cr. 18.
7. R. v. Mulu, (1880) 2 A. 646; Lakshman Totaram v. Emperor, 31 I. C. 354; 16 Cr. L. J. 754; 17 Bom. L. R. 590.

certainly not in a case like this where the witness was alive and his evidence reasonably procurable."<sup>8</sup>

A delay of a week or a fortnight is not unreasonable.<sup>9</sup> In a murder case in the Tinnevelly District, the principal witness for the prosecution had, after giving evidence before the committing Magistrate, joined the army and was at Madras. It was said that "any delay or expense which might be involved in this case is disproportionate to the public interests involved in examining, in the box and in the presence of the learned Judge and the assessors, the principal witness upon so serious a charge as this."<sup>10</sup>

In a Madras case, it was observed that the fact that the witness happened to live at Rangoon was not a ground for holding that his evidence could not be procured without unreasonable delay or expense, when no application for the issue of warrant or for taking his evidence on commission was made.<sup>11</sup> If there is nothing of a special nature to stand in the way, the case should be adjourned to the next session to procure the attendance of the witnesses.<sup>12</sup> Where a Sessions Judge, finding that the witnesses who had been summoned to give evidence for the prosecution did not appear upon the date fixed, adjourned the case, and ordered fresh summons to be issued, and on the witnesses failing to appear on the adjourned date, made use of the evidence which they had given before the Magistrate, stating that he did so under this section, it was held that the evidence could not be so used, for he ought to have compelled the witnesses to attend.<sup>13</sup> Where the handwriting expert was readily available he should be examined as his statement in earlier proceeding will not be admissible on the ground that unnecessary expenditure would be involved.<sup>13-1</sup>

It is only in significant cases of expense and delay that the personal attendance of a witness should be dispensed with. Four illustrations may be given: In one case, the evidence of several witnesses was admitted under this section on the ground that their attendance could not be procured without an expense of Rs. 500 which the Sessions Judge considered unreasonable. These witnesses were required to identify certain property alleged to be stolen. The whole case rested on the identification and the accused had not cross-examined. It was held that the Sessions Judge was not justified in admitting the evidence under Sec. 33.<sup>14</sup> But in another case, a witness had been brought from Calcutta and examined on two different occasions, once before the framing of the charge and again after framing of the charge. In fact, all that could be got out of the witness had been got out of him. The complainant was a man of ordinary means and to bring such witness again to Calcutta for the *de novo* trial must have been a very heavy drain on his purse. Moreover, there would have been delay in securing the attendance of such a witness. In the circumstances it was held sufficient to make the evidence of the witness admissible.<sup>15</sup>

8. R. v. Mula, (1880) 2 All. 646 per Straight, J., at p. 648.

9. Ib., Savlimiya Miyabhai v. Emperor, 1911 Bom. 338; 46 Bom. L. R. 589; Emperor v. Gajendra Mohan, 1913 Cal. 222.

10. In re S. Siluvai Antony Nadar, 1. L. R. 1914 M. 687; 215 I. C. 212; 1914 Mad. 319.

11. Kadappa v. Tirupathi, 1925 Mad.

444; 86 I. C. 576; 21 L. W. 210.

12. R. v. Lukhuthu Sanal, (1874) 21 W. R. Cr. 56.

13. R. v. Nanhe, 1905 A. W. N. 202 (2).

13-1. G. Bulliswamy v. C. Anarpumamma, A. I. R. 1976 A. P. 270.

14. R. v. Burke, (1881) 6 All. 224.

15. Fernandez v. Emperor, A. I. R. 1935 Rangoon 484; 160 I. C. 215.

In *Dalip Singh v. Crown*,<sup>16</sup> it was held that the statement of a witness, recorded by a committing Magistrate, could not be brought on record at a sessions trial under Sec. 33 merely because the witness had expressed his inability to attend on the particular day for which he had been summoned. Similarly a mere failure of the witness to respond to the summons was held not sufficient to entitle his deposition to be taken as relevant under Sec. 33, because the court could have enforced his attendance by issuing a warrant. Indeed, it is only when all reasonable efforts to secure the attendance of witnesses fail that it can be said that there would be unreasonable delay in securing their attendance, if further attempts were made.<sup>17</sup> But, where it is found that the witnesses have migrated to another dominion and hence can no longer be brought before the trial court without an inordinate amount of delay and expense such as would be unreasonable under the circumstances of the case, previous statements of those witnesses can be read in evidence.<sup>18</sup> Similarly, where the witnesses for the prosecution are graziers and nomads and their whereabouts are not traceable, their depositions, before the Magistrate, can be taken into evidence under this Section.<sup>19</sup>

**19. Proviso (1) : "Between the same parties or their representatives."** The "proceeding" referred to is the former proceeding, and the proviso means : "Provided that the first proceeding was between the parties to the second proceeding or between representatives-in-interest of the parties to the second proceeding."<sup>20</sup> The language would have been more accurate if it had been : "those whom they represent in interest."<sup>21</sup> The language of the proviso, which had been said<sup>22</sup> to be "perhaps a little defective," gives rise to the question whether, for the purpose of complying with the first proviso (where the parties to the two proceedings are not identical) the party to the first proceeding must have been a representative-in-interest of the party to the second proceeding,<sup>23</sup> or the party to the second proceeding must be a representative-in-interest of the party to the first proceeding.<sup>24</sup> The question is a crucial question, for, if the latter view be the true one, it would seem that the proviso could only be fulfilled where an interest vested in the party to the first proceeding at the date thereof had become vested in the party to the second proceeding—in other words, where, according to the well-known terms of English law, the party to the second proceeding was privy in estate with the party to the first proceeding, and so claimed title through and under him. On the other hand, if the former view prevails, the words "representatives-in-interest" may cover a much wider field, and include persons who have no privity of estate with and do not claim through or under the propositus. The question came for consideration before

16. *I Pepsu L. R.* 356.

17. *Nathuram v. State*, A. I. R. 1961 H. P. 1; 52 Cr. L. J. 50.

18. *Khadim Hussain v. Crown*, A.I.R. 1950 Lah. 34.

19. *Koli Dala v. Rabari*, A. I. R. 1950 Kutch 29; 51 Cr. L. J. 744.

20. *Krishnayya v. Venkata Kumara*, 1933 P. C. 202 at pp. 206, 207; 60 I.A. 336; I.L.R. 57 Mad. 1; 145 I.C. 216.

21. *Norton, Ev.*, 169.

22. Per Krishnan, J., in *Krishna Rao v. Raja of Pittapur*, 1927 Mad. 733

at 737; 102 I. C. 713.

23. See *Sitanath v. Mohesh*, (1886) 12 Cal. 627; and *Chandreshwar Prasad v. Bisheshwar*, 1927 Pat. 61; I. L. R. 5 Pat. 777; 101 I. C. 289.

24. See *Minomoyee v. Bhoobun Moyee*, (1874) 15 B. L. R. 1; 23 W. R.

42; *Raj Kumari v. Nityakali*, (1910) 7 I. C. 892; *Lakshamanna v. Var-*

*danamma*, 1919 Mad. 540; I. L. R. 42 Mad. 103; 49 I. C. 638;

*Krishna Rao v. Raja of Pittapur*, 1927 Mad. 733.

their Lordships of the Privy Council in *Krishnayya v. Venkata Kumara*,<sup>25</sup> and their Lordships answered it as follows :

"Whatever may have been the intention of those who framed the section, the first proviso exactly inverts the requirements of the English law, which requires that the parties to the second proceeding should legally represent the parties to the first proceeding, or be their privies in estate. Their Lordships, however, are not disposed to consider this inversion to be accidental. The omission of strict English legal terminology and the employment of the less restricted phrase 'representative-in-interest' was deliberate and intentional. It will be a question depending for its correct answer upon the circumstances of each case, where the question arises, whether there was a party to the first proceeding who was a representative-in-interest of a party to the second proceeding within the wider meaning which their Lordships attribute to those words. Turning back to the first proviso, it requires, in their Lordships' view, that the party to the first proceeding should have represented in interest the party to the second proceeding in relation to the question in issue in the first proceeding to which 'the facts which the evidence states' were relevant. It covers not only cases of privity in estate and succession of title, but also cases where both the following conditions exist, viz., (1) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding is consistent with, and not antagonistic to the interest therein of the relevant party to the first proceeding, and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical. There may be other cases covered by the first proviso, but if both the above conditions are fulfilled, the relevant party to the first proceeding in fact represented in the first proceeding the relevant party to the second proceeding in regard to his interest in relation to the particular question in issue in the first proceeding, and may grammatically and truthfully be described as a representative-in-interest of the party to the second proceeding.

"What the section intends is to allow the admission of evidence given in a former proceeding, which it is, for the specified reasons, impossible to give in a later proceeding, subject to the protection which the provisos afford to the party to the later proceeding against whom the evidence is tendered. What the first proviso aims at securing is that the evidence shall not be admitted unless the person who tested, or had the opportunity of testing, the evidence by cross-examination, either is himself, or represented the interests of the party to the later proceeding against whom the evidence is tendered, i.e., that he was (in the latter case), in effect, fighting that person's battle as well as his own."<sup>1</sup>

It makes no difference that the parties are differently marshalled in the proceedings, the plaintiffs in the first proceeding being defendants in the

25. 1933 P. C. 202; 60 I. A. 336; I. L. R. 57 Mad. 1; 145 I. C. 216; 1933 A. L. J. 1039; 35 Bom. L. R. 1076; 58 C. L. J. 305; 38 C. W. N. 1; 65 M. L. J. 479; 38 M. L. W. 409;

1933 M. W. N. 1191.  
1. See also Ganpat Rao v. Nagorao 1940 Nag. 382; 1940 N. L. J. 487; Subrahmanya v. Lakshminarasamma, A. L. R. 1958 A. P. 22.

second, or *vice versa*, nor if there has been plurality of parties in the one case and not in the other. Therefore, where a witness testified in a suit in which A and several others were plaintiffs and B defendant, his testimony was, after his death, held admissible in a subsequent action relating to the same matter, brought by B against A alone.<sup>2</sup> Where a certified copy of a deposition of one of several brothers regarding separation of some of them, as a witness in a previous mutation case in which all the defendants to the subsequent suit were also parties, was sought to be admitted, as the deponent had died in the meanwhile, it was held that the other conditions of the section having been fulfilled, the deposition could not be held to be inadmissible simply because the deponent and the present defendant were not arrayed as parties opposed to each other. The conditions of this section will be deemed to have been fulfilled when all the present parties were also parties in the previous case and further the self-same question of jointness and separation was required to be determined in the previous case where the deposition was taken and the witness was also cross-examined.<sup>3</sup> Where, however, one of the parties to a subsequent proceeding was not a party<sup>4</sup> to the previous proceeding, evidence taken in the first suit is not admissible in the second.<sup>5</sup> Thus, for instance, in a suit upon a promissory note, the statement of one of its attestors in a previous suit not *inter partes* could not be admitted after his death, unless it falls within the ambit of section 32 or section 33.<sup>6</sup>

An enquiry before the Coroner, although it may be a judicial proceeding, is not a proceeding between the prosecutor and the accused. The proceedings before the Coroner are merely an inquiry into the circumstances leading to the death of the person whose death is under inquiry and it is impossible to say that the Crown is a party to those proceedings, even if it can be said that the accused is a party on the ground that he was during those proceedings a suspect. Hence the evidence given by a witness before a Coroner is not admissible under Sec. 33, if such witness dies prior to enquiry before Magistrate.<sup>7</sup> It is not necessary that all the questions in issue in the two proceedings should be substantially the same.<sup>8</sup> The two suits must be brought by or against the same parties, or their representatives-in-interest at the time when the suits are proceeding and the evidence is given.<sup>9</sup> In a joint trial of A and B, depositions recorded in previous proceedings between B and the present complainant are not admissible.<sup>10</sup> In considering the question whether a person is or is not the representative-in-interest of another, much assistance cannot be derived from the rule of *res judicata* enacted in Sec. 11, Civil Procedure Code.<sup>11</sup> In

2. Doe v. Wright, (1889) 10 A. & E. 763.
3. Fakirmath v. Krishna Chandranath, 1954 Orissa 176.
4. R. v. Vaman, (1903) 5 Bom. L. R. 599, 601; 27 B. 626; Cf. Mohamed v. Fattan, 1919 P. L. R. 12; Debi v. R. 1919 All. 351 (1); 52 I. C. 385; 20 Cr. L. J. 625; see also Raj Mangal Misir v. Mst. Mathura Durbain, 1915 All. 383; I. L. R. 38 All. 1; 30 I. C. 578; 13 A. L. J. 881.
5. Ayyavar Thevar v. Secretary of State, 1912 Mad. 528; 202 I. C. 274; (1942) 1 M. L. J. 485; 1942 M. W. N. 270; Sitanath Das v. Mohesh

6. Chunder Chuckerbati, 12 Cal. 627.
7. Bhagat v. Ajudhia, I. L. R. 1959 Punj. 1197; A.I.R. 1960 Punj. 261.
8. Emperor v. Mahamed Yusuf, 1933 Bom. 479 (1); 146 I.C. 544; 35 Cr. L.J. 106; 35 Bom. L.R. 1020.
9. Krishnayya v. Venkata Kumara, 1933 P.C. 202; 145 I.C. 216.
10. Sitanath v. Mohesh, (1886) 12 C. 627.
11. Abdul Gaffoor v. Govind Prasad, 1928 Rang. 284.
12. Krishnayya v. Venkata Kumara, 1933 P. C. 202; but see Rama Krishna Pillai v. Tirunarayana, 1932 Mad. 198; I. L. R. 55 Mad. 40; 139 I.C. 684.

order to determine, whether a person is a "representative-in-interest" one has to consider the interest involved in each case, and they must be the same or similar. Without reference to the subject-matter it cannot be predicated that one is the representative-in-interest of another, for that very expression connotes and implies that the representation must be with reference to a particular title. It is a well-known legal term and one cannot conceive of a representative-in-interest in the abstract.<sup>12</sup> In a joint Hindu family, the father represents the interest of his son, and so also the incumbent of an imparible estate the representative-in-interest of his descendants who have a contingent interest in the estate.<sup>13</sup> In a case G's son, E, whose interest as well as that of G, had been purchased by the plaintiff in the subsequent suit, was the ostensible party on the record in the former suit but he had at that time no interest in the subject-matter of the suit, the real party interested being G. It was held that G, and not E, was the representative-in-interest of the plaintiff in the subsequent suit and if he had been a party to the former suit, his deposition would have been admissible. But if he was no party to that suit, the fact that E subsequently acquired an interest in the property would not avail to make the evidence taken in that suit admissible in the subsequent suit.<sup>14</sup> Partners and joint contractors are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts and must be regarded as privies in estate.<sup>15</sup>

This section does not apply to the deposition of a witness in a former suit, when the witness is himself a defendant in the subsequent suit, and the deposition is sought to be used against him, not as evidence given between the parties, one of whom called him as a witness but as a statement made by him, which would be evidence against him whether he made it as a witness or on any other occasion; such a deposition is admissible under the sections relating to admissions, although it might be shown that the facts were different from what on the former occasion they were stated to be.<sup>16</sup> Statements of insolvents under Sec. 27, sub-section (1) of the Presidency Towns Insolvency Act, 1909, cannot be received in evidence in a subsequent suit brought against them by their creditors, neither this section nor the last being in such case of any avail.<sup>17</sup> This section is not applicable to evidence recorded before a person is added as a defendant, but the objection to the inadmissibility of such evidence will not be allowed to be raised for the first time in second appeal.<sup>18</sup>

**20. Proviso (2): "Right and opportunity to cross-examine."** Cross-examination, if properly conducted, is one of the most useful and efficacious means of discovering the truth; and this proviso is intended to secure that no evidence is admitted, unless it is tested by cross-examination by the party sought to be affected or by his representative-in-interest. Under the old law, as well as under the present section, there must have been the right and

12. Krishna Rao v. Raja of Pittapur, 1927 Mad. 733 at pp. 738, 766 : 102 I.C. 713 ; reversed in Krishnayya Rao v. Raja of Pittapur, 1933 P.C. 202 on another point.
13. *Ibid.*
14. Sitanath v. Mohesh, 12 Cal. 627.
15. Chandreswar Prasad v. Bidreshwar, 1927 Pat. 61 : I.L.R. 5 Pat. 777;

16. Soojan v. Achmut, (1874) 14 B.L.R. App. 3: 21 W. R. 414. Also v. post, Note to Explanation.
17. Luchiram v. Radha, 1922 Cal. 267: I. L. R. 49 Cal. 93: 66 I. C. 15.
18. Rangaswami Naidu v. Sundararajulu, 35 I.C. 52 : A.I.R. 1917 M. 722 (2).

opportunity to cross-examine, that is, there must have been both the right and the opportunity of cross-examining.<sup>19</sup> "There may be circumstances where, although a prisoner has the right, he has not the opportunity, e.g., where the witness is at a great distance and the prisoner cannot go to the place and is too poor to employ a pleader or too unfamiliar with the ways of the place to get legal help there."<sup>20</sup> Similarly, there may be cases where there has been an opportunity, but no right to cross-examine. In either case, the previous deposition is not admissible under this section.<sup>21</sup>

**21. "Right to cross-examine."** The word "right", used in the section means a right conferred by a statutory provision, such as that contained in Sec. 138 of the Evidence Act and not a right accruing from mere permission granted by the Court.<sup>22</sup> If a Court permits the accused to cross-examine a witness, it is nothing but giving him an opportunity of cross-examining him, but the section requires a right in addition to an opportunity to cross-examine.<sup>23</sup> There is a conflict of judicial opinion as to whether, in a warrant case, the accused has a right to cross-examine the prosecution witness before the framing of the charge. In some cases it has been held that he has no such right.<sup>24</sup> In others, it has been held that he has the right.<sup>25</sup>

In the leading case of the first group, *Emperor v. C. A. Mathews*,<sup>1</sup> Cuming, J., observed : "Now as far as I can see the accused in a warrant case has no right to cross-examine the prosecution witnesses until after the charge has been framed. The Magistrate may in his discretion allow him to do so, and pro-

19. *Dal Bahadur Singh v. Bijoy Bahadur Singh*, 1930 P.C. 79; I.L.R. 52 All. I. 1; 122 I.C. 8: 57 I.A. 14: 1930 A.L.J. 122; 32 Bom. L.R. 487: 51 C.L.J. 230: 34 C.W.N. 369: 58 M.L.J. 446: 31 L.W. 434: 7 O.W.N. 295; *Bunwari Lal v. The State*, 1956 All. 385; *Abdul Rahman v. Emperor*, 1946 Lah. 275: 226 I.C. 29: 47 Cr. L.J. 810: 48 P.L.R. 39: both right and opportunity to cross-examine must co-exist; *R. v. Etwarce*, (1874) 21 W.R. Cr. 12; and see *R. v. Lukhy Narain*, (1875) 24 W.R. Cr. 18; Attorney-General v. *Davison*, (1825) M'Cle & Yo, 160; *Taylor, Ev.*, s. 466; *R. v. Ramchandra*, 19 B. 749. Per *Jardine*, J., in *R. v. Ramchandra*, 19 Bom. 749, 757.
20. *Sundara Rajali v. Gopala Thevan*, 1934 Mad. 100; 150 I.C. 132; 39 L.W. 34 (right without opportunity); *Bayava Shiddappa v. Parvateva*, 1933 Bom. I26, 130; 144 I.C. 442; 35 Bom. L.R. 118 (opportunity without right); *Bunwari Lal v. The State*, 1956 All. 385.
21. *Bunwari Lal v. The State*, 1956 All. 385, 391.
22. *Ib.*
23. See *Lachmi Narain v. Emperor*, 1931 All. 621; 1932 A.L.J. 5;

- Emperor v. C. A. Mathews, 1929 Cal. 822; 125 I.C. 281; 31 Cr. L.J. 809; *S. C. Mitter v. The State*, 1950 Cal. 435; 86 C.L.J. 21; *Brahmachari Ajitananda v. Anath Bandhu*, 1954 Cal. 395.
25. See *Banwari Lal v. The State*, 1956 All. 385; *Dibakanta Chatterjee v. Gour Gopal*, 1923 Cal. 727; I.L.R. 50 Cal. 939; 75 I.C. 715; 25 Cr. L.J. 27; *Ashirbad Muchi v. Maju Muchini*, (1904) 8 C.W.N. 888; *Queen-Empress v. Sagalsamba Sajao*, 21 Cal. 642; *Lockley v. Emperor*, 1920 M. 201; I.L.R. 43 Mad. 411; 55 I.C. 345; *Varisai Rowther v. Crown*, 1923 Mad. 609; I.L.R. 46 Mad. 449; 73 I.C. 163; 24 Cr. L.J. 547 (F.B.); *Muthiah Pillai v. Emperor*, 1932 Mad. 559; 139 I.C. 203; 33 Cr. L.J. 738; 1932 M.W.N. 857; *Local Government v. Maria*, 1925 Nag. 44; 87 I.C. 427; 26 Cr. L.J. 971; 20 N.L.R. 174 (F.B.); *Guru Din v. Emperor*, 1935 Nag. 8; 154 I.C. 369; 36 Cr. L.J. 578; 31 N.L.R. 276; *Mohamed Hussain v. Fakhruallah Beg*, 1932 Oudh 298; 140 I.C. 689; 34 Cr. L.J. 58; 9 O.W.N. 782; *The State v. Gajraj*, 1958 Raj. 66.
1. 31 Cr. L.J. 809; 125 I.C. 281; 1929 Cal. 822, at pp. 823, 824.

bably, if the accused requested would allow him to do so, but the accused cannot claim as of right to cross-examine until the charge has been framed. Section 138, Evidence Act, on which the prosecution rely, deals not with the rights of the party but only provides the order in which the proceedings are to be conducted. See the case of *Ashirbad Muchi v. Maju Muchini*,<sup>2</sup> where it was held that the Magistrate should give the accused an opportunity to cross-examine even though the charge may not be framed. But that is not the same as saying that the Court must give him an opportunity. No doubt Sec. 256 does not prohibit cross-examination at a previous stage, but that is not the same as saying that the accused has any right to cross-examine. I am of opinion that until the stage of the case provided for in Section 256 is reached the accused has no right to cross-examine. That being so in the present case, the accused had no right to cross-examine and so the evidence of Mr. Milno is not admissible in evidence under Section 33."

The chief argument of the other group is as follows : "The Evidence Act deals with the rights of parties in the matter of evidence ; it is the Code of Criminal Procedure, which lays down the procedure. Whether a party has a right to cross-examine the adverse party's witnesses or not has to be ascertained from the Evidence Act which is known to be exhaustive on the subject, and not from the Code of Criminal Procedure which deals with the subject of evidence only incidentally. If Section 138 does not confer the right of cross-examination upon the adverse party, there is no other provision which does so, and it cannot be contended that there is no law which deals with the right of cross-examination. Of course Section 138 also regulates the order in which a witness can be examined-in-chief, cross-examined and re-examined, but this is because the rights of the parties to examine-in-chief, cross-examine and re-examine a witness accrue in certain order, and a provision conferring the rights must at the same time regulate the order in which they are to be exercised. The word 'evidence' means, as pointed out above, all statements which the Court permits or requires to be made before it by witnesses. The statements of the witnesses include statements made by them in cross-examination and re-examination. There is nothing in Section 252 to suggest that the accused has no right to cross-examine the prosecution witnesses or that the word 'evidence' means only the statements made by them in examination-in-chief."<sup>3</sup>

In *G. L. Biswas v. State*,<sup>4</sup> it was observed : "Reading the relevant sections of Chapters 18 and 21 in juxtaposition, it is clear that Section 252 does not give the accused a statutory right, and the opportunity of cross-examination before charge, which in practice he is given, as a matter of interpretation and on the application of the principles that the accused must get every reasonable opportunity of establishing his innocence, whereas Section 208 expressly gives an absolute right to the accused to cross-examine the witnesses for the prosecution before the charge and the Magistrate has no power to refuse to the accused the right of cross-examination, if the latter insists on his right to cross-examine the witnesses for the prosecution, Section 256 gives a statutory right

2. (1904) 8 C. W. N. 888.

3. *Banwari Lal v. State*, 1956 All. 385 at 390; see also *Muhammad Rahim v. Emperor*, 1935 Sind 13: 154 I. C. 762; 36 Cr. L. J. 581: 29

S. L. R. 92 (F.B.).

4. 1950 Pat. 550: I. L. R. 29 Pat. 935 followed in *Satyanarain Singh v. State of Hyderabad*, 1955 Hyd. 145.

to the accused to cross-examine the witnesses for the prosecution after the charge is framed. There is no corresponding right in the accused if the enquiry is under Chapter 18 ; this makes it essential that Section 208 (2) must be strictly complied with." But later on it was added : "The framing of the charge under Section 210 by the Magistrate without complying with the provision of Section 208 is illegal. He can frame the charge only after giving a full opportunity to the accused to cross-examine the witnesses for the prosecution, because before the framing of the charge the accused is entitled to an opportunity to satisfy the Magistrate by cross-examination that the case is one for discharge and not for commitment."

**22. Opportunity to cross-examine.** The proviso does not require that the adverse party should have actually exercised his right to cross-examine the witness. It is enough, if he had the opportunity to cross-examine on the occasion.<sup>5</sup> Such opportunity is available to the accused in the committal Court, even before the framing of the charges.<sup>6</sup> As Ellenborough, L. C. J., said in *Cazenov v. Vaughan*<sup>7</sup> :

"If the adverse party has had liberty to cross-examine and has not chosen to exercise it, the case is then the same in effect as if he had cross-examined."

In the case of a witness who was examined under section 202, Cr. P. C., before the committing Magistrate, cross-examination was not possible at that stage of the proceedings ; his statement, therefore, cannot be admitted in evidence by the trial Judge under the present section.<sup>8</sup>

What is contemplated under this section is an opportunity of cross-examining the witness, and not an effective use of it. All that the Court has to do, in such cases, is to exercise caution before admitting a statement under this Section. It cannot be postulated, that in every case where the accused is not represented by counsel and could not submit the witness to a searching cross-examination, he had no opportunity to cross-examine and therefore that the evidence of the witness should not be admitted under this Section.<sup>9</sup> But the condition will not be satisfied merely because the accused was physically present in police custody at the time of the examination of a witness. There must be something more than that. He should know that the witnesses would be produced, and the time when, and the place where, they would be produced, or could have known of it ; but not where a witness is sprung upon him as a surprise. It is immaterial, whether it is designed or accidental. The object of the section is to afford a genuine opportunity, which could be

5. *Gauri Dutt Marwari v. D. K. Dowring*, 1934 Pat. 413; I. L. R. 13 Pat. 735; 151 I. C. 683; *Tahawar Ali Khan v. Emperor*, 1946 Oudh 26; 1945 O. W. N. 331; *Mulkraj Sikka v. Delhi Administration*, 1974 Cri. L. R. (S.C.) 512; 1974 Cri. L. J. 1171; 1974 S. C. C. (Cri.) 698; 1974 Cri. App. R. (S.C.) 226; (1975) 3 S. C. C. 2; 1975 All. Cri. C. 17; A. I. R. 1974 S. C. 1723.
6. *Panalal v. State*, (1959) 25 Cut. L.

#### T. 307.

7. (1813) 1 M. & S. 4: 14 R. R. 377.
8. *Mukerji, A. N. v. State*, 1968 A. W. R. (H.G.) 575; 1969 Cr. L. J. 1203; A. I. R. 1969 All. 489, 499.
9. (In re) *Bora Narasimhulu*, 1952 Mad. 165, 166; 1953 Cr. L. J. 344; (1951) 1 M. L. J. 478; 1951 M. W. N. 297; *Chintamani Das v. The State*, 36 Cut. L. T. 825; 1970 Cr. L. J. 906; A. I. R. 1970 Orissa 100, 103.

effectively availed of, and not for show only. Where all that is known is that a date would be given, and is actually given, for the examination of witnesses by the committing Magistrate but the accused is called again on the same date, and the witnesses are examined and the accused is denied a chance to prepare for cross-examination, Section 33 has no application.<sup>10</sup> When the name of witness is supplied to the accused under section 173 Criminal P. C., he cannot complain that he has not been given opportunity to cross-examine him.<sup>11</sup> When the adverse party had no effective opportunity to cross-examine, the statement of witness contained in examination-in-chief is inadmissible.<sup>12</sup> In *R. v. Peacock*,<sup>13</sup> it was said : "If a deposition is to have been taken in the presence of the accused the law will presume that he had full opportunity of cross-examination." Similarly, it has been held in one case in India,<sup>14</sup> that on the maxim *omnia praesumuntur rite et solemniter esse acta*, it can fairly be assumed that there was opportunity to cross-examine the witness, if the accused had chosen to exercise their right. But, in *R. v. Mbwjan*,<sup>15</sup> the Court remarked as follows :

"We observe further that there is nothing on the face of the Extra Assistant Commissioner's record that an opportunity was presented to the prisoner of cross-examining the witness, Ratoor Ray. It may be gathered from the context that the prisoner was present during the examination of this witness. But it is not stated by the Extra Assistant Commissioner that the prisoner had an opportunity of cross-examining and declined to avail himself of it. We think that, in order to make a deposition admissible under Section 33, there must be evidence that the accused person did, in fact, have an opportunity of cross-examining."<sup>16</sup>

So also, it has been held by the Bombay High Court that to make evidence admissible against an accused person, the fact that he had full opportunity of cross-examination, if not admitted, must be proved.<sup>17</sup> Quaere—Whether the opportunity to administer cross-interrogatories under a commission is "an opportunity to cross-examine," within the meaning of the proviso, so as to render the evidence taken on interrogatories admissible?<sup>18</sup> In the undernoted case,<sup>19</sup> it has been held, that in the absence of anything on the record to show that the accused was afforded an opportunity to cross-examine the witness, this section would have no application. The words "opportunity to cross-examine" do not imply that the actual presence of the cross-examining party or his agent before the tribunal taking the evidence is necessary.<sup>20</sup> Therefore, where a commission was returned when the witness had been in part, before he had been fully cross-examined, it was held to be inadmissible.<sup>21</sup> Platt, B., in

10. Abdul Rahman v. Emperor, 1946 L. 275, 276: 226 I. C. 29: 47 Cr. L. J. 810: 48 P. L. R. 39.
11. Paramu v. State, 1973 Ker. L. T. 28: 1972 Ker. L. J. 131.
12. Ram Sarup v. State of Haryana, (1975) 2 Cri. L. T. 328: 1975 Chand L. R. (Cri.) 458: (1975) 77 Pun. L. R. 594.
13. (1870) 12 Cox. C. C. 21.
14. Tafiz Pramanik v. Emperor, 1980 Cal. 228: 125 I. C. 743: 31 Cr. L. J. 916: 50 C. L. J. 584. In this case there was a certificate of the

- Magistrate that the accused was given an opportunity to cross-examine. (1873) 20 W. R. Cr. 69.
15. Ib., at p. 70, per Macpherson, J.
16. R. v. Ramchandra, 19 Bom. 749; Banwarilal v. State, A. I. R. 1956 All. 385: 1956 Cr. L. J. 841.
17. Ib.
18. State of Assam v. Ramani Mohan Chandra, 1953 Assam 176.
19. R. v. Ram Chandra, (1895) 19 B. 749.
20. Boisogomoff v. Nahapiet Jute Co., (1901) 6 C. W. N. 495.

*R. v. Johnson*,<sup>22</sup> reprobated the practice of taking depositions in the absence of the prisoner and then supplying the omission by reading them over to the prisoner and asking him if he would like to put any question to the witnesses. The Magistrate should, when the prisoner is undefended, invite him to cross-examine the witnesses at the end of each examination, and not merely at the end of all the examinations, and should allow him sufficient time to consider his questions.<sup>23</sup> The fact that deceased attesting witnesses to a mortgage were cross-examined by the Special Registrar is enough to make the evidence admissible under this section.<sup>24</sup>

A report by an official in earlier proceeding is not a document written in the ordinary course of business like an entry in a register. The contents of the report cannot be used as evidence in a subsequent proceeding unless the official who made the report is produced and the party against whom its contents are to be used is given an opportunity to cross-examine that official.<sup>25</sup>

**23. Death or illness of witness before cross-examination, effect of.** In England, it has been held, that where the witness dies, or falls ill, before cross-examination, his evidence-in-chief is admissible, though its weight may be slight.<sup>1</sup> The same rule has been followed in India in some cases.<sup>2</sup> But in *J. Boisogomoff v. Nahapet Jute Company, Ltd.*,<sup>3</sup> where the cross-examination was incomplete, a deposition was excluded from consideration. Again in *Rosidi v. Pillamma*,<sup>4</sup> where a witness having died after being partly cross-examined and it being contended that his evidence was altogether inadmissible, it was held : "Without going so far as to hold that it is altogether inadmissible for any purpose, because the cross-examination was not completed, we think it is clear that the principle underlying Section 33, Evidence Act, points to the conclusion that such evidence should not ordinarily be acted upon." Following this ruling, it has been held in *Narsingh Das v. Gokul Prasad*,<sup>5</sup> and *Sundara Rajali v. Gopala Thevan*,<sup>6</sup> that a deposition, on which there was no opportunity to cross-examine, is not admissible under this section. But, if the accused had the right and opportunity to cross-examine the witness before he died, his evidence is admissible, notwithstanding the omission of their pleader

22. (1847) 2 C. & K. 354; and see Ss. 353, 537 Cr. P. Code 1898 and notes to Ss. 135, 167 post and *R. v. Bishop-nath*, (1869) 12 W. R. Cr. 33; *R. v. Mohun*, (1874) 22 W. R. Cr. 38; *Alee Meah v. Magistrate, Chittagong*, (1876) 25 W. R. Cr. 14; *R. v. Nandram*, 1887 A. W. N. 143; 9 A. 609; *Norton*, Ev., 197.

23. *R. v. Day*, (1852) 6 Cox. 55; *R. v. Watts.*, (1863) 9 Cox. 95.

24. *Jekets v. Jaibannessa*, (1913) 18 C. W. N. 605.

25. *Udai Pratap Singh v. Baiju Kewat*, 1967 A. W. R. (H.C.) 827, 828.

1. *Phipson*, 11th Ed., 648; *Taylor*, Ev., s. 1469; see also cases cited there.

2. See *Ibrahim v. R.*, 18 I. C. 406; 17 C. W. N. 230; *Maharaja of Kolhapur v. S. Sundaram*, 1925 Mad. 497; I. L. R. 48 Mad. 1; 93 I.C. 705; *Mangal Sen v. Emperor*, 1929 Lah.

840 (2); 118 I. C. 647; *Diwan Singh v. Emperor*, 1933 Lah. 561; 144 I. C. 331; 34 P. L. R. 719; *W. Stewart v. New Zealand Insurance Co. Ltd.*, (1912) 17 I. C. 188; 16 C. W. N. 991; *Mst. Horil Kuer v. Rajab Ali*, 1936 Pat. 34; 160 I. C. 445; 17 P. L. T. 101; *Ahmad Ali v. Joti Prasad*, 1944 All. 188 (2); I. L. R. 1944 All. 241; 1944 A. L. J. 182; *Chintamani Das v. The State*, 36 Cut. L. T. 823; 1970 Cr. L. J. 906; A. I. R. 1970 Orissa 100, 103; *Ramjilal v. Mansur Ali*, 1974 Cut. L. R. (Cri.) 500.

3. (1902) 29 Cal. 587; 5 C. W. N. 230n.

4. (1910) 5 I. C. 512; 11 Cr.L.J. 145.

5. 1928 All. 140; I.L.R. 50 All. 113: 107 I.C. 243.

6. 1934 Mad. 100; 150 I.C. 132: 39 L.W. 34.

to avail himself of that right.<sup>7</sup> What the proviso requires is, that the adverse party must have a full opportunity of cross-examining the witness.<sup>8</sup> If a witness gave evidence in the committing court and he was cross-examined by the defence but died before the Sessions trial began his evidence is admissible under this section.<sup>9</sup> Statement of a deceased witness who was cross-examined in committing court though admissible under this section was not evidence under section 288, Cr. P. C. of 1898.<sup>10</sup> Where the witness died, after being partly cross-examined, the deposition was not admissible.<sup>11</sup> Where a witness not subjected to cross-examination in committing court died before trial in Sessions Court, his testimony was discarded.<sup>12</sup>

A deposition would not become admissible, merely because of the death of the witness at any stage of the suit; and this is more so in cases when no attempt had been made before his death to have him examined as a witness.<sup>13</sup>

The correct position has been summed up as follows by Wigmore : "There may have been an adequate opportunity of cross-examination, so far as it depends upon the nature of the tribunal or the state of the issues and parties; yet the required opportunity may nevertheless practically have failed, through circumstances connected with the conduct of the examination.

"Where the witness's death or lasting illness would not have intervened to prevent cross-examination but for the voluntary act of the witness himself, or the party offering him—as, by a postponement or other interruption brought about immediately after the direct examination, it seems clear that the direct testimony must be struck out. Upon the same principle, the same result should follow where the illness is but temporary, and the offering party might have recalled the witness for cross-examination before the end of the trial.

"But, where the death or illness prevents cross-examination under such circumstances that no responsibility of any sort can be attributed to either the witness or his party, it seems a harsh measure to strike out all that has been obtained on the direct examination. Principle requires in strictness nothing less. But the true solution would be to avoid any inflexible rule, and to leave it to the trial Judge, to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss. Courts differ in their treatment of this difficult situation; except that, by general concession, a cross-examination begun, but unfinished, suffices if its purposes have been substantially accomplished."<sup>14</sup>

7. Queen-Empress v. Basvanta. (1900) 1 I.L.R. 25 Bom. 168; 2 Bom.L.R. 761; see also Gauri Dutt v. D. K. Dowring. 1934 Pat. 413; I.L.R. 13 Pat. 735; 151 I.C. 688; Tafiz Pramnik v. Emperor. 1930 Cal. 228; 125 I.C. 743; 50 C.L.J. 584.

8. S. C. Mitter v. The State. 1950 Cal. 435; 86 C.L.J. 21.

9. State v. Dhusa Kandy. 35 Cut.I.T. 152; 1970 Cr.L.J. 1322. 1323; In Re Basi Reddi. 1972 Mad.L.J. 118; 1972 Cri. L. J. 1141; Nathu Sors, v. State of Rajasthan. 1970 W. L. N.

(Part 1) 361 : I.L.R. (1971) 21 Rai. 400.

10. Turlok Singh v. State of Punjab. 1974 Cri. L. J. 1265; A. I. R. 1974 S.C. 1797.

11. Narsing Das v. Gokul Prasad. 1928 All 140; I.L.R. 50 All. 113; 107 I. C. 248; Coomar Satya Sankar Ghosal v. Ranee Golacmonee Debee. (1900) 5 C.W.N. 280n.

12. 1972) 1 Cut.W.R. 464.

13. Subrahmanya v. Lakshminarasamma. A.I.R. 1958 A.P. 22.

14. Wigmore, s. 1390

As Shaw, C. J., said in an American case : "No general rule can be laid down in respect of unfinished testimony. If substantially complete, and the witness is prevented by sickness or death from finishing his testimony whether *viva voce* or by deposition, it ought not to be rejected, but submitted to the jury, with such observations as the particular circumstances may require. But if not so far advanced as to be substantially complete, it must be rejected."<sup>15</sup>

**24. Evidence on commission.** Where on remand by the Bombay High Court for the determination of certain issues, the District Court sent down the case to the first Court in order that the evidence might be taken there, and the evidence of the plaintiff was taken on commission, it was held that the defendant was not aggrieved by that procedure.<sup>16</sup> There must have been the right and opportunity to cross-examine,<sup>17</sup> and therefore, if a commission be executed without any notice, or without a sufficient notice,<sup>18</sup> being given to the opposite-party, to enable him if he pleases, to put cross-interrogatories, the depositions will be rejected,<sup>19</sup> yet it is by no means requisite that he should exercise that power ; and if notice has been given to him of the time and place of the examination, and he neither intimates any wish to cross-examine, nor applies to the court to enlarge the time for that purpose, it will be presumed that he has acted advisedly, and the deposition will be received.<sup>20</sup> So where, a defendant, after joining the plaintiff in obtaining a commission to examine witnesses upon interrogatories, gave notice that he declined to proceed with the examination, whereupon the plaintiff sent him word that he should apply for a commission *ex parte*, which he accordingly did, the Court held, that the examinations taken under this order were admissible in evidence, although the defendant had received no notice of the time and place of taking them.<sup>21</sup>

**25. Proviso (3): Questions in issue.** The questions in issue must have been substantially the same in the first and in the second proceedings. And so, if in a dispute respecting lands, any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point in another action between the same parties or their privies, though the last suit relates to other lands.<sup>22</sup> Depositions of witnesses in a mutation proceeding were held to be admissible in a subsequent suit between the same parties in which the self-same question of jointness of the family came to be determined.<sup>23</sup> So also, in the proceedings before a Magistrate on a charge of causing grievous hurt,

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- 15. Fuller v. Rice, 4 Gray (Mass.) 343 cited with approval in Diwan Singh v. Emperor, 1933 Lah. 561 : 144 I.C. 331 : 34 Cr.L.J. 735 : 34 P.L.R. 719.
- 16. Khashaba v. Chandrabhagabai, (1908) 32 B. 441.
- 17. R. v. Etwaree, (1873) 21 W.R.Cr. 12; and see R. v. Lukhy Narain, (1875) 24 W.R.Cr. 18; Attorney-General v. Davison, (1825) M'Cle & Yo, 160; Taylor, Ev. s. 466; R. v. Ramchandra, 19 B. 749.
- 18. Fitzgerald v. Fitzgerald, 3 Sw. & Tr. 997. Tarucknath v. Gouree, (1865) 3 W.R. 147.
- 19. Steinkeller v. Newton, (1898) 9 C. & P. 313; see Gregor v. Dooley, (1870) 14 W.R. 17.
- 20. Taylor, Ev., 9th s. 466; Cazenove v. Vaughan, (1813) 1 M. & Sel. 4; R. v. Mowjan, (1873) 20 W.R. 69; Norton, Ev., 196, 197.
- 21. M. Combie v. Anton, (1843) 6 M. & G. 27.
- 22. Taylor, Ev., 9th Ed., S. 467 cited in In re Rami Reddi, (1881) 3 M. 48. See also Lawrence v. French, 4 Dowl 472; Phipson, Ev., 11th Ed. 586.
- 23. Fakirnath v. Krishna Chandra Nath, 1954 Orissa 176.

two (among other) witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution. The prisoners were committed for trial. Subsequently the person assaulted died in consequence of the injuries inflicted on him. At the trial, before the Sessions Judge, charges of murder and of culpable homicide, not amounting to murder, 'were added to the charge of grievous hurt.' The deposition of the deceased witness was put in and read at the Sessions trial : Held that the evidence was admissible, either under the first clause of Section 32, or this section, notwithstanding the additional charges before the Sessions Court. The question whether the proviso is applicable, that is, whether the questions at issue are substantially the same, depends upon whether the same evidence is applicable, although different consequences may follow from the same act.<sup>24</sup> In the abovenoted case, it was said :

"Now here the act was the stroke of a sword which, though it did not immediately cause the death of the deceased, yet conduced to bring about that result subsequently. In consequence of the person having died, the gravity of the offence became presumptively increased ; but the evidence to prove the act with which the accused was charged remained precisely the same. We, therefore, think that this evidence was properly admitted under the thirty-third section."<sup>25</sup>

A statement made by a witness in a civil suit concerning the authenticity of a document before the Court may be admissible in evidence on the prosecution of a party to the suit for an offence relating to the document, the witness having since died ; but such a statement cannot be treated as evidence against another witness in the same civil suit, accused of abetment of the offence charged against the party and of perjury.<sup>1</sup> "Although the act in using the word 'questions' in the plural seems to imply that it is essential that all the questions shall be the same in both proceedings to render the evidence admissible, that is not the intention of the law. And though separate proceedings may involve issues, of which some only are common to both, the evidence to those common issues, given in the former proceedings, may (on the conditions mentioned in Section 33 arising) be given in the subsequent proceedings."<sup>2</sup> All questions need not be substantially same in both the proceedings. When in previous suit only question of possession was involved and in subsequent suit questions of title and possession are involved, this section is applicable.<sup>3</sup>

The evidence of witnesses examined in an enquiry held by a Sub-Registrar under Section 41 (2) of the Registration Act, 1908, as to the genuineness of a will, is admissible in evidence in a subsequent suit between the same parties, raising an issue as to the genuineness of the will, if it is proved that the witnesses are dead at the time of the suit and that the adverse party at the enquiry before the Sub-Registrar had an opportunity of cross-examining the

24. R. v. Rochia, (1881) 7 Cal. 42 : 8 C.L.R. 273. See ss. 467, 468 : Norton, Ev., 195.
25. Ib. per Pontifex, J. see Taylor, Ev., ss. 467, 468; Norton, Ev., 195; Phipson, Ev., 11th Ed., 586 (because arising out of the same facts).
1. Kadhe v. R., 42 A. 24 : 52 I.C. 394 : A.I.R. 1920 A. 358.

2. In re Rami Reddi, (1881) 3 M. 48, at p. 52; see also Krishnayya Surya Rao v. Venkata Kumara Mahipathi, 1933 P.C. 202 at 205; Subrahmanyam v. Lakshminarasamma, A.I.R. 1958 A.P. 22.
3. Sadashiv v. Joshi, A.I.R. 1976 Goa 11.

witnesses.<sup>4</sup> In deciding, whether the questions in issue are substantially the same, it is always a useful test to see whether the same evidence will prove the affirmative of the issue in both.<sup>5</sup> To conclude : Whether the questions at issue are substantially the same depends upon whether the same evidence is applicable although different consequences may follow from the same act. The principle involved in requiring identity of the matter in issue is the circumstance that in the former proceeding the parties were not without the opportunity of examining and cross-examining to the very point upon which the evidence is adduced in the subsequent proceeding. It is absolutely necessary that the former statement was sufficiently tested by cross-examination upon the point now in issue. It is sufficient if the issues were substantially the same for the purpose.<sup>6</sup>

In the following cases, it was held that the questions in issue were substantially the same :

| 1st proceeding.                                | 2nd proceeding.                              | Case-law.                                  |
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| Prosecution for criminal trespass and assault. | Civil suit for possession.                   | Fool-Kissory Dassee v. Nobin, 23 Cal. 441. |
| Civil suit relating to lands.                  | Civil suit relating to other lands.          | In re Rami Reddi, 3 Mad. 48.               |
| Prosecution for assault, robbery or stabbing.  | Murder forming part of the same transaction. | E. v. Rochia, 7 Cal. 42.                   |
| Prosecution of A for receiving bribe from B.   | Prosecution of B for bribing A.              | R. v. Samiappa, 15 Mad. 63.                |
| Enquiry under Sec. 41 (2) of Registration Act. | Civil suit relating to genuineness.          | Lanka v. Lanka, 42 Mad. 103.               |

**26. Explanation to the Section.** The explanation to the section is inserted for the purpose of excluding the objection which may arise, when the depositions are taken in criminal cases, that they cannot be used in a subsequent proceeding for want of mutuality, because the King is the prosecutor in all criminal proceedings.<sup>7</sup> As so explained, the section admits of the use, in a civil suit, of a deposition taken in a criminal trial or the reverse provided the conditions of the section are fulfilled. In the undenoted case, a prosecution was instituted by S against NCB, at the instance, and on behalf of F, for criminal trespass into a house belonging to F (Penal Code, Section. 448), and on his own behalf for assault and insult (ib. Sections 342, 504) and S at the trial gave evidence on these charges. A civil suit was subsequently brought by F against NCB for possession of the house under the ninth section of the Specific Relief Act. Between the date of the prosecution and civil suit S died. At the hearing of the suit, the deposition of S in the Criminal Court

4. Lanka v. Lanka, 42 M. 103 : 49 I.C. 638 : A.I.R. 1919 M. 540.
5. See R. v. Rochia, (1881) 7 Cal. 42 Chendikamba v. Viswanatha, A.I.R. 1939 Mad. 446 : (1939) I M.L.J. 227; Subrahmanyam v. Lakshminarasamma, A.I.R. 1958 A.P. 22.

7. Norton, Ev., 197, 198, for the question "who is prosecutor" see Gaya v. Bhagat, 30 A. 525: 10 Bom. L. R. 1080: 14 Bur. L. R. 318 (P.C.); State of Himachal Pradesh v. Charan Das Dogra, 1976 Eri. L. J. 1466 (Him. Pra.).

was tendered on the issue of possession. It was held, that, according to the evidence, the charge of criminal trespass had been at the instance of F, and was therefore the charge of F as the real prosecutor, that therefore the parties in both the prosecution for trespass and the civil suit were the same, that NCB had the right and opportunity to cross-examine and had, in fact, exercised that right, the issues in the civil suit were whether F was in possession and whether NCB's entry was unlawful, and that in order to establish the charge of criminal trespass, it had to be shown that F was in possession, that NCB had unlawfully ousted her, and that such ouster was with a criminal intent, that two of the issues in the suit were the same as those in the criminal trial, that the fact that there was an additional issue in the criminal trial made no difference,<sup>8</sup> and that, under the above circumstances, the deposition of S in the criminal trial was admissible in the civil suit, in proof of the issue therein of possession. A certified copy of the deposition was, therefore, tendered and on objection that such copy was inadmissible, and that the original record should be produced, the objection was overruled and the certified copy admitted in evidence. A witness under examination was then asked what information S. had given him on the morning following the date of deposition. On objection being again taken, the question was held admissible under Section 158 in corroboration of the deposition of S in the criminal trial.<sup>9</sup>

The scope of the Explanation is this : Suppose a man is run over by a car, and his leg is amputated. He complains against the driver, who is prosecuted by the State for an offence under the Motor Vehicles Act. Later, he files a suit against the driver for damages. Some of his witnesses who appeared in the criminal court may be dead, by the time the civil case comes up for trial. If the evidence given in the criminal case is sought to be used in the civil case, it may be objected to on the ground that the parties are not the same, as the parties in the criminal case are the State and the driver, and the parties in the civil case are the victim and the driver. The Explanation has been put in to get over this argument and make the evidence in the criminal case relevant evidence in the civil case.

**27. Miscellaneous.** Oral evidence is as receivable as when it has been reduced to a formal deposition. The testimony may be proved from memory or judge's notes or by any one who swears to its accuracy, e.g., judge, counsel or reporter.<sup>10</sup>

The words "description of the witness" noted at the head of the deposition e.g., age, caste, calling, residence, etc. if recorded, as is generally done after the witness is sworn or affirmed by questioning and which the opposite party has the right and opportunity to witness, form part of the evidence given by the witness on oath or solemn affirmation.<sup>11</sup> But, if not so recorded, these descriptive words as such cannot be used as evidence to prove the facts stated.<sup>12</sup>

8. See *In re Rani Reddi*, (1881) 3 M. 48.
9. *Foolkissory Dassee v. Nobin*, (1895) 23 C. 441.
10. Phipson, Ev., 11th Ed., 587; Taylor, Ev., s. 546.
11. See *Jadunath Singh v. Bishesh Dar*, A.I.R. 1939 Oudh 17; 178 I.C.

- 950; *Chotan v. Rex*, A.I.R. 1928 Pat, 420; I.L.R. 7 Pat. 361; 111 I.C. 308.
12. *Maqbulan v. Ahmed*, 26 A. 108; 31 I.A. 38 (P.C.) followed in *Lakshman v. Takim*, A.I.R. 1924 Cal. 558: 80 I.C. 357.

A mutilated condition would deprive the record of all weight.<sup>18</sup>

Certain miscellaneous cases of unavailability of witnesses may be considered. Inability on the part of witness to attend trial owing to requirements of official duty will easily be deemed sufficient for receiving the secondary evidence of his former testimony. The adequacy of the excuse will be a matter for the exercise of judicial discretion.<sup>14</sup> But the witness's imprisonment for crime may be no reason for excusing his non-production as his production might be obtained by order of court provided for in the Civil and Criminal Rules of Practice. When the witness is out of the jurisdiction, it will be a case of impossibility to compel his attendance.<sup>15</sup>

The previous deposition in civil cases should have been recorded as provided for in Order XVIII, Rr. 4 to 17, C. P. C., 1908, and in criminal cases as provided for in Sections 263, 264, 273 to 283, 291 and 358 under the Criminal Procedure Code. There is a presumption under Section 80 of the Evidence Act of genuineness of documents containing record of such evidence. In regard to irregularities in the record of depositions and their credibility depending on whether they were fatal or non-fatal in criminal proceedings, see the leading cases.<sup>16</sup>

The deposition of a witness in previous proceedings is admissible as substantive evidence if certain prerequisites are satisfied; but it cannot be used even with consent merely for the purpose of contradicting the statement of another person in such proceedings.<sup>17</sup>

On a trial *de novo*, in consequence of a transfer, the court can, if a witness is dead, get his evidence in the first judicial proceeding proved under Section 33.<sup>18</sup>

The principle of admissibility being the right and opportunity of cross-examination, a mere affidavit is not admissible under Section 33.

A deposition admitted under Section 33 constitutes substantive evidence. See the wording of the section itself. It can also be used as an admission against a deponent in his lifetime and even without his being examined in the case to which he is a party, as well as against his successor-in-interest; or as a dying declaration under Section 32(1); or as a declaration as to a public right or custom under Section 32(4); or under Section 288, Criminal Procedure Code of 1898 if the deponent had been examined at the sessions trial. But, if the deponent is examined as a witness in a subsequent proceeding and his previous deposition is used under Section 127 or Sections 155 and 145, it does not become substantive evidence, and is admissible for the limited pur-

13. Gobinda v. Shamalal, A.I.R. 1931 P.C. 89 : 58 I.A. 125 : 181 I.C. 753.
14. Chamb. H.B. s. 628.
15. Wigmore, ss. 1404 and 1407.
16. Subramania Iyer v. King-Emperor, 28 I. A. 257; P. Kottaya v. Emperor, A.I.R. 1947 P.C. 67 : 74 I.A. 65 ; I.L.R. (1948) M. 1 : 230 I.C. 135; Abdul Rahman v. Emperor, A.I.R. 1927 P.C. 44 : 54 I.

- A. 96; 100 I.C. 227; Atta Mohammad v. Emperor, A.I.R. 1930 P.C. 57 and Slaney v. State of M.P., A.I.R. 1956 S.C. 116.
17. Bhavamma v. Bomba Ramamma, 78 I.G. 176 (M) : A.I.R. 1924 M. 537.
18. Muthiah Pillai v. Emperor, A.I.R. 1932 M. 559 : 33 Cr.L.J. 738 ; 139 I.C. 203.

poses specified in the section itself which authorises the admission. But a deposition may, however, become substantive evidence, when it is used to refresh witness's memory in accordance with Section 160 of the Act. Who is a prosecutor?

In the following extract from *S. T. Sahib v. Hasan Ghani*,<sup>19</sup> Ramaswami, J., deals with the question, who is a prosecutor:

"A prosecutor has been described as a man actively instrumental in putting the law in force. A person would be a prosecutor where he files the complaint himself or has it filed through the instrumentality of an agent or a counsel. A private person at whose instance and report the prosecution is launched by the police is a prosecutor within the meaning of the present context.<sup>20</sup> But the case would be otherwise, where the defendant merely gave an account of his honest suspicion about the plaintiff to the police, who without any further activity on his part had started a case against the plaintiff. Thus, a mere informant cannot be a prosecutor. There is a sharp distinction between giving information and making complaint upon which prosecution is based. The question whether the defendant was the real prosecutor or informant is to be determined by his conduct before and during the trial.<sup>21</sup> To render one liable to malicious prosecution it must appear he was the proximate and efficient cause of putting the law in motion; some affirmative action in connection with the prosecution must be shown. Their Lordships of the Privy Council in *Mohamed Amin v. Jogendra Kumar*,<sup>22</sup> have laid down a different test, viz., whether criminal proceedings have reached a stage at which damage to the plaintiff results.<sup>23</sup>

Thus the answer to the question, who is the prosecutor must depend upon the whole circumstances of the case. The mere setting up of the law in motion is not the criterion; the conduct of the complainant before and after making the charge must also be taken in consideration. Under Section 302, Cr. P. C., in India a private person may be allowed to conduct a prosecution which provides that any Magistrate enquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police.... Any person conducting the prosecution may do so personally or by a pleader. Former statement is not admissible if prosecutor was not a party to the first proceedings.

The expression "adverse party" is used in this Section to distinguish that party from the party who calls a witness and the distinction has nothing whatever to do with the nature of the evidence given by the witness. A party calling a witness does not become the adverse party, because the witness gives evidence, which favours the opposite party or is hostile to the party calling

19. A.I.R. 1957 Mad. 646 at 653.

20. Gaya Prasad v. Bhagat, I.L.R. 30 All. 525 (P.C.).

21. Periya Goundan v. Kuppa Goundan, I.L.R. 42 Mad. 880; A.I.R. 1919 Mad. 229 (2); M. Rajagopal v. Spencer & Co. Ltd., 12 Mad. L.W. 87; A.I.R. 1920 Mad. 712: 59 I.C. 218; Shunmugha v. Kandasami, 12 Mad. L.W. 170: A.I.R. 1920 Mad. 789: 59 I.C. 973.

22. 51 Cal.W.N. 723 : A.I.R. 1947 P.C. 108.

23. See also Anand and Sastri, Indian Law of Torts, 1967, 3rd Edition, p. 831. (English) Clerk and Lindsell on Torts, 11th ed., p. 740: (American) 34 Am. Jur. Ss. 25-26 p. 715 and foll.; Restatement of the Law, Vol. III Ch. 20, S. 654, p. 389: 38 Corpus Juris, S. 22, p. 394 and foll.

the witness; and the expression "adverse party" in the proviso can only refer to the party which was adverse party at the time when the deposition was recorded in the first proceeding.<sup>24</sup>

On the principles set out above the deposition of a witness taken in an enquiry before the Coroner is inadmissible.<sup>25</sup>

If the statement of a witness taken by the prosecution is transferred to the sessions record at the request of the defence that statement should be brought on the record, not as that of a prosecution witness but as that of a defence or court witness.<sup>1</sup>

Admission of second marriage in a written statement in answer to an application for restitution of conjugal rights is not evidence, in a subsequent case of adultery or bigamy, of the fact of the second marriage having taken place.<sup>2</sup>

Admission made under somewhat suspicious circumstances at the end of the trial of a case without formally amending the written statement has weak evidentiary value.<sup>3</sup>

If the certified copy of a defendant's written reply in earlier Rent Control proceedings between the same parties is admitted without any objection from that defendant, he cannot raise an objection at the stage of second appeal.<sup>4</sup>

Statement made before a police officer is not evidence within the meaning of Section 33.<sup>5</sup>

**28. Identity of parties.** "The requirement of identity", says Prof. Wigmore, "of parties is after all only an incident or corollary of the requirement as to the identity of issue. It ought, then, to be sufficient to inquire whether the former testimony was given upon such an issue that the party opponent in that case had the same interest and motive in his cross-examination that the present opponent has; and the determination of this ought to be left entirely to the trial Judge. Nevertheless, the courts have not in name at least, often gone so far as to accept so broad a principle. (1) It is well settled that the former testimony is receivable if the difference of parties consists merely in a difference of nominal parties only, or in addition or subtraction on either side of parties not now concerned with the testimony. (2) It is well settled that the former testimony is receivable, if the then party-opponent, though a different person, had the same property interest that the present opponent has." (Wigmore, S. 1388).

It follows that when a nominal party is either added to the record or taken from it, the administrative operation of the rule in question is not affected. In other words, the addition of a nominal party to the record on the substitu-

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| 24. Makhan Khan v. Emperor, A.I.R. 1948 Sind 122, 124 : 49 Cr.L.J. 558.<br>25. Rex v. Mahomed Yusuf, A.I.R. 1933 Bom. 479 : 146 I.C. 544.<br>1. Kala v. Emperor, A.I.R. 1944 Lah. 206 : 213 I.C. 355.<br>2. Kanmal Ram v. Himachal Pradesh Administration, 1966 S.C.D. 174 : (1966) 1 S.C.J. 210 : (1966) 1 S.C.W.R. 64 : 1966 Cr.L.J. 472 : 1966 M.L.J. (Cr.) 151 : A.I.R. 1966 | S.C. 614, 615.<br>3. Ambika Prasad Thakur v. Ram Ekbal Rai, (1966) 1 S.C.A. 35 : 1966 S.G.D. 485 : 1966 B.L.J.R. 147 : A.I.R. 1966 S.C. 605, 612.<br>4. Mangoolal Pandey v. Haji Alladin, 1966 A.W.R. (H.C.) 196 : 1966 A.L.J. 285, 287.<br>5. Sk. Manzoor v. State of Bihar, 1970 P.L.J.R. 412, 415. |
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tion of a person beneficially interested for the nominal party by whom he had previously been represented, is not regarded as a matter of administrative importance in this connection. In a like manner, the joinder in a peremptory record of persons whose coming into the case fails to affect, in any material degree, the identity of the issue or the right to cross-examination, does not impair the admissibility of the former evidence. *Mutatis mutandis*, the rule is the same where a party whose omission from the record fails to alter the issue or the opposing party's right of cross-examination, has been dropped in the second case.<sup>6</sup>

By virtue of the first Proviso to the section, it is not attracted unless there is identity of parties.<sup>7</sup> Hence documents on record of a criminal proceeding are not admissible in proceedings to prove negligence against the party which was not party to the criminal proceeding.<sup>8</sup> Evidence in one cross case cannot be considered in another cross case.<sup>9</sup> Unless recorded under Section 512, Cr. P.C., 1898 (Section 299 of Cr. P.C., 1973) the evidence recorded in a criminal trial cannot be used in subsequent trial of absconding accused who were not parties to the previous trial.<sup>10</sup>

**29. Foreign judgment.** Notwithstanding anything contained in this section, Indian Criminal Law Act XIV of 1908, Section 13, provides for a special rule of evidence in the case of the trial of offences under that Act.

## STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES

### Topical Introduction to Section 34

Two general classes of statements are dealt with in this portion of the chapter—(a) Entries in books of account, regularly kept in the course of business, (b) entries in public documents, or in documents of a public character. Both classes of statements are relevant, whether the person who made them, is or is not, called as a witness, and whether he is, or is not, a party to the suit, and are admissible owing to their special character and the circumstances under which they are made, which in themselves afford a guarantee for their truth.

The first class of statements was not generally admissible according to the principles of the English common law, except in the case of entries against interest or made in the course of business by deceased persons,<sup>11</sup> but Courts of Equity acted upon the principle of admitting account-books in evidence in

6. Chamberlayne's Evidence, s. 1671.
7. Ram Dulare Shukla v. M.P. State Road Transport Corporation, 1970 Jab.L.J. 626 : 1969 M.P.L.J. 922, 923; Krishnayya v. Venkata Kumara, A.I.R. 1933 P.C. 202; Ganpatrao Yadavrao v. Nagorao Vinayakrao, A.I.R. 1940 Nag. 382.
8. Ram Dulare Shukla v. M.P. State Road Transport Corporation, *supra*.
9. Dadarao v. State of Maharashtra, 1974 Cri.L.J. 447 : A.I.R. 1974 S.C. 388.
10. Govisiddheah v. State, (1975) 1 Kant. L.J. 193 : I.L.R. (1975) Kant, 355 : L.E.—137

11. 1975 Mad.L.J. (Cri.) 132: 1974 Cri.L.J. 285.
- Taylor, Ev., S. 709; Steph. Dig. Arts. 25-31; Best, Ev., ss. 501, 503; Roscoe, N. P. Ev. 60-62; Powell, Ev. 9th Ed., 316-323; Starkie, Ev., 65. Thus A sues B for the price of goods sold; an entry in A's shop-books, debiting B with the goods is not evidence for A to prove the debt; Smith v. Anderson, (1828) 4 Russ 352 but an entry debiting C. and not B with the goods is evidence against A to disprove the debt; Storr v. Scott. 6 C. & P. 241.

cases in which the vouchers have been lost<sup>12</sup> and the same principle has been adopted in certain cases, by the Rules of the Supreme Court.

As a general rule, a man's own statement is not evidence for him, though in certain cases it may be used as corroborative evidence.<sup>13</sup> The entries alluded to in Section 34, being the acts of the party himself, must be received with caution.<sup>14</sup> But these statements are in principle admissible upon considerations similar to those which have induced the Courts to admit them in evidence when made by persons who are dead and cannot be called as witnesses. Moreover, in the words of the Judicial Committee, "accounts may be kept, and so tally with external circumstances as to carry conviction that they are true."<sup>15</sup> They are, moreover, subject to the restrictions that they shall not alone be sufficient evidence to charge anyone with liability without some independent evidence of the facts stated in them.<sup>16</sup>

The second class of statements is contained either in public documents, such as official books, registers, or records, or in documents at least of a public character, such as maps offered for public sale. The grounds upon which these statements are admissible have been given in the Notes to the following sections. Public documents are entitled to an extraordinary degree of confidence, on the ground of the credit due to the agents who have made them, and of the public nature of the facts contained in them. Where particular facts are enquired into and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials, are in fact the agents of all the individuals who compose the public, and every member of the community may be supposed to be privy to the investigation.<sup>17</sup> The other documents mentioned in the following sections, such as maps offered for public sale, deal with matters of public interest, are accessible to the entire community, and being open to its criticism, are unlikely to be inaccurate, and if inaccurate, are liable to detection and to consequent correction.<sup>18</sup>

**34. Entries in books of account when relevant.** Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

12. Taylor, Ev., s. 711; and see 15 and 16 Vict., c. 80, s. 4.

13. Ishan v. Haran, (1869) 11 W. R. 526; see Introduction to the sections on "admissions" et seq., ante.

14. Kheero v. Beejoy, (1867) 7 W. R. 538; Taylor, Ev., s. 709: but proper weight must be given to them. Where it was said that "an account-book is nothing; it is one's private affair and he may prepare it as he likes," the Privy Council remarked, "it is true that there may be accounts to which that description would apply. Other accounts may be so kept, and may so tally with external circumstances, as to carry

conviction that they are true. And the Evidence Act, S. 34 therefore enacts etc.": Jaswant v. Sheo, (1894) 16 A. 157, 161.

15. v. S. 32, cl. (2), supra; Taylor, Ev., s. 709; Powell, Ev., 9th Ed., 316; Starkie, Ev., 65; Steph. Introd, 164, 165; Jaswant v. Sheo, I. L. R. 16 All. 157, 161, 162; one test of genuineness is correspondence of books with themselves, but a better test is correspondence with other evidence, ib.

16. S. 34 post, and Commentary.

17. Starkie, Ev., 272, 273; see Samar v. Juggal, (1895) 23 C. 366, 370.

18. v. post, Ss. 36, 38.

### Illustration

A sues B for Rs. 1,000 and shows entries in his account books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt.

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| s. 32, cl. (2) (Statement made in course of business by person who cannot be called). | s. 69 (How much of a statement is to be proved.)    |
| s. 32, cl. (3) (Statement against interest by same person.)                           | s. 65 (g) (Numerous accounts : secondary evidence.) |
|   | s. 3 ("Relevant").                                  |

Civil Procedure Code, Order XIII, Rule 5 (Production of Accounts Books in Evidence); Order XXVI, Rules 11, 12 (Commissions to examine accounts); Act 1 of 1956 (Companies), Section 548; Acts XVIII of 1891 and 1 of 1893 (Bankers' Books and Books of Post Office Savings Bank and Money Order Offices); Taylor, Ev., Section 709; Best Ev., Sections 501, 503; Wigmore, Ev., Section 1558.

### SYNOPSIS

- 1. Principle.
- 2. Scope.
- 3. "Books of account regularly kept" in the course of business.
- 4. "Books".
- 5. "Of account".
- 6. "Regularly kept in the course of business."
- 7. Relevancy and value of entries in account books regularly kept in the course of business.
- 8. Proof of accounts.
- 9. Evidentiary value of books of account.
  - (a) General.
  - (b) Not sufficient to charge with liability unless corroborated.
- 10. Jama-wasil-baki papers.
  - (a) General.
  - (b) Value of these papers.
- 11. Jamabandi and other papers.
- 12. When should objection be taken to admissibility of books of account?

**1. Principle.** This section is a reproduction of the Roman Law. In Roman Law, the production of a merchant's or tradesman's books of account regularly and fairly kept in the usual manner was deemed presumptive evidence of the justice of his claim; and, in such cases, the supplementary oath of the party was admitted to make up the presumptive evidence necessary to a decree in his favour.<sup>19</sup>

This section, which makes entries in regularly kept books of account admissible in favour of a person, even in his lifetime, constitutes an exception to the general rule enacted in Section 21 that a man cannot make evidence for himself. Only those entries, which are against the interest of the person in whose books they occur, are relevant as admissions under Section 21, even if the book is not regularly kept in the ordinary course of business. In order to avoid the dangerous consequences of admitting this self-serving kind of evidence, the section declares that the entries cannot be used against other persons as sufficient evidence of liability. The principle of admissibility of parties' account books shows a recognition of the two traditional features of hearsay exceptions in general, viz., the necessity, principle and the circumstantial guarantee of trustworthiness.<sup>20</sup>

19. Taylor Ev., s. 712; Cunningham,  
10th Ed. p. 175.

20. Wigmore, Ev., Vol. 2, s. 1536.

This section is a modification of Section 43 of Act II of 1855 which ran : "Books proved to have been regularly kept in the course of business shall be admissible as corroborative but not as independent proof of the facts stated there." To make account books admissible under that section, it was necessary to give some other substantive evidence in support of the fact sought to be established. The present section does away with that requirement. Under this section entries in books of account relating to a matter in issue regularly kept are relevant, though not corroborated by other evidence; but though admissible, the entries alone are not sufficient to charge any one with liability, that is to say, no decree can be passed on the basis of the entries alone but there must, in addition, be some independent evidence of the transaction relating to the entries. In other words, the section only lays down that a plaintiff cannot obtain a decree, by merely proving the existence of certain entries in his books of account, even though they are shown to have been kept in the regular course of business. He will have to show further, by some independent evidence, that the entries represent real and honest transactions and that the monies were paid in accordance with those entries. Account books, as such, do not create any rights and any entry in the account books cannot be the basis of charging a person with the liability of what is noted against him. The entries can be merely evidence of certain facts and as such are relevant evidence in view of this section.

Stephen in his Introduction (p. 165) says :

"We have admitted entries in books kept in the ordinary course of business. we have also made admissible written acknowledgments of the receipt of money, goods, securities, or property of any kind and documents used in commerce. Declarations which under the English law are only admitted because they have been made against interest will, by the effect of our rules, be excluded, unless they have been made in the ordinary course of business. The test of pecuniary interest is exceedingly difficult of application, and appears to us to be of little value as a test of truth. In certain cases statements are made in circumstances which in themselves are a strong reason for believing them to be true, and in these cases there is generally little use in calling the person by whom the statement was made. The sections which relate to them are 34—38."

The circumstantial guarantee of trustworthiness constituting the basis of Section 34 is explained by Wigmore and others as follows : The reasons for the rule are as follows; viz., first that the habit and system of keeping any such book with regularity ensure their accuracy; secondly that the influence of habit prevents casual inaccuracies and counteracts the casual temptation to mistakes; thirdly, as such books record a regular process of business transactions, an error is always certain to be detected and rectified; fourthly, that in such books misstatements cannot be made except by systematic and comprehensive plan of falsification; and fifthly, in some cases the writer may make the record under a duty to his employer in which case there is the additional risk of censure from the master if a mistake is committed.

It is recognised that to use a system of regular accounts to sustain a particular fraud is so difficult and dangerous a procedure, that the courts may guide their decisions by using entries in such a system, truth and accuracy and contemporaneous record being almost indispensable for a due carrying on of such accounts.<sup>21</sup> It must be confessed that to forge elaborate accounts

21. Mukundram v. Dayaram, 10 N.L.R. 44: 23 I. C. 893; 1914 Nag. 44.

extending over six years, or even to insert new sheets in such accounts, would be a most dangerous undertaking, and to make the different books correspond exactly would be a task of almost insuperable difficulty.<sup>22</sup> The principle is to admit only such statements recorded by a party in his own behalf as by their nature and circumstances are ordinarily beyond his power to tamper with, undiscovered for the purpose of a particular case.<sup>23</sup>

To conclude : Cases have from time to time occurred, where, under special circumstances, accounts between master and servant, between tradesman and shopman and between banker and customer have from the necessity and for the convenience of mankind been admitted as evidence but such evidence ought not to be received, unless there are special circumstances sufficient to warrant its reception.<sup>24</sup>

In general, it is thought that the regularity of habit, the difficulty of falsification, and the fair certainty of ultimate detection, give in a sufficient degree a probability of truthworthiness. The particular element of self-interest and partisanship that might be supposed to diminish trustworthiness in the case of a party himself is supposed to be balanced by certain additional requirements here made for this class of books, for example, the existence of a reputation for honest book keeping, the fair appearance of the books, and the like.

In applying the general principle of Regularity of Entry different circumstances may come into question,—the kind of occupation, the kind of book, the kind of item.<sup>25</sup>

The entries contemplated by the section are those in the account books of the plaintiff. Therefore, the entries in the account books of a third party are not enough to charge the defendant with liability. Corroborative material could, however, be afforded by the circumstances surrounding the existence of the books and of the transaction which is recorded in the books of account.<sup>1</sup>

**2. Scope.** This section makes all entries in books of account regularly kept in the course of business relevant. If the entry is against the interest of the person in whose books it occurs, it would be relevant as an admission under Section 21. But, if it is in his favour, it would not be relevant under that section. In so far as the present section makes such an entry relevant, it must be taken to be an exception to the rule enacted in Section 21.<sup>2</sup> Since an entry in an account book is an admission by the maker thereof in his own favour, it is accepted in evidence only, if it strictly complies with the requirements of the books being kept (1) regularly, and (2) in the ordinary course of business.<sup>3</sup>

A question sometimes arises whether a particular account should be considered, and can be referred to as to the original account. "The record admissible is one consisting of a regular series; hence, the first regular and col-

22. Jaswant Singh v. Sheo Narain, 16 All. 157 : 21 I.A. 6.

23. Mukundram v. Dayaram, 1914 Nag. 44.

24. Symonds v. Gas Light & Coke Co., (1848) 50 E. R. (825) (827) : 11 Beav. 283; see Phipson (11th Ed.), 343.

25. Wigmore, Vol. 2, s. 1546, p. 1905; Ramaji v. Manohar, A.I.R. 1961

Bom. 169; 62 Bom. L. R. 322.

1. Ghulam v. Government of Jammu and Kashmir, A.I.R. 1960 J. & K. 136, 138.

2. See Mukundram v. Dayaram, 1914 Nag. 44 : 23 I.C. 893 : 10 N.L.R. 44.

3. Uttam Chand v. Hakim Md., 1932 Lah. 417: 137 I.C. 44; 33 P.L.R. 168.

lected record is the original one, and it is immaterial that it was made up from casual or scattered memoranda preceding it. The application of the principle must depend much on the circumstances of the particular case.<sup>4</sup> If accounts be merely memoranda and rough books from which the regular accounts are prepared, the former, it has been said can hardly be considered the original account.<sup>5</sup> Where account books, though dealing with the same subject-matter, deal with it in different ways, as in the case of a day-book, cash-book, ledger or the like each of such books is an original account book.<sup>6</sup>

3. "Books of account regularly kept" in the course of business. The principle of this section is to admit only such statements recorded by a party in his own behalf as by their nature and circumstances are ordinarily beyond his power to tamper with, undiscovered for the purpose of a particular case. Therefore, when an entry of that kind is tendered, it must be shown—

- (a) to be in a book,
- (b) that book must be a book of account, and
- (c) that account must be one regularly kept in the course of business.

These essentials require to be carefully observed.<sup>7</sup>

4. "Books."<sup>8</sup> The term "Books" in this section may properly be taken to signify, ordinarily,—

- (1) collections of sheets of paper bound together,
- (2) with the intention that such binding shall be permanent and the papers used collectively in one volume.<sup>9</sup>

It may be taken, that a collective unity of sheets, even at the time that the entries came to be made, is implied in the conception of a "book". It may also be assumed that it connotes an intention that it should serve as a permanent record. Beyond these two ideas, it is not necessary that it should consist of a particular number of sheets, or that it should be bound in a particular way.<sup>10</sup> So, where it appeared that the book was stitched before the entries were made and the entries covered both the sheets and there was a heading at the top of the first page (e.g., account of V.M.G.), it was held that it was a book.<sup>11</sup> Unbound sheets of paper, in whatever quantity, though filled up with one continuous account, are not a book of account within the purview of this section.<sup>12</sup> Loose sheets of papers have not the probative force of a book of account regularly kept.<sup>13</sup>

4. Wigmore, *Ev.* s. 1558.
5. D. Peary v. Narendra, (1905) 9 C. W.N. clxxviii: see S. 63, post.
6. Megraj v. Sewnarain, (1901) 5 C. W.N. clxviii: see S. 63, post.
7. Mukundram v. Dayaram, 1914 Nag. 44, 45 : 23 I.C. 893 : 10 NLR 44, see also Uttamchand v. Hakim Mohammad, 1932 Lah. 417 : 137 I.C. 44 : 33 P.L.R. 168; see also Bankey Behari v. Brij Beharilal, 1929 All. 170 : I.L.R. 51 All. 519 : 116 I.C. 285; Hingu Miya v. Heramba, 8 I.C. 81 :

- 13 C.L.J. 189.
8. Mukundram v. Dayaram, 1914 Nag. 44 : 10 N.L.R. 44 : 23 I.C. 893.
9. Ambalavana Pillai v. Gowri Ammal, 1936 Mad. 871, 874 : 1936 M.W.N. 1274: 44 L.W. 467.
10. *Ibid.*
11. Mukundram v. Dayaram, 1914 Nag. 44 : 23 I.C. 893 : 10 N.L.R. 44.
12. Mahasay Ganesh Prasad v. Narendra Nath Sen, 1953 S.C. 431, 432: 17 Cut.L.T. 73.

5. "**Of account.**" To account is to reckon, and it is difficult to conceive any accounting which does not involve either addition or subtraction or both of these operations of arithmetic. A book which contains successive entries of items may be a good memorandum book; but until those entries are totalled or balanced, or both, as the case may be, there is no reckoning and no account. A book which merely contains entries of items, of which no account is made at any time, is not a book of account for the purposes of this section.<sup>13</sup>

6. "**Regularly kept in the course of business.**" The books must have been "regularly kept in the course of business." This does not mean, as is frequently supposed, that they must be maintained in a particular form favoured by bankers—usually called the mahajani system. Their evidential value will, of course, depend upon their formality and the checks against fraud secured by the method of keeping them, but that is not to be confused with admissibility. This section makes no difference between the cash books and ledgers of a large bank; and the day book of a house-keeper. The difference lies in the weight to be given to the entries therein.<sup>14</sup>

"Regularly" or "systematically" means that the accounts are kept according to a set of rules or a system, whether the accountant has followed the rules or system closely or not. Nor is there anything in the section that says the system must be an elaborate or reliable one. Both these matters, the degree of excellence of the system and the closeness with which it has been followed, affect the weight of the evidence of an entry, not its admissibility. The roughest memoranda of accounts kept generally according to the most elementary system, though often departing from it, are admissible in evidence, but do, of course, have no weight.<sup>15</sup> The regularity, of which the section speaks cannot possibly mean that there is no mistake in the account, as that would make the section a dead letter.<sup>16</sup> The term "regularly kept" has reference to the system of book-keeping, rather than to the truth or correctness of the entries in the account books. The words "regularly kept" only mean that the books should be kept in accordance with a certain fixed method or in some customary form.<sup>17</sup> In a Assam case,<sup>18</sup> where a certain books of account were produced in evidence it was observed :

"They are merely the ledgers of the defendant. They are not supported by any day-book or *roznamcha*. They do not contain entries of transactions as they take place. There is no daily opening or closing balance in the ledger accounts. What has been shown from these books is that there was plaintiff's account and in that account entries were made. These entries could all have been made on any one day. These books, therefore, cannot be regarded as relevant under Sec. 34, Evidence Act."

But a too limited meaning must not be given to this part of the section. It is not necessary that the entries in the books should have been made from day to day or from hour to hour as the transactions take place. Accounts prepared from rough books or memoranda should be treated as original accounts

13. Mukundram v. Dayaram, 1914 Nag. 44 : 23 I.C. 893 : 10 N.L.R. 44.

1932 Oudh 225 : 138 I.C. 716 : 9 O.W.N. 532.

14. Ibid.

18. Chandi Ram v. Jamini Kanta, 1952 Assam 92. See also Hira Meher v.

15. Kesheo Rao v. Ganesh, 1926 Nag. 407 : 95 I.C. 128.

Birbal, I.L.R. 1957 Cut. 437 : A.I.R. 1958 Orissa 4.

16. Ib.

17. Gulab Halwai v. Bhagwan Dass,

and cannot be rejected on the ground that they were not entered regularly from day to day. All that this section requires is that the entries in the accounts should be regularly kept in the course of business.<sup>19</sup>

The word "regularly" means that the accounts must be kept according to a system, though that system need not be elaborate. The expression "regularly kept" is not synonymous with "correctly kept", though if they are not correctly kept, that would affect the weight to be attached to the entries made therein but not their admissibility.<sup>20</sup> If the entry is made in a suspicious way, that circumstance detracts from the value of the entry.<sup>21</sup> Where one of the plaintiff's witnesses, named K T, stated in cross-examination that he had formerly been employed by C D, at intervals of a week or fortnight, to make entries in his (CD's) cash book relating to private transaction which he (the witness) did from C's loose memoranda or from oral instructions given by C and this cash book was tendered in evidence. West, J., refused to receive it and said: "Under Sec. 34 of the Evidence Act, I do not think this book comes within the designation of books of account regularly kept in the course of business. It is C's private account-book, entered up casually once a week or fortnight, and with none of the claims to confidence that attach to books entered up from day to day (as in bank from hour to hour) as transactions take place. These only are I think, "regularly kept in the course of business."<sup>22</sup> But in a later decision<sup>23</sup> the Privy Council have not approved of the opinion thus expressed, holding that it gave a much too limited meaning to the section, that if it were correct, merchants' and bankers' books regularly kept would in many cases be excluded from being used as corroborative evidence and that the time of making the entries may affect the value of them, but should not, if not made from day to day or from hour to hour, make them entirely irrelevant. It is thus not necessary that the entry should have been made at the time of the transaction, provided that the book has been kept in the regular course of business. In the case cited, the course of business in keeping the accounts in the office of a talukdari estate was that monthly accounts were submitted by kaimdars at the head office where they were abstracted and entered in an account book, under the date of entry, that being in some cases many days after the transaction of payment or receipt; but the entries were made in their proper order, on the authority of the officer whose duty it was to receive or pay the money. It was held that the entry in the account book was admissible as corroborative evidence of oral testimony as to the fact of a payment for what it was worth, objection being only to be made to its weight, not to its relevance, under this section.<sup>24</sup> So, a book of account may be said to be regularly kept, although the book is not entered up from day to day or from hour to hour as the transactions take place<sup>25</sup> or if the entries are

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- 19. Ram Kuwar v. Pyarchand, 1952 M.B. 55; Panna Lal v. Labhchand, 1955 M.B. 49; Ramaji v. Manohar, A.I.R. 1961 B. 169 : 62 Bom.L.R. 322.
- 20. Balmukand v. Jagannath, I.L.R. 1963 Raj. 579 : A.I.R. 1963 Raj. 212; 1963 Raj. L. W. 195.
- 21. Venkata Mallayya v. Rāmaswami & Co., 1963 (Supp.) 2 S.C.R. 995 : 1963 S.G.D. 785 : (1963) 2 S.C.J. 483; (1963) 2 Andh. W. R. (S.C.) 110; (1963) 2 M.L.J. (S.C.) 110; A.I.R. 1964 S.C. 818, 823.
- 22. Munchershaw v. New Dhurumsey Co., (1880) 4 B. 570 at p. 583, referred to in Ningawa v. Bharmapada, (1898) 25 Bom. 63.
- 23. Deputy Commissioner, Bara Banki v. Ram Prashad, (1899) 27 C. 118 (S.C.); 4 C.W.N. 147; Chandreshwar v. Bisheshwar, 1927 Pat. 61 : I.L.R. 5 Pat. 777: 101 I.C. 289.
- 24. Deputy Commissioner, Bara Banki, v. Ram Parshad, (1899) 27 C. 118 (P.C.); 4 C.W.N. 147.
- 25. Chandreshwar v. Bisheshwar, 1927 Pat. 61 : I.L.R. 5 Pat. 777: 101 I.C. 289.

made from day to day and the totalling may not take place every day.<sup>1</sup> But a book containing profit and loss accounts not made out at regular intervals or for a uniform period, the calculation being made in a haphazard way for varying periods of time does not constitute a book in the regular course of business.<sup>2</sup> Accounts prepared at considerable intervals from memory or possibly from inadequate materials cannot be treated as proof of the actual income and expenditure of the estate to which they relate.<sup>3</sup> Thus, an entry made in 1917 is not relevant on the question whether a person had taken a loan in 1916.<sup>4</sup> But account books, though proved not to have been regularly kept in the course of business, but proved to have been kept on behalf of a firm of contractors by its servant or agent appointed for that purpose, are relevant as admissions against the firm.<sup>5</sup> Similarly, books not admissible under this section, as balances have not been struck in them, may be admissible under Sec. 32 (2) as entries or memoranda made by persons who are dead in books kept in the ordinary course of business.<sup>6</sup>

A finding of the lower appellate court that the accounts were maintained in the regular course of business will not be interfered with in second appeal.<sup>7</sup>

An adverse inference cannot be drawn against a person for the non-production of account books if other evidence has been produced and accepted by the court. Nor can a presumption be drawn under section 114 for it is permissive and regard must be had to the circumstances of the particular case.<sup>8</sup>

Entries in the property register of a Society showing properties gifted to the Society will not be inadmissible to show that the properties were gifted because they were not made immediately but after some time.<sup>9</sup>

**7. Relevancy and value of entries in account books regularly kept in the course of business.** This Section appears in a group of Sections headed : "Statement made under special circumstances". It makes entries in books of account regularly kept in the course of business relevant in all proceedings in the course of business. These entries are, however, not by themselves sufficient to charge any person with liability. Therefore, when plaintiff sues defendant for a sum of money, he may put his account books in evidence, provided they are regularly kept in the course of business and show by reference to them that the amount paid by him is debited against the defendant. The entries, though made by plaintiff in his own account books, and though they are in his own favour, are a piece of evidence which the Court may take into consideration for determining whether the amount referred to therein

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| <ol style="list-style-type: none"> <li>1. Narayan v. Waman, 1921 Nag. 133 (2); 59 I.C. 121; Ram Lochan v. Maikha Sethani, A.I.R. 1960 Pat. 271.</li> <li>2. Jasodabai v. Dharamdas, 1932 Sind 186 : 26 S.I.R. 184; R. R. Ghari v. State, A.I.R. 1959 All. 149.</li> <li>3. Rajagopala Naidu v. Subbammal, 1928 Mad. 180 ; I.L.R. 51 Mad. 291 ; 109 I.C. 153 : 54 M.L.J. 703 : 28 L.W. 158; see also Arjan Singh v. Surjan Singh, 1935 Pesh. 44 : 155 I.C. 1006.</li> <li>4. Ramji v. Menohar Chintaman, 62 Bom.L.R. 322.</li> </ol> | <ol style="list-style-type: none"> <li>5. Munchershaw v. New Dhurumsey Co., (1880) 4 B. 576.</li> <li>6. Babhnaji v. Ratanlal, 1934 Nag. 106 : 148 I.G. 1033 ; 30 N.L.R. 192.</li> <li>7. V. Venkata v. K. Lakshmi, (1964) 1 Andh.L.T. 104 : A.I.R. 1967 Andh. Pra. 64, 65.</li> <li>8. A. Kantaswami Pillai v. P. M. Theagaraja Pattar, I.L.R. (1968) 2 Mad. 604 : 80 M.L.W. 458 ; (1967) 2 M.L.J. 581 ; A.I.R. 1968 Mad. 203, 206.</li> <li>9. Shanti Sarup v. Radhaswami Sastry Sabha, Dayalbagh, A.I.R. 1969 All. 248, 261.</li> </ol> |
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was in fact paid by plaintiff to defendant. An entry, by itself, is of no help to plaintiff in his claim against defendant but it can be considered by the Court along with the evidence of the plaintiff for drawing the conclusion that the amount was paid by plaintiff to defendant. To this limited extent, entries in account books are relevant and can be proved. This Section does not go beyond that. It says nothing about non-existence of entries in account books.<sup>10</sup> No inference can be drawn from the absence of any entry relating to any particular matter.<sup>11</sup> But this Section is not the only provision to be considered. There is Section 11, which provides that facts not otherwise relevant are relevant, if they are inconsistent with any fact in issue or relevant fact. So, where a fact in issue in a case is whether a certain sum of money was paid, that fact is a relevant fact. Absence of entries in the account books would be inconsistent with the receipt of the amount and would thus be a relevant fact which can be proved under Section 11.<sup>12</sup> So where it is the case of a party that an alleged payment was never made, and it is also its case that it maintains accounts in the regular course of business and it is its practice to enter in accounts all payments received by it, both the sets of facts are relevant, that is, non-receipt of the amount by it and non-existence of entries in its account books pertaining to that amount. It is permissible, therefore, for that party to lead evidence to prove both these facts. The best evidence to prove the latter set of facts consists of the account books of the party itself. It is under these provisions that the account books of the parties must be held to be relevant. What value should be attached to the account books is another matter and is for the Court of fact to consider.<sup>13</sup>

No person can be charged with liability merely on the basis of the original entries in books of account even when they are kept in the regular course of business nor of copies of the entries under Section 4 of the Bankers' Books Evidence Act, 1891 (18 of 1891) unless the person to be charged accepts the correctness of the books of account and does not challenge them.<sup>14</sup>

The rule contained in the section applies only to entries in books of original entry, e.g., as in cash books or Rokar Bahis. But not to a ledger or Khata Bahi, which, though a book of account and kept in the regular course of business, is not a book of original entry. No reliance should be placed on the entries in the Khata Bahi which are not supported by corresponding entries in the Rokar Bahi or Naqal Bahi.<sup>15</sup>

**8. Proof of account.** The regular proof of books and accounts requires that the clerks who have kept those accounts, or some person competent to speak to the facts, should be called to prove that they have been regularly kept, and to prove their general accuracy.<sup>16</sup> It has been held by the

10. State of A.P. v. Ganeshwara, (1964) 2 S.C.A. 38 : (1963) 2 Cr. L. J. 671 : A.I.R. 1963 S.C. 1850.
11. Ram Pershad v. Lakhpatti, I.L.R. 30 I.A. 1; I.L.R. 30 C. 231.
12. State of Andhra Pradesh v. Ganeshwara, (1964) 2 S.C.A. 38 : (1963) 2 Cr.L.J. 671 : A.I.R. 1963 S.C. 1850, 1867.
13. State of Andhra Pradesh v. Ganeshwara, (1964) 2 S.C.A. 38 : (1963) 2 Cr.L.J. 671 : A.I.R. 1963 S.C. 1850, 1867.

14. Chandradhar Goswami v. Gauhati Bank Ltd., (1967) 1 S.C.R. 898 : 1967 S.C.D. 751 : (1967) 2 S.C.W. R. 451 : 37 Com. Cas. 108 : (1967) 1 Com.L.J. 98: A.I.R. 1967 S.C. 1058, 1060 (correctness of books of account not accepted).
15. Sohanlal v. Gulab Chand, I.L.R. 1965 Raj. 1035 : A.I.R. 1966 Raj. 229, 230.
16. Dwarka v. Jankee, (1855) 6 M.I.A. 88 at p. 98.

Oudh Chief Court, that, if the writer of the account books is alive, but has not been examined, the account books cannot be said to have been duly proved, and cannot be admitted, even if they seem to be genuine and have been used by both parties as it suited their convenience.<sup>17</sup> But in an Allahabad case,<sup>18</sup> it has been held, that since the words "proved to have been" which occurred in the corresponding Section 43 of the old Act<sup>19</sup> have been dropped out in the present section, the Legislature dispensed with the necessity of any formal proof that the books were kept up in the regular course of business, and that it is a matter of intrinsic evidence as to whether the books in question were books of account and regularly kept in the course of business. Though an account book, not regularly kept, cannot be used in evidence, memoranda kept by a witness may be used in evidence, not by itself, but as corroborating the witness or refreshing his memory.<sup>20</sup> The necessity of strict proof may be removed by the admission of the defendant, and the fact of the absence by him of any evidence to impeach the accuracy of the accounts, the disputed items being satisfactorily accounted for.<sup>21</sup> The section simply requires that entries in accounts should, in order to be relevant, be regularly kept in the course of business; and although it may be, no doubt, important to show that the person making or dictating the entries had, or had not a personal knowledge of the fact stated, this is a question which affects the value, not the admissibility, of the entries.<sup>22</sup>

The transactions can be proved independently of the writer of the entries in the account books by a person who had knowledge of the transactions.<sup>23</sup> The entries in the books of account are not, by themselves, sufficient evidence to charge any person with liability, but if they are found to have been kept in the regular course of business, the entries in them are relevant and as such admissible in evidence when they refer to a fact in issue or relevant fact; and the entries of the transaction made therein are admissible in corroboration of the evidence of the person who effected those transactions in proof of them. It cannot be said that, in every case, where the scribe of the entries, though alive, is not examined, the books of account are inadmissible, even though there is other reliable evidence to show that the entries were made in regular course of business by the scribe whose writing could be duly identified.<sup>24</sup> But, where the writer of the account books is alive and has not been examined, the account books may be said not to be duly proved.<sup>25</sup>

**9. Evidentiary value of books of account.** (a) *General.* There is no presumption of correctness attaching to entries in books of account. Entries in books of account regularly kept carry weight unless there are counter-

- 17. Thakur Gajendra Shan v. Thakur Shankar Bux Singh, 1935 Oudh 16 : 152 I.C. 468 : 11 O.W.N. 1323; Lachmi Narain v. Musaddi Lal, 1942 Oudh 155 : I.L.R. 17 Luck. 327 : 197 I.C. 247 : 1941 O.W.N. 1195.
- 18. Emperor v. Narbada Prasad, 1930 All. 38, 41 : I.L.R. 51 All. 864 : 121 I.C. 819 : 31 Cr.L.J. 356; see also Hagami Lal v. Bhura Lal, I.L.R. 1960 Raj. 1304 : A.I.R. 1961 Raj. 52.
- 19. Act II of 1855.
- 20. Keyarsosp v. Garbad, 1930 Nag. 24 (I) : 120 I.C. 224; see also Mukundram v. Dayaram, 1914 Nag. 55 : 23 I.C. 893.

- 21. As to Bankers' books and the book of Post Office Savings Banks and Money Order Offices, vide Acts XVIII of 1891 and I of 1893; see Gopala v. Gopala, A.I.R. 1957 T. C. 184.
- 22. R. v. Hanmanta, (1877) 1 B. 610 at p. 616; see also Ram Kuwar Jainayayan v. Pyarchand Meerchand, 1952 M.B. 55; Pannalal v. Labhchand, 1955 M. B. 49.
- 23. Hagami Lal v. Bhura Lal, I.L.R. 1960 Raj. 1304 : A.I.R. 1961 Raj. 52.
- 24. Ibid.
- 25. Kaka Ram v. Thakar Das, A.I.R. 1962 Punj. 27.

acting elements to throw sufficient doubts as to their genuineness.<sup>1</sup> If account books are suspicious they cannot be relied upon.<sup>2</sup> The only limitation in the Section is that statements contained in documents of this kind shall not alone be sufficient to charge any one with liability.<sup>3</sup> It appears that this change of expression has made substantial alteration in the law.<sup>4</sup> Books of accounts are admissible as corroborative evidence,<sup>5</sup> though the Section does not require any particular form of corroborative evidence. Therefore, where the plaintiff produces his books of account and a witness gives evidence in support of the entries and there is no cross-examination of the witness with respect to his personal knowledge of the facts stated, that is sufficient corroboration.<sup>6</sup> And plaintiff's own statement on oath in support of the entries may be sufficient to fix the defendant with liability.<sup>7</sup> Documents (*jama-wasilbaki* papers) admissible under this section, though not alone sufficient to charge any one with liability,<sup>8</sup> were held to be sufficient to answer a claim set up to exemption from what would be the ordinary liability of a tenant, e.g., in a suit for enhancement of rent to rebut a presumption arising from uniform payment for 23 years.<sup>9</sup> These documents were not used alone in order to charge the defendant with the liability that has been imposed upon him. He was charged with the rent of the land he occupied by reason of its occupation by him, that rent being considered a fair and equitable rent for the land occupied; and what these documents were used for was not to charge him with the liability, but to answer the claim which he set up to exemption from what would be the ordinary liability of a tenant.<sup>9</sup>

Indeed, books of account, when not used to charge a person with liability (civil or criminal),<sup>10</sup> may be used as independent evidence requiring no corroboration, but when sought to be so used they must be corroborated by other substantive evidence independent of them.<sup>11</sup> Entries in certified copies of statement of accounts, corroborated by certificate of their truth, may be held sufficient to charge the debtor with liability.<sup>12</sup> And, in this sense, books of account remain under the present, as under the repealed Act, corroborative evidence

1. Maidhandas v. Sridharan, A.I.R. 1956 Assam 170, 174.
2. B. Siddalingappa v. M. C. Maben, A.I.R. 1978 Kant. 10.
3. V. K. Abraham v. N. K. Abraham, A.I.R. 1978 Mad. 42.
4. Belact v. Rash, (1874) 22 W.R. 549 per Markby, J., (v. post), the present section substitutes "regularly kept" for "proved to have been regularly kept" but of course a proof is still required except in those cases in which it is rendered unnecessary by the admissions of the parties. As to account books as corroborative evidence of separation in estate, see Jagun v. Rughoonundun, (1868) 10 W.R. 1408. As to Act II of 1855. See Ram Krsto v. Hurydos, Marshall, 219.
5. Hlagami Lal v. Bhura Lal, A.I.R. 1961 Raj. 52.
6. Narain Das v. Ghasi Ram, A.I.R. 1938 A. 353; 1938 A.L.J. 449.
7. Balukund v. Jagan Nath, I.L.R. 1963 Raj. 579; A.I.R. 1963 Raj. 212; 1963 Raj.L.W. 195.
8. Belact v. Rash, (1874) 22 W.R. 549.
9. Ib., this decision, in so far as it held *jama-wasil-baki* papers might in certain cases be other than corroborative evidence only appears to be dissented from by Prinsep and Bose, JJ., in Surnomoyi v. Johur, (1882) 10 C. L. R. 545 v. post, but it does not appear in the latter case what use was sought to be made therein of those papers; see also Gopal v. Nobbo, (1866) 5 W.R. (Act X) 83; Shib v. Promothanath, (1868) 10 W. R. 193.
10. R. v. Hurdeep, (1875) 23 W.R.Cr. 27.
11. Ib., Dwarka v. Sant, (1895) 18 A. 92; see also Gopeshwar Sen v. Bijoy Chand Mahatab, 1928 Cal. 854: I. L.R. 55 C. 1167 : 108 I.C. 883; Emperor v. Narbada Prasad, 1930 All. 38 : I.L.R. 51 All. 864 : 121 I.C. 819 : 31 Cr.L.J. 356.
12. Kalipada v. Mahaluxmi, A.I.R. 1961 Cal. 191.

only, and cannot be used as independent primary evidence of the payment or other items to which the entry refers; nor, when payments entered in many of the items of a book of account are corroborated by other evidence, can the inference be raised thereon that even the entries which are not so corroborated are accurate; or in other words, afford good substantive evidence of the payments to which they refer.<sup>13</sup>

This section only lays down that a plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account, even though those books are shown to be kept in the regular course of the business. Even though no formal proof that the books were kept up in the regular course of business is necessary, the entries in them are not sufficient by themselves to charge any person with liability. The value of the entries is only corroborative and independent evidence is necessary to fix the liability.<sup>14</sup> He will have to show further by some independent evidence that the entries represent real and honest transactions and that the monies were paid in accordance with those entries.<sup>15</sup> The entries must be proved unless the necessity for such proof is removed by the admission of the opposite party.<sup>16</sup>

No presumption of correctness attaches to entries in account books.<sup>17</sup> In a criminal prosecution entrustment is not proved merely by account book entries unless mode of keeping accounts is proved by oral evidence.<sup>18</sup> The books have to be proved item by item for the purpose of charging the opposite party.<sup>19</sup> In the absence of proof of specific sums of money having been paid, a general statement of the plaintiff that there were dealings between him and the defendant is not sufficient.<sup>20</sup> The various items must be proved by independent evidence.<sup>21</sup> But a Division Bench of the Patna High Court has observed :

"What would amount to independent evidence sufficient to corroborate the entries in the account books depends upon the facts of each case and particularly on the issues between the parties. What is necessary to be seen in each case is whether, besides the entries in the account books, there is any evidence to prove that the transactions referred to in those entries actually took place. Where the transactions sued upon are numerous and extend over some length of time, it is hardly reasonable to expect independent evidence to be given to prove each and every particular

13. R. v. Huvdeep, (1875) 23 W.R. Cr. 27.
14. Emperor v. Narbada Prasad, 1930 All. 38, 42 : I.L.R. 51 All. 864 : 121 I.C. 819 : 31 Cr.L.J. 356; State v. Kishan Dayal, 1952 H.P. 46.
15. Yesuvadiyan v. Subba, 52 I.C. 704 : A.I.R. 1919 M. 132; Kundan Mal v. Kashi Bai, 26 Bom. 363 : 4 Bom. L.R. 42; Mathilda v. Fritz Gaebele, 1926 Mad. 955 : 96 I.C. 429 : 23 L.W. 272; Dunichand v. Munshi Amarnath, 1953 H.P. 68; Hira Lal v. Ram Rakha, 1953 Pepsu 113; TNS Firm v. Muhammad Hussain, 1933 Mad. 756: 146 I. C. 608: 65 M.L.J. 458 : 1933 M.W.N. 1095 : 38 L.W. 481; Hira Meher v. Birbal, I.L.R. 1957 Cut. 437 : A.I.R. 1958 Orissa 4; Bansidhar Ganga Pd.
16. Bahadur Singh v. Padamchand, 1933 Lah. 384 : 141 I.C. 655 : 34 P.L.R. 46 (see also cases cited therein).
17. Ahmad Din Allah Ditta v. Partap Singh, 1939 Lah. 438 : 41 P.L.R. 373.
18. Dadaraao v. State of Maharashtra, A.I.R. 1974 S.C. 388 : 1974 Cr.L.J. 447.
19. Mathilda v. Fritz Gaebele, 1926 Mad. 955 : 96 I.C. 429 : 23 L.W. 272.
20. Buta v. Tirlok Chand, 1927 Lah. 903 : 100 I.C. 862.
21. Ganeshlal v. Firm Mangat Ram Atma Ram, 1924 Lah. 540 : 76 I.C. 157.

transaction. In such cases, the genuineness of the account books if they are regularly kept in the course of business, will be the determining factor. But mere proof of the correctness of the entries in the account books will not be enough. There must be some evidence to corroborate those entries. Such corroboration will be the best afforded by the evidence of the person who wrote the account books and in whose presence the transactions took place. He cannot possibly have independent recollection of the various transactions, and he may, as provided in Section 159, Evidence Act, refresh his memory by referring to the account books. But it is not necessary for him to prove that such and such articles valued at such and such amount were supplied on such and such dates. If he proves the entries written by him and states that the transactions referred to in those entries actually took place in his presence or to his knowledge, the effect will substantially be the same. Where however the dispute between the parties is confined to some particular items only, specific evidence may be available and should be insisted upon to prove those particular transactions. In this connection reference may be made to the decision of the *Privy Council in Baboo Goonga Persad v. Baboo Inderjit Singh*.<sup>22</sup> There, it was held that where the fact of payments by a banking firm is distinctly put in issue the books of the firm being at most corroborative evidence, the mere general statement of the banker to the effect that his books were correctly kept is not sufficient to discharge the burden of proof that lies upon him, particularly if he has the means of producing much better evidence."<sup>23</sup>

No particular form or kind of evidence in addition to the entries is required. Any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished in the books of account, if true.<sup>24</sup> Every case shall have to be decided on its own merits. In a case where the witness, who produces the account books, is reliable and has personal knowledge, the Court may accept his statement as enough proof combined with the books of account. In cases, however, in which the witness is not reliable at all, the Court would require more proof.<sup>25</sup> It may take the shape of oral testimony.<sup>1</sup>

(b) *Not sufficient to charge with liability unless corroborated.* Entries in accounts relevant only under this section are not by themselves alone sufficient to charge any person with liability; corroboration is required.<sup>2</sup> Entries from books of account regularly kept in the course of business, before they can be acted upon for holding a person liable thereunder, must get some corroboration by evidence from other sources.<sup>3</sup> In other words, mere entries in books

- 22. 23 W.R. 390; 3 Sar. 486 (P.C.).
- 23. See also *Ram Gobind Prasad v. Gulab Chand Sahu*, 1941 Pat. 430; I. L. R. 20 Pat. 273; 196 I. C. 57.
- 24. *Yesuvadiyan v. Subba*, 52 I.C. 704; A. I. R. 1919 M. 132; *Narain Das v. Firm Ghasi Ram Gojar Mal*, 1938 All. 353; 176 I. C. 99; 1938 A. L. J. 449; 1938 A. W. R. (H.C.) 394.
- 25. *Khuda Bakhsh Nur Ilahi v. Yasin*, 1937 Pesh. 103, 107; 172 I. C. 598.
- 1. *Kallu Mal v. Bhawani*, 1925 All. 742; 88 I. C. 383.
- 2. *Abdul v. Puram*, (1914) 49 P. R. C. J. No. 82, p. 289; *Ram Kishen v. Vallabhdas*, A. I. R. 1958 Raj. 255;

- Kelu Sahu v. Hadibandhu Sahu*, I. L. R. 1967 Gut. 413; 33 Cut. L. T. 825; (1968) 1 Lab. L. J. 59; A. I. R. 1968 Orissa 19, 20.
- 3. *Alunal Tahelram v. Mehtram*, 9 Guj. L. R. 1078, 1081. See also *Rampyrrabai v. Balaji*, 28 Bom. 294; (1904) 6 Bom. L. R. 50; *Kallumal, Dhakkan Lal v. Bhawani Das*, A. I. R. 1925 All. 742; *Mukhi Ram v. Firm Karta Prasad*, A. I. R. 1937 Pat. 222; *Firm Jodha Mal Budhu Mal v. Ditta*, A. I. R. 1925 Lah. 242; *Ramgobind Prasad v. Gulab Chand Sahu*, A. I. R. 1941 Pat. 430.

of account cannot, by themselves, fasten the defendant with liability.<sup>4</sup> Any evidence relevant under the Act would be sufficient. The quantum of evidence required for corroboration would vary in each case. The materials for corroboration may be contemporaneous vouchers, receipts or any other documentary evidence.<sup>5</sup> It is not necessary that independent oral evidence should be given in each case. Even the evidence of the plaintiff himself may be sufficient for corroboration provided the court accepts it.<sup>6</sup> The defendant can, however, be made liable, if there is sufficient evidence on record in support of the account books.<sup>7</sup> But where accounts are relevant also under the second clause of Section 32, they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible under only this section, require corroboration. But the Court has a discretion to require corroborative evidence.<sup>8</sup> Entries in accounts may in the same suit be relevant under both the sections; and in that case the necessity for corroboration does not apply.<sup>9-28</sup> The illustration to Section 34 makes it plain that if the book of account is regularly kept in the course of business, the entry will be relevant notwithstanding that the person who made the entry has not been examined to prove the truth of the transaction to which the entry relates and notwithstanding that he is available as a witness. The only material difference as between an entry relevant under Section 34, and one relevant under Section 32, clause (2) is that in the former case the person who made the entry, may be available as a witness while in the latter case he is not. Where the maker of the entry is available as a witness the entry alone will not be sufficient proof to charge a person with liability but, where the maker is not available as a witness but the entry is relevant by reason of one, or other of the conditions mentioned in the opening paragraph of Section 32 being present, there is no statutory obligation to look for anything else to found the liability.<sup>24</sup> Though account books are not sufficient evidence to attach a liability to the debtor, they can be used to corroborate the oral statement of the creditor that the payments had been made.<sup>25</sup> In a suit to recover money, due upon a running account, the plaintiff produced his account books, which were found to be books regularly kept in the course of business, in support of his claim. One of the plaintiffs gave evidence as to the entries in the account-books, but, in such a manner, that it was not clear whether he spoke from his personal knowledge of the transactions

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4. Haribux v. Subhakaran, A. I. R. 1965 Orissa 211, 212; Bansidhar Ganga Pd. Agency v. Chamanlal, I. L. R. (1975) 1 Delhi 445; 1975 Rajdhani L. R. 289 (Delhi); Sajjanraj Swarup Chand v. Mehta Commercial Co., A. I. R. 1973 Guj. 57; Shubhkaran v. Durga Prasad, A. I. R. 1972 Guj. 208; I. L. R. (1972) Cuj. 160; 13 Guj. L. R. 179.
5. Shubhkaran v. Durga Prasad, A. I. R. 1972 Guj. 208; I. L. R. (1972) Guj. 160; 13 Guj. L. R. 179.
6. Kelu Sahu v. Hadibandhu Sahu, I. L. R. 1967 Cut. 413; 33 Cut. L. T. 825; (1968) 1 Lab. L. J. 59; A. I. R. 1968 Orissa 19, 20.
7. Himatsingka Motor Works Ltd. v. Haranath, A. I. R. 1965 Assam 10, relying on 1 M. I. A. 47 : 5 M. I. A. 432; A. I. R. 1952 Assam 92; I. L. R. 1951 Assam 329; A. I. R. 1958 Raj. 255; 1958 Raj. L. W. 483; Ganpati v. N. C. Sahu, (1972) 38 Cut. L. T. 309.
8. Eranna v. D. H. S. Satty & Co., A. I. R. 1960 A. P. 331, 335.
- 9-23. Rampyarabai v. Balaji, 28 Bom. 294; (1904) 6 Bom. L. R. 50; Gopeshwar Sen v. Bijoy Chand, 1928 Cal. 854; I. L. R. 55 Cal. 1167; 108 I.C. 883; 32 C. W. N. 580; Abdul Wahed v. Nagendra Chandra Lahiri, 1940 Cal. 524; I. L. R. (1940) 2 Cal. 559; 192 I. C. 685; 44 C. W. N. 993; see also cases cited therein.
24. Pcr Mukherji, J., in Gopeshwar Sen v. Bijoy Chand, 1928 Cal. 854; I. L. R. 55 Cal. 1167; Hagami v. Bhura, I. L. R. (1960) 10 Raj. 1304; A. I. R. 1961 Raj. 52.
25. Suraj Prasad v. Mst. Makhna Devi, 1946 All. 127, 129; I. L. R. 1945 All. 465; 223 I.C. 355; 1945 A. L. J. 283; 1945 A. W. R. (H.C.) 392.

entered in the books, the entries in which were largely in his own handwriting or simply as one describing the state of affairs that was shown by the books. He was cross-examined, but no questions were asked of him to show that he was not speaking as to his personal knowledge. It was held that the evidence, given as above, should be interpreted in the manner most favourable to the plaintiff and might be accepted in support of the entries in the plaintiff's account books which, by themselves, would not have been sufficient to charge the defendants with liability.<sup>1</sup>

The mere production of the books without further proof is not enough.<sup>2</sup> Such further proof must be afforded by substantive evidence, independent of them, as by that of witnesses who speak to the payment of money or delivery of goods, or of evidence of receipt of, or given for, the same.<sup>3</sup> In a case decided under the repealed Act, the Privy Council observed as follows :

"The evidence which the subordinate Judge seems to have considered sufficient to prove the payments which the defendants were bound to prove consisted of the mercantile books of the banking firm and of a general statement by the defendant GP that the items in those books were correct. Their Lordships are of opinion that the books being (as is admitted) at most corroborative evidence, the mere general statement of the banker, where the fact of the payments was distinctly put in issue, to the effect that his books were correctly kept, was not sufficient to satisfy the burden of proof that lay upon him, particularly as with respect to many of the disputed items he had the means of producing much better evidence.<sup>4</sup>

It has been held that, though the actual entries in books of account are relevant to the extent provided by the section, such a book is not by itself relevant to raise an inference from the absence of any entry relating to a particular matter.<sup>5</sup> The decision cited, if it is to be taken to have ruled that the fact of the absence of an entry is not evidence at all under any section of the Act, it is submitted, is erroneous, and has not, in such sense, been followed.<sup>6</sup>

(c) *Cases of no entry in account books.* This section, which presupposes the existence of an entry and deals with the question how far existent entries tendered in evidence may fix parties with liability, does not obviously apply where there is no entry. Evidence that there is no entry is not admissible under this section, but may be so under other sections of the Act as for instance, the ninth and eleventh sections. Thus evidence having been given of the visit of M to Calcutta, which he denied, the latter's son was called by the other party to corroborate M's statement. He deposed that it was usual, when a partner of his firm (to which both he and M belonged) made a journey on the firm's business, to enter in the account book the

1. Dwarka v. Sant Bakhsh, (1895) 18 A. 92.
2. Sri Kishen v. Huri, 5 M. I. A. 432; Sorabjee v. Koonwurjee, (1866) 1 M. L. A. 47; Roushan v. Hurray, 9 C. 931.
3. R. v. Hurdeep, (1875) 23 W. R. Cr. 27 and v. post; see Hiru Meher v. Birbal, I. L. R. 1957 Cut. 437; A. I. R. 1958 Orissa 4.
4. Gunga v. Inderjit, (1878) 23 W. R. 1918 Pat. 537.

5. R. v. Grees Chander, (1884) 10 C. 1024 and see In re Juggan Lall, 7 C. L. R. 356.
6. Sagurmull v. Manraj, (1900) 4 C. W. N. ccvii. In Ram v. Lakhpat, 30 C. 231 at p. 247, Lord Davey referred to R. v. Grees Chander, 10 C. 1024 and Lord Robertson said: "The Act applies to entries in books of account, but no inference can be drawn from the absence of an entry relating to any particular matter."

expenses of such journey, and he was allowed to produce the account books of his firm and to state that there was no entry of expenses relating to such alleged visit.<sup>7</sup> The question arose again before a Full Bench of the Allahabad High Court in *Sadhu Sahu v. Raja Ram*<sup>8</sup> and the Judges were divided in opinion. The conflict may now be taken to have been set at rest by the judgment of the Judicial Committee in *Imambandi v. Mutsaddi*,<sup>9</sup> holding that where absence of entry was held relevant, its effect was to be determined in the light of the general evidence in the case.<sup>10</sup>

(d) *Court should look to all the entries.* Where quite a number of entries in the ledger stand corroborated by some other admitted transactions, by evidence of documents of unquestioned genuineness and some other transactions which have been fully proved before the Court, the mere fact that the day book of the business has not been produced, which is admittedly preserved in the firm, does not detract from the evidentiary value to be attached to the ledger.<sup>11</sup> If one party uses the statement of another against him the whole of the statement must be put in evidence, but the Judge is not bound to believe the whole of it. If, for instance, the Judge upon the evidence really believes that the payments credited in plaintiff's account books were made, although he disbelieves the entry as to the amount of the debits, there is nothing inequitable in his giving the defendant benefit of the payments. The Judge is bound to look at the whole of the entries, giving credit to such as he believes to be true, and discrediting those which he believes to be false.<sup>12</sup>

(e) *Books can be used to refresh memory and also to corroborate other testimony.* Books of account, regularly kept, may be used, not only for the purpose of refreshing the memory of a witness but also as corroborative evidence of the story which he tells. Books of account, containing entries referring to a particular transaction, are not entitled to the same credit that is given to the books that record that transaction in common with other transactions in the ordinary course of business.<sup>13</sup> Where any Company is being wound up, all books, accounts, and documents of the Company and of the liquidators are, as between the contributories of the Company, *prima facie* evidence of the truth of all matters purporting to be therein recorded.<sup>14</sup> As to a hatchitta book being, in the absence of fraud, binding upon the vendor for whose security it is kept.<sup>15</sup>

Besides their use as corroborative evidence under this section, entries in books of account may, under the conditions mentioned in Sec. 159, be used to refresh the memory, or as admissions (*v. ante*), and also under other sec

- 7. Sagurmull v. Manraj, (1900) 4 C. W. N. ccvii.
- 8. (1898) 16 All. 40; (1893) 13 A. W. N. 200.
- 9. (1918) 45 Cal. 878; 47 I. C. 513; 45 I. A. 73 (P.C.); A. I. R. 1918 P. C. 11.
- 10. Tara Kumar Ghose v. Arun Chandra Singh, 1923 Cal. 261; 74 I. C. 383; 36 C. L. J. 389; Debendra Nath Basu v. Arun Chandra Singha, 1925 Cal. 64; see also Babulal v. Smt. Kamala Devi, 1954 Cal. 145: 58 C. W. N. 85.
- 11. Gopasundar Sabatho v. Chunilal, 1955 Orissa 6, 10; 1956 Cr. L. J. 162.
- 12. Ishan v. Haran, (1860) 11 W. R. 525, per Peacock, C. J.
- 13. Bhog Hong Kong v. Ramanathen Chetty, (1902) 29 C. 334; 50 C. L. J. 8.
- 14. Act VII of 1913 (Indian Companies), S. 240; see now S. 548 of Act 1 of 1956.
- 15. Gopi v. Abdul, (1866) 1 Jur. N. S. 358.

tions of the Act. Further, statements made in books kept in the ordinary course of business by persons who cannot be called as witnesses, may be proved under the provisions of the second clause of the thirty-second section.<sup>16</sup> Account books, as such, do not create any right, and any entry in the account books cannot be the basis of charging an accused with the liability of what is noted against him. Entries in the account books can be merely evidence of certain alleged facts and, as such, are relevant evidence in view of this section. Certain entries which might be signed by a constituent may form the basis of a charge against him in view of his acknowledging his liability, and the correctness of the contents noted in that entry. But if there is no entry of such a type the secreting of an account book with respect to that particular entry would not amount to the secreting of a valuable security within the meaning of Sec. 477, Indian Penal Code.<sup>17</sup>

(f) *Books should be carefully tested regarding their probative value before being used as evidence.* Inasmuch as private account books are put in by the plaintiff it must not be overlooked that the plaintiff is allowed to use in his own favour evidence which he has created and therefore courts have carefully to test these account-books before they are used against the defendant. Thus, the honest appearance of the books which is "a matter before the court" requires careful scrutiny. Therefore, the appearance of the books must be honest and no suspicion or false dealings must be present.<sup>18</sup> Unfastened portion of a book with leaves mutilated, or missing, or entries on the last page of a book having many pages blank and many torn out, and books containing unexplained blanks must be examined with the greatest care. But entries are not necessarily excluded, because there may be alterations, erasures or mistakes, such as those in the name of the party. These are matters which may be explained to the satisfaction of the court, but if the entries show that they were all made at the same time, though relating to separate transactions, or if, by reason of alterations or erasures or other cause, they have a suspicious or fraudulent appearance and are not explained, they should be rejected.<sup>19</sup>

Where the account consists of loose sheets of papers, they cannot have the same probative value of account books which are regularly kept in the course of business. Where such loose sheets have blanks left at several places, and the possibility of entries or sheets being substituted or interpolated could not be ruled out, the entries therein could not be said to have been made in the regular course of business.<sup>20</sup> The same remarks apply also, where the account book is a stitched one and each customer is allowed a particular page or pages but with the possibility of interpolation or substitution.<sup>21</sup>

**10. Jama-wasil-baki papers.** (a) *General.* Jama-wasil-baki papers are accounts, made up at the end of the year, showing the total rent demandable from each raiyat for the current year, the balance of previous year, the amount collected during the year, the balance due at the end thereof, and

16. v. ante S. 32.

17. Hari Prasad v. The State, 1953 All. 660.

18. Wigmore, s. 1551; B. Siddalingappa v. M. C. Mobern, A. I. R. 1978 Kant. 10.

19. Jones, s. 576; R. R. Chari v. The State, A. I. R. 1959 All. 149; 1959

Cr. L. J. 268; 1953 Cr. L. J. 315; 1953 A. L. J. 318.

20. Mahasay Ganesh Prasad Ray v. Narendra Nath Sen, A. I. R. 1958 S. C. 431.

21. Hira Meher v. Birbal; I. L. R. 1957 Cut. 437; A. I. R. 1958 Orissa 4.

sometimes an account of the land as well as the rent. They ought not to be regarded as anything else than books proved to have been kept in the regular course of business.<sup>22</sup> Taken by themselves, they are not admissible as independent evidence of the amount of rent mentioned therein; but it is perfectly right that a person, who has prepared such papers on receiving payments of the rents, should refresh his memory from such papers, when giving evidence as to the amount of rent payable; when so used they are not used as independent evidence.<sup>23</sup> In a suit, where the Lower Court found upon the evidence *inter alia* of certain jama-wasil-baki papers that the defendant had been the plaintiff's tenant at a certain rate of rent and gave the plaintiff a decree for that rent, it was observed as follows :

"Then it is said that, in the first Court, the Munsif relied improperly on certain jama-wasil-baki papers. These jama-wasil-baki papers, we all know, are not evidence by themselves. The mere production of such papers is not enough. But coupled with other evidence, these papers often afford a very useful guide to the truth in cases of this kind; and it is only right that those who have been collecting rent with the assistance of such papers should produce them in Court.<sup>24</sup>

And in a suit,<sup>25</sup> for arrears of rent at an enhanced rate it was said :

"The appellant's pleader contends that the jama-wasil-baki papers, under the Evidence Act of 1872, are no longer regarded as corroborative evidence, and that, therefore the Judge has taken a wrong view of the weight which should be attached to them. But we would observe that, with the exception of one case, *Belaet Khan v. Rash Beharee*,<sup>1</sup> we are not aware of any case in which this Court has regarded jama-wasil-baki papers in a different light. In fact, so far as my own individual experience goes as a Judge of this Court, I have never known them to be looked upon as anything else. It seems to us, moreover, that the terms of S. 34 of the Evidence Act do not give such papers any weight beyond that of corroborative evidence."<sup>2</sup>

(b) *Value of these papers.* With regard to the value to be attached to these papers, there have been varying decisions. In a suit for possession, on the allegation of wrongful dispossession, it was said :

"Jama-wasil-baki papers, in a case of this kind, are really of very little consequence or value, as it is a matter of perfect ease for either parties in the suit to produce any number of such papers; the absence of particular papers of this kind does not appear to be a very material omission."<sup>3</sup>

- 22. Ram v. Tara, (1867) 3 W. R. 280; Kheero v. Bejoy, (1867) 7 W. R. 533; Bejoy v. Bheekoo, (1868) 10 W. R. 291; Jackson, J. doubting. As to their corroborative value, see Jonab v. Siva, 1927 Cal. 855; 104 I. C. 733; (1927) 46 C. L. J. 253.
- 23. Akhil v. Nayu, (1883) 10 C. 248 and see Mahomed v. Jafar, (1885) 11 C. 407.
- 24. Roushan v. Hurray, (1882) 8 C.

- 926, per Garth, C. J.
- 25. Surnomoyi v. Johur, (1882) 10 C. L. R. 545.
- 1. 22 W. R. 549.
- 2. Surnomoyi v. Johur, (1882) 10 C. L. R. 545 at p. 546, per Prinsep and Bose, JJ.
- 3. Sheo v. Goodur, (1867) 8 W. R. 328, per Jackson, J.; but see Roushan v. Hurray, 8 C. 926.

In the case of *Allyat Chinaman v. Juggut Chunder*,<sup>4</sup> the Court<sup>5</sup> remarked as follows :

"But it is contended that their allegations are corroborated by the jama-wasil-baki papers filed by the respondent, in which the names of these raiyats are entered. Now, we observe that such a document—a private memorandum made for the zamindar's own use, and by his own servants—must be looked upon with great suspicion, for nothing could be easier in a case like the present than to supplement defective oral evidence by the production of a document which could be manufactured at any time and of any required pattern. Has then this document been attested? We think not. Doubtless a person calling himself a karkun's muharrir has been produced to depose to IC's (the tehsildar's) signature to this particular paper; but the tehsildar himself has not been examined, and it is not pretended that the man is either dead or unable to depose. The best evidence was required to prove a document so naturally open to suspicion, and that evidence has not been given."

In a subsequent case,<sup>6</sup> Norman, J., referring to this case, said :

"As to the value of jama-wasil-baki papers as evidence in rent-suits for the zamindar, the Deputy Collector quotes a passage from the 5th volume of the Weekly Reporter, p. 243 and treats it as if the language applied to all jama-wasil-bakis. But there is a wide distinction between the case with which the learned Judges were then dealing and to which they applied their remarks, and the present. Here we have a series of jama-wasil-bakis apparently regularly kept for ten years, with one gap, from 1249 to 1258. There is a single paper unattested, the writer of which was not called and his absence not accounted for. Of course, all books of account and entries made by or on behalf of a party when produced as evidence in his favour must be received with caution; but there seems to be no reason why a series of collection accounts, or jama-wasil-baki papers, appearing to be regularly kept, should not be entitled to credit on the same principle as other contemporary record made, and kept by the party producing them in the ordinary course of his business."

In a case,<sup>7</sup> where, in order to rebut the presumption in favour of a permanent tenure created by the fourth section, Act X of 1859, the fact of the rate which rent was paid having varied, was the fact sought to be proved by na-wasil-baki and similar papers, it was observed :

"The Judge of the Lower Court alludes to the evidence of the go-mastas who filed or attested certain papers of the zamindar. Such papers, we need hardly observe, cannot incontestably prove variations in a raiyat's jama, unless it can be shown not merely that the jama-wasil-baki and similar papers show a varying rate, but that the raiyat has paid at a varying rate, otherwise every raiyat would be at the mercy of a zamindar or his agents. The Judge says that the witnesses attest these papers, but he does not say how he considers the raiyats bound by them."<sup>8</sup>

4. (1886) 5 W.R. 242.

5. Phear and Glover, JJ.

6. Khcero v. Bejoy, (1867) 7 W. R. 533.

7. Gopal v. Nobbo, (1866) 5 W. R. (Act X), 83.

8. Gopal v. Nobbo, (1866) 5 W. R. (Act X) 83 at p. 84; but see Shib v. Promotho, (1868) 10 W. R. 193; and Belaet Khan v. Rash Beharee, 22 W. R. 549.

**11. Jamabandi and other papers.** This jamabandi shows the quantity of land held by each cultivator, its different qualities (i.e. what is grown upon it), the rate of rent for each kind of land, the total rent for all the land of that particular kind in each cultivator's possession and, lastly, the grand total for all the lands of every kind held by him. Many of the following cases were decided under the law, as it stood prior to the passing of this Act. In *Gajjo Koer v. Ally Ahmed*,<sup>9</sup> D. N. Mitter, J., said :

"The jamabandi paper may be only used as corroborative evidence, viz., of the same value as that which is attached to books of account under Act II of 1855. These papers were admittedly prepared by the zamindar's own agent in the absence of the raiyats, and if the mere fact of the agent coming forward to swear that he wrote the papers to justify a Court accepting every fact recited therein as true against the raiyats, no raiyat in this country would be safe."

And where certain jamabandi papers prepared by former patwari were produced in order to show the rent paid by the defendant in previous years, Phear, J., said :

"Had the former patwari come forward as witness and sworn that he had collected rent from the defendant at the rate shown in the jamabandi and that the jamabandi was his own record of the fact, then this would have afforded very material evidence in support of the plaintiff's claim; but this man is not called and his jamabandi papers without him are valueless."<sup>10</sup>

Jamabandi papers for the year in respect of which rent is claimed, made out by the officers of the person claiming the rent, cannot be evidence of his right to that which they set forth; though the evidence of the patwari (as being the officer usually charged with the duty of collecting rent) as to the amounts collected in previous years, corroborated by the jamabundees of those years, would be as conclusive in respect of the claim as it well could be.<sup>11</sup> But where the raiyats signed a jamabandi, they were held to be bound by it.<sup>12</sup> A tenant cannot be sued for enhanced rent upon a jamabandi to the terms of which he has not consented.<sup>13</sup>

As to Jaibakee,<sup>14</sup> Ism-navisi,<sup>15</sup> Settlement Behari and Awargha,<sup>16</sup> Hasta-bood<sup>17</sup> and Canoongo<sup>18</sup> papers, see cases cited below.

- 9. 6 B. L. R. App. 62; and see *Chamarnee v. Ayenoollah*, (1868) 9 W. R. 451.
- 10. *Bhugwan v. Sheo*, (1874) 22 W.R. 256.
- 11. *Dhanookdharee v. Toomey*, (1873) 20 W. R. 142; and see *Kishore v. Pursun*, (1873) 20 W. R. 171.
- 12. *Watson v. Mahendro*, (1875) 23 W. R. 436.
- 13. *Enayetullah v. Nubo*, (1873) 20 W. R. 207; *Reazooddeen v. McAldpine*, (1874) 22 W. R. 540; both followed in *Akshaya v. Shama*, (1889) 16 C. 586.
- 14. *Boidonath v. Russick*, (1868) 9 W. R. 274.
- 15. *Fergusson v. Government*, (1868) 9 W. R. 158; *Farquharson v. Dwarkanath*, (1871) 8 B. L. R. 504; *Erskine v. Government*, (1867) 8 W. R. 232.
- 16. *Bunwary v. Forlong*, (1868) 9 W. R. 239.
- 17. *Ram v. Tripura*, (1868) 9 W. R. 105.
- 18. *Kheero v. Bejoy*, (1867) 7 W. R. 533; *Nund v. Tara*, (1865) 2 W. R. (Act X) 18; *Dwarkanath v. Tara*, (1867) 8 W. R. 517.

Now jamabandi being in the nature of account book, they are admissible as corroborative evidence, but not as in themselves substantive evidence.<sup>19</sup> Although zamindari papers cannot be admitted under this section, as corroborative evidence, without independent evidence of the fact of collection at certain rates, they can be used as independent evidence, if they are relevant under Sec. 32, clause (2), ante.<sup>20</sup>

**12. When should objection be taken to admissibility of books of account ?** An objection that a book of account is not kept regularly in the course of business within the meaning of this section should be taken when it is sought to be admitted in evidence. If no objection had been then taken, it cannot be raised in appeal, although the reliability of and the weight to be attached could be investigated by the Court of appeal.<sup>21</sup>

**35. Relevancy of entry in public record made in performance of duty.** An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact.

ss. 65 (e), (f), 77 (Proof of public documents).

s. 74 (Definition of "public documents").

s. 76 (Certified copies of public documents)

s. 78 (Proof of certain official docu-

ments).

s. 79 (Genuinehess of certified copies).

s. 81 (Genuineness of documents directed to be kept by law).

#### Public and Official books, registers and records.

**Magistrate Registers.**—See also following repealed Acts : V of 1852 (Marriage by Registrar), Secs. 41, 42, 49 ; XXV of 1864 (Marriage of Christians) ; V of 1865 (Marriage of Christians) Sec. 44 ; XV of 1972 (Indian Christian Marriage). As regards Births, Deaths and Marriages, see In re Stroller (1926) 1 Ch. 284, overruling In re Win, L. R. 9 Ex. 373 ; III of 1936 (repealed in part by Act XX of 1937, and amended by Act XIV of 1940, A.L.O. 1950 and Act III of 1951 (Parsi Marriage and Divorce) Secs. 8, 9 ; III of 1872 (Non-Christian Marriage), Secs. 13, 13-A, 14 and Schedule III, now repealed and substituted by Act 43 of 1954 (Special Marriage Act) ; XV of 1872 (Christian Marriage), Secs. 28, 30, 31, 32-37, 54, 62, 79, 80, and Schedule III ; (See Acts II of 1891 ; I of 1903 ; XIII of 1911 ; X of 1914 ; XXXVIII of 1920 ; XVIII of 1928 ; A.L.O. 1937 ; A.L.O. 1948 ; A.L.O. 1950 ; Act III of 1951 ; repealed in part by I of 1938) ; 14 and 15 Vict., c. 40 ; Act VI of 1886 (as amended by Acts XXXVIII of 1926, XXIV of 1934, A.L.O. 1950) (Registration of

19. Deo Narayan v. Dwarka Prasad, 1928 Pat. 429: 109 I. C. 136: 9 P. L. T. 679; see also Gopeshwar Sen v. Bijoy Chand, 1928 Cal. 854: 55 C. 1167: 108 I. C. 883 and the cases discussed there.

20. Charitter v. Kailash, 4 Pat. L. W. 213: 44 I.C. 422: A. I. R. 1918

Pat. 537.

21. Ramaji v. Manohar, A. I. R. 1961 Bom. 169; see Jagarnath v. Hanuman, L. R. 36 I.A. 221; I. L. R. 36 C. 833; Moola Sons, Ltd. v. Burjorjee, L. R. 59 I. A. 161: 1932 P.C. 118; Kara Ram v. Thakar Das, A. I. R. 1962 Punj. 27.

Births, Deaths and Marriages), Secs. 7, 9, 32–35-A; 1 of 1876 (B. C. Moham-medan Marriages), amended by Act 1 of 1903 [Vide *Khaden v. Tajimunnissa*, (1884) 10 C. 607].

Birth and Death Registers.—Act VI of 1889 (Registration of Births, Deaths and Marriages) Secs. 7, 9, 18, 22, 25, 28, 32, 35-A.

Registers or Records of Baptism, Naming, Dedication, Burial—Act VI of 1886 as amended by Act XXXVII of 1920, Secs. 32–35; Act XXV of 1955 (Hindu Marriage Act), Sec. 5.

Registers directed to be kept under the Indian Registration Act—Act XVI of 1908 (Indian Registration), Part XI, Act XVI of 1908 (Indian Registration) has been amended by Act IV of 1914, Acts V and XV of 1917, Act XXXVIII of 1920, Act XIII of 1920, Act II of 1927; Acts XV of 1929 and XXVI of 1929; Acts XXXII and XXXIII of 1940; Madras Act III of 1936, I.A.O. 1948; Act XXXIX of 1949, A.L.O. of 1950 and Act III of 1951; see also repealed Acts VIII of 1871; XX of 1866; XVI of 1864; XI of 1851; XVIII of 1847; IV of 1845; XIX of 1843 1 of 1843 and XXX of 1838.

Logbooks.—Act I of 1859 (Merchant Seamen), Sections 103–108; now substituted by Act XXI of 1923; 17 and 18 Vict., c. 104 (Merchant Shipping Act), Sections 280, 285.

Registers of Printing Presses. Newspapers and books published in India.—Act XXV of 1867 (Printing Presses and Newspapers), Sections 6–8, and Part V.

Registers of Inventions and Designs.—See also repealed Acts XV of 1859 (Patents), XIII of 1872 (Patterns and Designs) and V of 1888; Act II of 1911 as amended by Act XVII of 1914, Schedule 1 and Acts XXVIII and XXIX of 1961 (Inventions and Designs), Sections 20, 46, 71.

Registers of Literary, Scientific and Charitable Societies—Act XXI of 1860 (Registration of Societies).

Registers of Companies.—Act VII of 1913 as amended by Acts X and XI of 1914 and Act XLII of 1920 (Indian Companies), Sections 31, 40, 87, 100, 128–125; Part VI and *passim*, now substituted by Act 1 of 1956.<sup>22</sup>

Registers of British Ships.—Act X of 1841 (Ship Registry), Section 4; 17 and 18 Vict., c. 104 (Merchant Shipping Act).

Records-of-Rights.—See Local Acts of the various States of India.

Taylor, Ev., ss. 1591–1595, 1774–1780; Powell Ev., 9th Ed., 271–273; Roscoe, N. P. Ev., 24–129, 200–216; Steph. Dig. Art. 34; Phipson, Ev., 11th Ed., 453.

## SYNOPSIS

1. Principle.
2. Scope.
3. Public or official duty.
4. Duty specially enjoined by law.
5. Contemporaneity.
6. Genuineness and minor irregularities.
7. Absence of interest or motive.
8. Documents held admissible or not.
  - (a) Wajib-ul-arz,
  - (b) Riwaq-i-am.
  - (c) Panna Lal's Book, Cookes' Book,
  - (d) Entry in a decree.
  - (e) Fard Hissa Kassi.
  - (f) Inam Register.
  - (g) Quinquennial papers.
  - (h) Revenue Register.
  - (i) Record-of-rights.
    - (1) General.
    - (2) As evidence of title.
    - (3) More than one record-of-rights.
    - (4) Evidentiary value of settlement records.
  - (j) Certificate of guardianship.
  - (k) Teiskhana register.
  - (l) Register of minhai-dari-village, etc.
  - (m) Partition map and chitta.
  - (mm) Dag Chittas.
  - (n) Dharepatrak,
  - (o) Ekrarnama etc.
  - (oo) Khasra Girdwari, Tabdilat papers.
  - (p) Statements in judgments and decrees.
  - (q) Official reports.
  - (r) Settlement reports.
  - (s) Orders in mutation proceedings.
  - (t) Judicial and Revenue enquiries. Distinction between.
  - (u) Order sheet, entries in.
  - (v) Official communications.
  - (w) First information report.
  - (x) Endorsement of Register.
  - (y) War Diaries.
  9. School Registers.
    - (a) General,
    - (b) Recent cases.
  10. Municipal register.
  11. Jail register.
  12. Crime-note-book.
  13. Forest marking-book.
  14. Vaccination report.
  15. Hospital register.
  16. Recovery list.
  - 16-A. Voters list.
  17. Register of power-of-attorney.
  18. Entries, consequent on decree.
  19. (a) General Diary.
  - (b) Accidents Register.
  - (c) Report of Court of Enquiry on accident to aircraft.
  - (d) Wound certificate.
  - (e) Post-mortem certificate and post-mortem notes.
  - (f) Bedhead ticket.
  - (g) Possession receipt.
  - (h) Meteorological records.
  - (i) District Gazetteer.
  - (j) Official Reports.
  - (k) Other Instances.
  - (l) Pleadings.
  - (m) Other public documents.
  20. Proof by public record.
  21. Facts of which public records are evidence.
  22. Personal knowledge not necessary.
  23. Admissibility under special provisions of law.
  24. Births; Deaths.
  25. Certified copies of entries admissible.
  26. Evidentiary value.
  27. Proof of identity of parties named in record.
  28. Facts contained in judgments not *inter partes* are not admissible under Sections 40 to 43.

**1. Principle.** Statements in public documents are receivable to prove the facts stated on the general grounds that (1) they were made by the authorized agents of the public in the course of official duty, and (2) respecting facts which were of public interest or required to be recorded for the benefit of the community.<sup>23</sup> The principle, upon which the entries mentioned in this section are received in evidence, depends upon the public duty of the person, who keeps the book, register, or record, to make such entries after satisfying himself of their truth. The section is based upon the circumstances that, in the case of official documents, entries are made in the discharge of public duty by an officer who is an authorized and accredited agent appointed for the

23. Taylor: Law of Evidence, 10th Ed., s. 1591, followed in Mian Ghulam Rasul Khan v. Secretary of State for

India, 1925 (P.C.) 170, 172; 86 I.C. 654; 22 L. W. 299.

purpose. The law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity.<sup>24</sup> It is not that the writer makes them contemporaneously, or of his own knowledge,<sup>25</sup> for no person in a private capacity can make such entries.<sup>1</sup> They are admissible, though not confirmed by oath or cross-examination, partly because, in some cases, they are required by law to be kept, and, in all, are made by authorized and accredited persons appointed for the purpose and under the sanction of the official duty, partly on account of the publicity of the subject-matter, and in some instances of their antiquity. It may be noted that the unavailability, by reason of the death or other cause, of the maker of the entries is not a condition of their reception. There is no such principle of necessity underlying the admission of statements in public documents as is applicable to declarations by deceased persons. Nevertheless, it is not difficult to perceive that there is a necessity, less pressing, it is true, than in the latter cases, and it lies in the great inconvenience and, perhaps sometimes, the impossibility, of requiring the attendance at Court of the Official responsible for the entries. The public officers are few in whose daily work something is not done which must later be proved in Court; and the trials are rare in which testimony is not needed from official sources. Were there no exception for official statements, hosts of officials would be found devoting the greater part of their time to attending as witnessess in Court or delivering their depositions before an officer. The work of administration of Government and the needs of the public having business with officials would alike suffer in consequence. Although, then, there is strictly no necessity for employing hearsay, in the sense that the personal attendance of the officer is corporally impossible to obtain, there is nevertheless a high degree of expediency that the public business be not deranged by insisting on the strict enforcement of the Hearsay Rule.<sup>2</sup> Although this section is devised to apply to old records and entries in old registers, there is no reason why it should not be called in aid for holding that a report, if it is proved to have beeen made by a public servant in the discharge of his official or legal duty is relevant.<sup>3</sup>

**2. Scope.** The scope of this exception to the hearsay rule is designated in England by the term "public document." Wigmore criticises this term as 'being ambiguous and misleading. As the word "public" may mean

24. Tarak Chandra Chuckerbutty v. Prasanna Kumar Saha, 1924 Cal. 654: 78 I. C. 719; 28 C. W. N. 679; 39 C. L. J. 389; Sant Ram v. Sital Das, 1952 Punj. 301; 54 P. L. R. 226.
25. Saraswati v. Dhanpat, (1882) 9 C. 431; Shoshi v. Girish, (1893) 20 C. 940; Lekraj v. Mahpal, (1879) 5 C. 744, 751, 753: cf. also acceptance of this principle in Ss. 19A, 20, 21 of Act VI of 1886 (Registration of Births, Deaths and Marriages), post; Graham v. Phanindra, 1916 Cal. 617: 31 I. C. 41; (1915) 19 C. W. N. 1038 (admissible irrespective of knowledge as when copy of another entry).
1. Phipson Ev., 11th Ed., 453; Doe v. L.E.-140

- Andrews, (1850) 15 Q. B. 756, per Erle, J.; Sturla v. Freccia, (1880) 5 App. Cas. 624-644; Lyell v. Kennedy, (1887) 56 L. T. 647: per C.A. Ioannou v. Dometriou, (1852) 1 All. E. R. 179 (P.C.); Lekraj v. Mahpal, (1879) 5 C. 744 where it is not shown that it is so made the entry is inadmissible; Shco v. Gaya, 1922 All. 510 (1): 77 I. C. 52; 20 A. L. J. 601.
2. Wigmore, s. 1631; see also Starkie, Ev., 272, 273; Taylor, Ev., s. 1591; see remarks of Privy Council in Rajah Bommarauze v. Rangasamy, (1885) 6 M. I. A. at p. 249, Samar v. Juggul, 23 C. 370, 371.
3. Krishna v. The State, A. I. R. 1958 Pat. 166, 173.

either "open to all" or "made or done by an officer of the Government," and as the exception, so far as it is an exception, is concerned with statements, or assertions as such, and not with writings or documents as such. Wigmore has adopted the term "official statements" to designate the exception.<sup>4</sup> In order to render a document admissible under this section, three conditions must be satisfied; first of all, the entry that is relied upon must be one in any public or other official book, register, or record; secondly, it must be an entry stating a fact in issue or a relevant fact; and, thirdly, it must be made by a public servant in the discharge of his official duty, or any other person in performance of a duty specially enjoined by the law.<sup>5</sup> The entry spoken of in the first part of the section must either (a) be made by a public servant in the discharge of his official duty, or (b) by any other person in the performance of a duty specially enjoined by the law of the country. The second part alone relates to legislative enactments; the first part is general in its term.<sup>6</sup> It is not necessary that the public servant should be compellable by legislative enactment to discharge the duty of preparing or keeping it.<sup>7</sup> The very wording of the section conveys the idea of a duty imposed, upon the maker of the entry by law or his official position, to record the information he possesses or has gathered in an official document of the nature described therein. It further imports that the entry will be of a permanent nature, and thus excludes all such writings as are merely of an ephemeral character, and in so far as they do not incorporate the result of personal inquiries, are not intended to be used for reference in future. Another idea which runs underneath this section is that the person making the entry should be such as is invested with authority to record a decision which so far as the matter before him is concerned will be final. It thus excludes all views expressed before the final stage is reached and makes only those decisions relevant which constitute the final word in the matter.<sup>8</sup>

By this section the documents admissible are not only public documents but also records of official acts.<sup>9</sup>

**3. Public or official duty.** The Act does not contain any definition of either of the terms "public" or "official" or of a "public servant"; but for the purposes of interpretation reference may be made to the seventy-fourth<sup>10</sup> and seventy-eighth sections, post, and Section 21 of the Penal Code in which the term "public servant" is defined. Certain Acts declare that the officers appointed under them are to be deemed "public servants." Thus, every Registrar of Births and Deaths, appointed under Act VI of 1886, is deemed to be a "public servant" within the meaning of the Indian Penal Code.<sup>11</sup> So also are census

4. Wigmore, s. 1630.
5. Samar Dasadh v. Juggul Kishore Singh, (1895) 23 C. 366.
6. Devarapalli Ramalinga Reddi v. Srigitiraju Kotayya, 1918 Mad. 451; I. L. R. 41 Mad. 26; 41 I. C. 286; 33 M. L. J. 60; 1917 M. W. N. 558; 6 L. W. 246.
7. ib., Phakkar v. Pragi, 1935 Oudh 268; 154 I.C. 570; 1935 O. W. N. 230.
8. Ghulam Mohammad Khan v. Samundar Khan, 1936 Lah. 37, 42; 165 I.C. 626; 38 P. L. R. 748; Sant Ram v. Sital Das, 1952 Punj. 301; 54 P. L. R. 226.

9. Bakshish Singh v. State of Punjab, (1967) 1 S. C. R. 211; 1968 S. C. D. 68; 1967 A. W. R. (H.C.) 88; 1967 M. L. W. (Cr.) 130; 69 P. L. R. 107; 1967 Cr. L. J. 656; A. I. R. 1967 S. C. 752, 760.
10. See Samar v. Juggul Kishore Singh (1895) 23 C. 366, 369.
11. Act VI of 1886, S. 14. A manager of an estate employed under the Court of Wards has been held to be a public servant under the Penal Code; R. v. Mathura, (1898) 21 A. 127; R. v. Sidhu, (1904) 26 A. 542 (as to place of Goraits).

officers,<sup>12</sup> and registering officers appointed under Act XVI of 1908.<sup>13</sup> It has been queried, whether the section applies to an entry in a public register or record kept outside British India.<sup>14</sup> But the section itself refers to "the law of the country in which such book, register or record is kept," and in view of these words and the language of Section 74 (1) (iii), post, it had been held that a copy of a school-leaving certificate, given by a school master in a Native State, wherein the age of the pupil was recorded and certified, as required by Section 78, clause (6), by the Political Agent, assigned to that State by the Government of India, was admissible in evidence under this section.<sup>15</sup> It had also been held that a school master employed by the Government of a State was a "public officer."<sup>16</sup> Copies of official correspondence from a Forest Officer to his superior, the Conservator of Forests, written and signed by the Forest Officer in due performance of his official duty before the institution of a suit, are admissible in evidence.<sup>17</sup>

This section in the main follows, but somewhat extends, the English law on the same subject. The book, register or record must either be a public or an official one; it must be one which the law requires to be kept for the benefit or information of the public<sup>18</sup> and where so kept for information, the public, having access thereto, are not necessarily all the world, but may be limited.<sup>19</sup> A "public document" has been defined to be a document that is made for the purpose of the public making use of it—especially where there is a judicial or quasi-judicial duty to inquire. Its very object must be that the public, all persons concerned in it, may have access to it.<sup>20</sup> Registers kept under private authority for the benefit or information of private individuals are inadmissible.<sup>21</sup>

**4. Duty specially enjoined by law.** Two classes of entries are contemplated by this section: (a) by public servants, (b) by persons other than public servants. In the case of the latter the duty to make the entry must be specially enjoined by the law of the country in which the book, register, or record is kept (the section thus includes British foreign or colonial registers); in the case of entries by the former, it is sufficient for their admissibility that they have been made in discharge of official duty. But in either case, in India as in England, the entry must have been made by a person whose duty it was

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- 12. The Census Commissioner, all Superintendents of Census Operations and all census-officers shall be deemed to be public servants within the meaning of the Indian Penal Code (XLV of 1860) Vide Sec. 5 of the Census Act (XXXVII of 1948). No person shall have a right to inspect any book, register or record made by a census officer in the discharge of his duty as such, or any schedule delivered under Sec. 10 and notwithstanding anything to the contrary in the Indian Evidence Act (I of 1872), no entry in any such book, register, record or schedule shall be admissible as evidence in any civil proceeding whatsoever or in any criminal proceeding other than a prosecution under this Act (Census Act) or any other law for any act or omission which constitutes an offence under this Act, (Census Act) Vide Sec. 15, of the Census Act (XXXVII of 1948).
- 13. Act XVI of 1908, S. 84 (Indian Registration).
- 14. Ponnammal v. Sundaram Pillai, (1900) 23 M. 499.
- 15. Maharaj Bhanudas Narayanba Gosavi v. Krishnabai Chintaman Deshpande, 1927 Bom. 11; I. L. R. 59 Bom. 716; 28 Bom L. R. 1225; 99 I. C. 307.
- 16. Ib.
- 17. Lionel Edwards v. State of W. Bengal, 70 C. W. N. 452; A. I. R. 1967 Cal. 191, 195.
- 18. Taylor, Ev., s. 1591 and cases there cited.
- 19. Sturla v. Freccia, (1880) 5 App. Cas. 623.
- 20. Ib.
- 21. Taylor, Ev., s. 1992n. and cases there cited; see Baij Nath v. Sukhu Mahton, (1891) 18 C. 534.

to make it.<sup>22</sup> Provision, however, is made by Act VI of 1886 for the admission in evidence under certain conditions of certain records and registers made otherwise than in the performance of a duty specially enjoined.<sup>23</sup> It is not necessary that the duty should be prescribed by any enactment—it is enough if it is prescribed by rules made under authority of an enactment.<sup>24</sup> Their Lordships of the Judicial Committee admitted in evidence, and placed great reliance upon, a pedigree contained in an estate note-book of the Court of Wards, because the Court of Wards Manual provides for the maintenance of such a book. Their Lordships say : "This document is, therefore, an official document prepared by a public authority in pursuance of a statutory duty." Where the rules in Police Manual prescribe maintenance of Finger Print slips-cum-descriptive rolls of criminals such slips are in discharge of official duty specially enjoined upon police officers and are admissible under section 35 to prove previous convictions.<sup>24-1</sup> Registers of births and deaths kept under Police Regulations,<sup>25</sup> or under the rules made under the Municipalities Act,<sup>1</sup> have been held to be admissible under this section.<sup>2</sup>

Under Section 136 of the Calcutta Municipal Act the authority is limited to inspection, survey and measurement and does not authorise the making of any entry. If the making of such an entry is neither authorised nor required by statute, it cannot be said that the officer made the entries in discharge of his official duty.<sup>3</sup>

If a matter which is not covered by the provisions of section 44 of the Police Act, 1861, or the Regulations thereunder, is nevertheless entered in the general diary under section 172, Cr. P. C., by a police officer, it will not be an entry 'made by a public servant in the discharge of his official duty.' Hence the impression gathered or the circumstances ascertained by a police officer on the spot are not required to be entered in the general diary and as such they will not be relevant facts under this section and cannot be used as evidence in the case.<sup>4</sup>

### 5. Contemporaneity. In England it has been held that the entries should be made promptly or at least without such long delay as to impair their

22. With regard to the books recognized as official registers and public documents in England, see Taylor Ev., s. 1956n; Roscoe, N.P. Ev., 124-129, 209, 216 in particular as to births, deaths and marriages in India, pp. 127, 128; Ratcliffe v. Ratcliffe, (1859) 1 Sw. and Tr. 467; Queen's Proctor v. Fry, (1879) 4 P. D. 230; 14 and 15 Vict., c. 40; s. 11; 42 and 43 Vict., c. 8.
23. Act VI of 1886 (Registration of Births, Deaths and Marriages), S. 35, v. post. See now Births, Deaths and Marriages Registration Act, 1886, Section 9.
24. Bishnath Prasad v. Emperor, 1948 Oudh 1; 230 I. C. 144; 1947 O. W. N. (C.C.) 180; Shyam Pratap Singh v. Collector of Etawah, 1946 P. C. 103; I. L. R. 1946 Kar. 111 (P.C.); 225 I. C. 188.
- 24-1. Bandra Naik and others v. State, 1974 Cut.L.R. (Cr.) 19.
25. Shibdeo v. Ram Prasad, 1925 All. 79; I. L. R. 46 All. 637; 87 I. C. 938.
1. Jai Bhagwan v. Guttoo, 1934 Oudh 167; 148 I.C. 418.
2. See also Tamizuddin v. Taju, 1919 Cal. 721; I. L. R. 46 Cal. 152; 46 I. C. 237; Ramalinga v. S. Kotayya, 1918 Mad. 451; I. L. R. 41 Mad. 26; 41 I.C. 286; Chakravarthi v. Pushpavathi, 1926 Mad. 985; 95 I. C. 1005; Mahomed Hassan v. Safdar Mirza, 1933 Lah. 601; I. L. R. 14 Lah. 473; 144 I.C. 45; Nanhan Lal v. Baijnath, 1935 Pat. 474; 160 I.C. 116; Shri Kisan Bhikam Chand v. Jagoba Mahipat, 1937 Nag. 264; I. L. R. 1937 Nag. 382; 172 I. C. 267; Mahomed Jafar v. Emperor, 1919 Oudh 75; 54 I. C. 166; 22 O. C. 250.
3. Jitendra Nath v. Makhan, (1957) 61 G. W. N., 175.
4. Abdul Halim v. State, I. L. R. (1965) 1 All. 298; 1964 A. W. R. (H.C.) 579; 1966 Cr. L. J. 498; A. I. R. 1966 All. 222, 223 and 224.

credibility. Thus, an entry made more than a year after the event has been rejected.<sup>5</sup> It is not necessary that the entries should have been made contemporaneously with the facts recorded.<sup>6</sup> In *Walker v. Wingfield*,<sup>7</sup> a book was admitted despite the fact that part of it was compiled by copying into it at one time the transactions of the previous four to five years. Likewise, in *May v. May*,<sup>8</sup> entries which were made only once in three months<sup>9</sup> were admitted. In India also, such delays will go to the weight of evidence only. With respect to an entry from the register of births and deaths maintained by the head-constable writer of a police station, it was observed in an Oudh case,<sup>10</sup> that it may be valuable evidence of age. It cannot be trusted for the exact date of birth because the chaukidar does not visit the thana every day and the entry is only made when he visits the thana in the regular course of his duties; but it is accurate to within a few days.<sup>11</sup>

**6. Genuineness and minor irregularities.** The presumption of correctness under this section applies only to genuine entries in public records. Fraud and forgery can always be shown and then the entry will have no legal value.<sup>11-1</sup> Errors, erasures, alterations and minor irregularities affect the weight and not the admissibility of the entries.<sup>12</sup>

**7. Absence of interest or motive.** So also the fact that the entry is to the interest of the officer or body keeping the register affects the weight and not the admissibility of the entries.<sup>13</sup> In a case, Parke B., said :

"In public document.....the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not.....The observation that it has been fabricated to advance the interests of the officer, affects the value of the evidence, not its admissibility."<sup>13-1</sup>

The entries must be made by, or under the direction of, the person whose duty it is to make them at the time.<sup>14</sup> Thus, where entries in the books of a public office had been made, not by some specific person in the discharge of his official duty, but indiscriminately by any of the clerks in the office, they were rejected.<sup>15</sup> It has been held that an entry in a register of births and deaths by a village chowkidar is not admissible in evidence under Section 35 after the death of the chowkidar when it has not been shown that the entry was made by him,<sup>16</sup> but in a Patna case,<sup>17</sup> a hathchitta, kept by a chowkidar in the prescribed form, was held to be admissible, even though it was written by the defadar at the request of the chowkidar who was illiterate.

5. *Doe v. Bray*, (1828) 8 B. & C. 813.

6. See *Erle, J.*, in *Doe v. Andrews*, (1850) 15 Q.B. 756, 759.

7. (1812) 18 Ves. 443.

8. (1737) 2 Stra. 1073.

9. See also *Lee v. Meecock*, (1805) 4 Esp. 177.

10. *Bishnath Prasad v. Emperor*, 1948 Oudh 1 at 6; 230 I.C. 144.

11. *Ibid.*

11-1. *Vishwajai Bharati v. Fakhrul Hasan*, A.I.R. 1976 S.C. 1485.

12. *Lyell v. Kennedy*, (1889) 14 App. Cas. 437. As to the correction of errors in registers under Act VI of 1886, v.

S. 28 of that Act.

13. *Sturla v. Freccia*, (1880) 5 App. Cas. 649.

13-1. *Irish Society v. Derry*, (1846) 12 C. & Fi. 641 at p. 668.

14. *Doe v. Bray*, (1828) 8 B. & C. 813.

15. *Henry v. Leigh*, (1813) 3 Camp. 499.

16. *Sheo Balak v. Gaya Prasad*, 1922 All. 510 (1) : 77 I.C. 52; 20 A. L. J. 601; following *Sampat v. Gauri Shankar*, 10 I. C. 713; 14 O. C. 68; and *Jiwan Baksh v. Khan Bahadur Khan*, 19 I. C. 528.

17. *Madho Saran v. Manna Lal*, 1933 Pat. 473; 14 P. L. T. 441.

Thus, to render a document admissible under Section 35 three conditions must be satisfied : First of all the entry that is relied upon must be one in any publication or other official book, register or record ; secondly it must be an entry stating a fact in issue or a relevant fact ; and thirdly it must be made by a public servant in the discharge of his official duty, or by any other person in performance of the duty specially enjoined by law, or under the direction of the person whose duty it is to make them at the time. This duty may be expressly provided for by statute or ordinance or it may be implied from the nature and functions of the office.<sup>18</sup>

There are many instances where records are kept by persons occupying public office or engaged in occupation of a public nature. These records, though somewhat similar in kind to those of which the court may take judicial notice, do not usually have a sufficient degree of publicity to bring them within the limits of that class of matters. They are, however, deemed to have sufficient guarantee of reliability to render them admissible, if offered in evidence.<sup>19</sup>

Where a document is clearly an official document, it is admissible in evidence under Section 35. It may be possible that, in the case of such a document, if it could be shown that any particular part was in excess of the official duty by reason of which it came into existence, that part might not be admissible. But registers kept under private authority for the benefit or information of private individuals are inadmissible under this section.

"It has already been seen", says Prof. Wigmore, "that an essential qualification of a witness is that, in general, his knowledge or belief should be based on personal observation; and that the testimony based on anything short of this is received only in a few classes of cases in which the source of knowledge is for practical purposes equivalent to personal observation. It has also been noted that the same principle is applied to persons whose hearsay statements are receivable under exception to the hearsay rule ; and the application of the principle has been noticed from time to time in the foregoing exceptions. How far the principle is to be maintained in the present exceptions? Must the officer whose statement is admitted have personal knowledge of anything recorded, certified or returned? In general, there can be no doubt that the principle applies here as elsewhere ; but the principle itself need not be, and it is not judicially implied, to the extent of unpractical strictness ; and it has its qualifications and exceptions based on good sense and practical convenience.<sup>20</sup> If we are to insist with pedantic strictness upon the entrant's personal knowledge, it will be found that the registers will cease to be of much practical service for any purpose. On the whole then, the sound policy is to receive all registers as evidence of the facts required by law to be recorded."<sup>21</sup>

The test laid down by Wigmore should be followed. The court has to see whether there was any motive on the part of the individual to deceive the official who is entrusted to make the entry.

18. Greenleaf, Evidence, s. 162.  
19. McKelvey's Evidence, s. 206.

20. Wigmore, s. 1635.  
21. Wigmore, s. 1646.

Sir John Beaumont J. in *Shyam Pratap v. The Collector*,<sup>22</sup> observed :

"This document (estate note-book for each estate under the Court of Wards, the object of which is to provide a separate and succinct history of every estate under the management of the Court of Wards), therefore, is an official document prepared by a public authority in pursuance of a statutory duty, and it is not disputed that it is evidence, though not conclusive evidence of the fact stated therein. .... The criticism directed against this document is that it does not show the sources on which the Court of Wards based its findings and that "assumption of charge file" on which the pedigree purports to be founded was not produced. But this is not criticism of weight against a public document. The Court must assume that the Court of Wards did its duty to the best of its ability, and based the pedigree on material, of the accuracy of which it was satisfied....."

**8. Documents held admissible or not.** (a) *Wajib-ul-arz*. A *Wajib-ul-arz* is a village administration paper, prepared by a village official, in which are recorded the statements of persons possessing interests in the village relative to existing rights and customs. As such it is of considerable value in the determination of such rights and customs. But statements which merely narrate traditions and purport to give the history of devolution in certain families, not even of the narrators, stand in no better position than any other tradition.<sup>23</sup> On a question, whether there did or did not exist a custom in the Bahrulia clan in Oudh, excluding daughters from inheriting, it was held that entries in a *wajib-ul-arz* were properly admitted to prove this custom, this custom being a usage of the kind which Settlement Officers were required by Regulation VII of 1822 to ascertain and record.<sup>24</sup>

A *wajib-ul-arz* is *prima facie* evidence of custom, its object is to supply a record of existing local custom.<sup>25</sup> It has been held by the Privy Council that entries in village records by the officer charged by Government with the duty of making them (as under the Oudh Land Revenue Act, Section 17) are *prima facie* admissible in proof of custom, as purporting to be made with due regard to the rules laid down for his guidance.<sup>1</sup> A *wajib-ul-arz*, being an official village record, is always admissible in evidence, though its weight may be slight or considerable, according to circumstances.<sup>2</sup> If no other evidence of a custom contrary to the ordinary Mitakshara Law of Inheritance is forthcoming, the Court can disregard the entries in a *wajib-ul-arz* where they seem rather to show the wishes of the persons consulted than to prove the custom.<sup>3</sup>

- 22. A. I. R. 1946 P. C. 103; 225 I.C. 188; I. L. R. 1946 Kar. P. C. 111.
- 23. Murtaza Husain v. Md. Yasin Ali, 1916 P.C. 89; 43 I.A. 269; I. L. R. 38 All. 552.
- 24. Lekhraj v. Mahapal, 5 C. 744, 752; 7 I. A. 68.
- 25. See the following cases: Isri v. Ganga, (1880) 2 A. 876; Deokinandan v. Sri Ram, (1889) 12 A. 234; Saparandhwaja v. Garuraddhwaja, (1887) 15 A. 147; Uman v. Gandharp, (1887) 15 C. 20; Sadhu v. Raja, (1894) 16 A. 40; Garuradhwaja v. Saparandhwaja, (1900) 5 C. W. N.

- 33 (P.C.): 23 A. 37; Ali v. Manik, (1902) 25 A. 90; Ram v. Sital, (1904) 26 A. 549; Entries in *Wajib-ul-arz*, Gokul v. Maharaj, (1905) 2 All L. J. 790; Mst. Ladli v. Murli, 33 I. A. 97; I. L. R. 28 All. 488.
- 1. Parbati v. Chandarpal, 31 All. 457; 36 I. A. 125 (P.C.).
- 2. Mahomed v. Surdar, (1898) 2 C. W. N. 737; Chandramajin v. Kanbhaya Lal, A. I. R. 1961 All. 206.
- 3. Anant v. Durga, 37 I. A. 191; 32 All. 363 (P.C.); Mawasi v. Mulchand, (1912) 34 A. 434.

A wajib-ul-arz prepared and attested according to law is *prima facie* evidence of the existence of any custom of pre-emption which it records. It is a document of a public character which is prepared with all publicity, and accepted by the Courts as sufficiently strong evidence of the existence of any custom recorded in it, so as to cast upon parties denying the custom the burden of proof.<sup>4</sup> It was held in *Digambar Singh v. Ahmed Sayeed Khan*,<sup>5</sup> that a wajib-ul-arz, by itself, is good *prima facie* evidence of custom, and that it is not necessary to corroborate a wajib-ul-arz by proof of instances in which pre-emption has been allowed. But the evidence afforded by the wajib-ul-arz may be rebutted by other evidence.

The fact that a wajib-ul-arz contains many provisions, relating to matters of contracts, does not prevent it from being treated also as a record of custom. Where the custom of pre-emption is recognized, the presence of a rule, that certain procedure should be followed in case of dispute as to the price, does not prevent the wajib-ul-arz from being a record of custom.<sup>6</sup> A wajib-ul-arz may, however, record a custom about certain matters and a contract as regards others. If it records a custom, the incidents of that custom, and the occasion which would give an opportunity for its enforcement may be proved by its production or by external evidence, or by both.<sup>7</sup> It is true that when there is an entry of a right of pre-emption in a wajib-ul-arz, there is a *prima facie* presumption that it is an entry of custom. But, if every clause which recites such a right contains other matters relating to the transfer or devolution of property, which cannot possibly be a record of custom, then that presumption is negatived.<sup>8</sup> An entry in a wajib-ul-arz is *prima facie* a record of custom rather than of contract and the fact, that such a word as *ikrarnama* is used at the beginning or end of it, is not enough to make the entry one of contract and not of custom.<sup>9</sup> Where there is an entry as to pre-emption and no contrary evidence, the Court having regard to the prevailing practice, can take the custom of pre-emption as proved.<sup>10</sup> Upon the question of custom, the wajib-ul-arz is generally more valuable as a record of the opinions of persons presumably acquainted with the custom than as an official record of the custom; but, if duly attested by Settlement officials and signed by zamindars of the village to which it relates, it may be admitted in evidence under this section.<sup>11</sup> The weight to be attached to any such entry must vary according to the circumstances of the case.<sup>12</sup> For instance, if the revenue authorities have not put any direct question on the point of custom, embodied in the wajib-ul-arz, to persons from whom the question was ascertained, or if the custom adversely affects the rights of the parties who had no opportunity of appearing before the revenue authorities, it would be unsafe to rely upon the entry.<sup>13</sup>

4. Ali v. Manik, (1902) 25 A. 90, 96.
5. 1914 P.C. 11: 42 I.A. 10; I. L. R. 37 All. 129; 17 Bom. L. R. 393.
6. Sher Muhammad v. Parbhu Lal, 924 All. 274; I. L. R. 46 All. 47; 79 I.C. 25 (F.B.).
7. Lalchand v. Ram Chand, 1924 All. 753; I. L. R. 46 All. 674; 82 I.C. 526.
8. Randhir Singh v. Rajpal Misir, 1924 All. 321; I. L. R. 46 All. 478; 81 I.C. 25 (F.B.).
9. Returaji v. Pahlwan, 33 A. 196 (F.B.).
10. Fazal v. Mohamed, 1914 All. 78; 36 A. 471; 24 I. C. 464.
11. Parbati v. Chandrapal, 36 I. A. 125; 31 All. 457 (P.C.).
12. Prem Jagat Kuer v. Harihar Baksh Singh, 1946 Oudh 163, 173; I. L. R. 21 Luck. 1; 223 I. C. 373.
13. Chuhar Singh v. Ramchand, 59 Punj. L. R. 263.

The wajib-ul-arz, though it does not create a title, gives rise to a presumption in its support which prevails unless the presumption is properly displaced. The wajib-ul-arz being part of a revenue record is of greater authority than a riwaj-i-am which is of general application and which is not drawn up in respect of individual villages. Whether the statutory presumption, attaching to an entry in the wajib-ul-arz, has been properly displaced or not, must depend on the facts of each case. Under Section 31 of the Punjab Land Revenue Act, 1887, the wajib-ul-arz is a part of the record of rights, and entries made therein in accordance with law and the provisions of Chapter IV of the Act and the rules thereunder, is to be presumed to be true. The wajib-ul-arz, or the village administration paper, is a record of existing customs regarding rights and liabilities in the estate; it is not to be used for the creation of new rights or liabilities. The entries in a wajib-ul-arz can be said to express the views of certain revenue authorities as to the rights of the parties or the intention of Government, but the views of the revenue authorities as to the effect or construction of a grant or the intention of Government in respect of a grant, do not conclude the matter or bind the civil courts.<sup>14</sup>

The expression 'conclusive evidence' in Section 10 of the Oudh Estates Act (I of 1869) means not only evidence of being taluqdars but also of having that status on the lists; a wajib-ul-arz, which merely related to traditions and purported to give the history of devolution in families (not the narrator's), is insufficient to rebut the presumption of a pre-existing custom.<sup>15</sup>

(b) *Riwaj-i-am*. A riwaj-i-am is a public record, prepared by a public officer in discharge of his duties and under the Government rules, and is admissible in evidence to prove the fact entered therein, subject to rebuttal; and the statements therein may be accepted, even if unsupported by instances.<sup>16</sup> Entries in riwaj-i-am are of great evidentiary value, and in cases where there is a conflict between those entries and Rattigan's Digest, the former usually prevail.<sup>17</sup> Even absence of entry is itself a relevant fact.<sup>18</sup> But where there are conflicting entries (in Riwaj-e-Abpashi in Jammu and Kashmir) in two consecutive years the effect of such entries are nil.<sup>18-1</sup>

A riwaj-i-am is not an instrument but a record of custom.<sup>19</sup>

No statutory presumption attaches to the contents of a riwaj-i-am or similar compilation, but being a public record prepared by a public officer in the discharge of his duties under Government Rules, the statements to be found therein in support of custom are admissible to prove facts recited therein and are generally regarded as a strong piece of evidence of the custom. The entries in the riwaj-i-am may, however, be proved to be incorrect. The quantum of

14. Rajinder Chand v. Mst. Sukhi, A. I. R. 1957 S.C. 286, 295: 1957 S. C. J. 119; 1957 S.C.A. 251: 1956 S. C. R. 889.

15. Murtaza v. Muhammad, 1916 P.C. 89: 43 I.A. 269: I. L. R. 38 All. 552: 14 A. L. J. 1083: 18 Bom. L. R. 884.

16. Beg v. Allah Ditta, 1916 P.C. 129: 44 I.A. 89: I. L. R. 44 Cal. 749: 38 I.C. 354: 19 Bom. L. R. 388; Ahmad Khan v. Channi Bibi, 1925

P.G. 267: 52 I.A. 379; I. L. R. 6 Lah. 502: 91 I.C. 455; Basant Singh v. Brij Raj Saran, 1935 P.C. 132: 62 I.A. 180: I. L. R. 57 All. 494: 156 I.C. 864.

17. Jai Kaur v. Sher Singh, A. I. R. 1960 S.C. 118: I. L. R. (1960) 2 Punj. 615.

Ibid. 1974 J. & K. L. R. 462. Swaran Singh v. Smt. Amro, 69 P.L.R. 391, 392.

evidence required for the purpose of rebutting them varies with the circumstances of each case. The presumption of correctness attaching to a riwaj-i-am may be rebutted, if it is shown that it affects adversely the rights of females or any other class of persons who had no opportunity of appearing before the revenue authorities.<sup>20</sup> Though the entries are entitled to an initial presumption in favour of their correctness, irrespective of the question whether or not the custom, as recorded, is in accord with the general custom, the quantum of evidence necessary to rebut that presumption must vary with the facts and circumstances of each case. Where, for instance, the riwaj-i-am lays down a custom in consonance with the general agricultural custom of the province, very strong proof would be required to displace that presumption; but where, on the other hand, the custom, as recorded in the riwaj-i-am, is opposed to the custom generally prevalent, the presumption will be considerably weakened. Likewise, where the riwaj-i-am affects adversely the rights of the females who had no opportunity whatever of appearing before the Revenue authorities, the presumption will be weaker still, and only a few instances would be sufficient to rebut it.<sup>21</sup> The initial presumption in favour of the correctness of entries in the Riwaj-i-am is subject to its being a reliable and trustworthy document. The Riwaj-i-am of Jullundur district in the Punjab was not such a document. The custom in question was whether a Hindu Jat could divorce his wife. The Supreme Court held that the Riwaj-i-am of Jullundur district could not prove that the custom did not exist.<sup>22</sup> If the riwaj-i-am, produced as a reliable and a trustworthy document, has been carefully prepared and does not contain within its four corners contradictory statements of custom, and, in the opinion of the Settlement Officer, is not a record of the wishes of the persons appearing before him as to what the custom should be, it would be a presumptive piece of evidence in proof of the special custom set up.<sup>23</sup> The opinions expressed by the Compiler of a riwaj-i-am or Settlement Officer, as a result of his intimate knowledge and investigation of the subject, are entitled to weight, which varies with the circumstances of each case. The only safe rule to be laid down, with regard to the weight to be attached to the Compiler's remarks, is that, if they represent his personal opinion or bias and detract from the record of longstanding custom, they will not be sufficient to displace the custom, but if they are the result of his inquiry and investigation as to the scope of the applicability of the custom, and any special sense in which the exponents of the custom expressed themselves in regard to it, such remarks should be given due weight.<sup>24</sup> Though the initial onus, in every case, is on the plain-

20. Beg v. Allah Ditta, 1916 P.C. 129; Mst. Subhani v. Nawab, 1941 P.C. 21 at p. 25; 68 I. A. 1; I. L. R. 1941 Lah. 154; 193 I.C. 436; Saleh Mohammad v. Zawar Hussain, 1944 P.C. 18; 71 I.A. 14; I. I. R. 44 Lah. 195; 212 I.C. 117; Gokalchand v. Parvin Kumari, 1952 S.C. 231; I. L. R. 1953 Punj. 1; 1952 S. C. J. 331; 90 C. L. J. 78; 65 L. W. 646.
21. Salig Ram v. Mst. Maya Devi, (1955) 1 S. C. R. 1191; 1955 S. C. J. 248; 1955 S. C. A. 382; 1955 S. C. 266; 1954 Cr. L. J. 724; see also Mst. Subhani v. Nawab, 1941 P.C. 21 at 25; Khan Beg v. Mst. Fateh Khatun, 1932 Lah. 157 at 162; I. L. R. 13 Lah. 276; 136 I. C. 769; Jagat Singh v. Mst. Jiwan, 1935 Lah. 617; 156 I. C. 215.
22. Gurdit Singh v. Angrez Kaur, (1967) 3 S. C. R. 789; 1968 S. C. D. 347; (1968) 1 S. C. J. 511; (1967) 2 S. C. W. R. 934; 1968 A. W. R. (H.C.) 268; 70 Bom. L. R. 76; 1968 M. P. L. J. 114; 1968 M. L. J. (Cr.) 247; 1968 Cr. L. J. 103; A. I. R. 1968 S.C. 142, 144 and 145.
23. Salig Ram v. Mst. Maya Devi, 1955 S. C. 266; see also Qamr-uddin v. Mst. Fateh Bano, 1944 Lah. 72; I. L. R. 1945 Lah. 110; 214 I. C. 34.
24. Gokal Chand v. Parvin Kumari, 1952 S. C. 231 at 235; see also Narain Singh v. Mst. Besant Kaur, 1935 Lah. 419 at 421-22; 158 I. C.

tiff, who comes into Court relying on a particular custom, that onus can very often be discharged by the production of an entry in the riwaj-i-am in support of the custom.<sup>25</sup> In the case of discrepancy in the khasra entries and wajib-ul-arz, or Administration paper, the entries in the latter prevail.<sup>1</sup>

Orders of Settlement Courts and Rubkars akhir, containing a summary of all the proceedings, prepared and kept on the settlement files in accordance with the directions of the Chief Commissioner have been held to be admissible under this section.<sup>2</sup>

(c) *Panna Lal's Book. Cookes' Book.* Mr. Panna Lal's Book, "Kumaun Local Customs" has been accepted as evidence of customs prevailing in Kumaun.<sup>3</sup> So also the book of Mr. Cookes on "Castes and Tribes of the North Western Provinces and Oudh".<sup>4</sup>

(d) *Entry in a decree.* In a suit for possession of a fishery, an admission made by the defendant's predecessor-in-title in a written statement, filed in a previous suit, was allowed to be proved under this section, by the production of the decree in such previous suit, it being the duty of the Court under the old practice of Mofussil Courts to enter in the decree an abstract of pleadings in each case.<sup>5</sup>

(e) *Fard Hissa Kassi.* Entries in Fard Hissa Kassi or parat malguzari, prepared by the revenue authorities at settlement, in the absence of anything to the contrary, are presumed to be correct.<sup>6</sup> A survey khasra may be admissible in evidence but it loses much of its value if it has not been finally published.<sup>7</sup> Canal papers such as the irrigation map and khasra prepared by the Canal Department are admissible in evidence; but what value should be attached to that evidence is entirely a matter for the Court of fact.<sup>8</sup>

(f) *Inam Register.* An Inam Register is an important piece of evidence as to the history of the property set out in it, though such a report cannot displace actual and authentic evidence in individual cases.<sup>9</sup> In the absence of

- 976; Mst. Chinto v. Thebu, 1935 Lah. 985; 166 I.C. 976; Khadam Hussain v. Mohammad Hussain, 1941 Lah. 73 at 79; I. L. R. 1941 Lah. 872; 195 I.C. 873; Badri Narayan v. Nagarmal, I. L. R. 1959 Bom. 77; A. I. R. 1959 B. 241.
- 25. Bawa Singh v. Mst. Taro, 1951 Simla 239, 240.
- 1. Ramji Saheblal v. Tanyabapu, 1940 Nag. 178 at 181; I. L. R. 1941 Nag. 299; 189 I.C. 26; 1940 N. L. J. 519; Mst. Manturabai v. Ithalchiman, 1954 Nag. 103; I. L. R. 1954 Nag. 96.
- 2. Parbhu Narain Singh v. Jitendra Mohan Singh, 1948 Oudh 307; I. L. R. 22 Luck. 522; 1947 O. W. N. (C.C.) 421.
- 3. Beharlal v. Harlal Sah, 1934 All. 984; 153 I.C. 556; 1935 A. L. J. 172; In the matter of Shyam Lal Shah, 1925 All. 648; I. L. R. 49 All. 848; 86 I. C. 729.
- 4. Mariam Bibee v. Muhammad Ibrahim, 48 I. C. 561.
- 5. Parbutty v. Purno, (1883) 9 C. 586; followed in Byathamima v. Avulla, (1891) 15 M. 19; and Thama v. Kondan, 15 M. 378; cf. Subramanyan v. Paramaswaran, (1887) 11 M. 117.
- 6. Mana v. Mst. Diali, 1950 Pepsu 55.
- 7. Murli Prasad v. Sheo Kishore, 1950 Pat. 432; I. L. R. 29 Pat. 448.
- 8. See Mathura Singh v. Rama Rudra Prasad, 1936 Pat. 231, 236 (i); I.L.R. 14 Pat. 824; 162 I.C. 235; 16 P. L. T. 484; Mohan Bikram Shah v. Deo Narain Mahto, 1945 Pat. 453; I. L. R. 24 Pat. 379; Isar Nonia v. Karinam, A. I. R. 1958 Pat. 353.
- 9. Arunachallam Chetty v. Venkata Chalapathi Guruswamigal, 1919 P. C. 62; 46 I. A. 204; I. L. R. 43 Mad. 263; 53 I.C. 288; Narayan v. Gopal, (1960) 1 S. C. R. 773; A. I. R. 1960 S.C. 100.

the original grant, the recitals in the Inam register are of great evidentiary value.<sup>10</sup> Entries in the Inam Register are not conclusive, though a strong piece of evidence not to be lightly disregarded, excepting for solid and substantial reasons or on account of other rebutting or contrary evidence.<sup>11</sup> At the same time, although, in the absence of the original grant, the Inam Register has great evidentiary value, yet the entry or entries in any particular column or columns in the register should not be accepted at their face value, without giving due consideration to other matters recorded in the entry itself. And the entries in the Inam Register cannot displace actual or authentic evidence in individual cases.<sup>12</sup> Thus, the fact that the Inam Commissioner treated a grant to be in support of *Sadavart* and for a temple does not make the grant for the purposes of the temple, when it was not in existence at the time when the grant was made.<sup>13</sup> But the entries in the Inam Register are evidence of the true intent and effect of the transaction and of the character of the right which was being recognised and continued. The entries in the Inam Register and the description of the Inamdar therein can be accepted as indications of the nature and *quantum* of the right and the interest created in the property. The entries made in the Inam Register are the result of an elaborate enquiry. Reliance could be placed on them, specially when the entries are in harmony with the statements made before the Inam Commissioner.<sup>13-1</sup> The Inam statement may be taken as one of the pieces of evidence which the Inam Commissioner might have taken into consideration in compiling the Inam Register. The recitals in the statement must, therefore, give place to the recitals in Inam Register, though attempt should be made to harmonise them, if possible.<sup>14</sup>

(g) *Quinquennial papers.* The entries in the quinquennial registers are receivable in evidence *quantum valeat* for what they are worth. They are, however, not conclusive and may be shown to be inaccurate.<sup>15</sup> The quinquennial register has sufficient evidentiary value to rebut the presumption under Section 50 (2) or Section 103, Bengal Tenancy Act.<sup>16</sup> Quinquennial papers were rejected by the lower Court; the latter was ordered to take these into consideration on the remand of the case.<sup>17</sup>

(h) *Revenue Register.* Revenue registers in the Madras Presidency, judgments, and other public records were admitted in *Byathamma v. Avulla*.<sup>18</sup>

10. *Kondavitti Brahmayya v. Rajeshwara-swami Temple*, 1953 Mad. 580; *Syed Imam Peer Khadri v. H. S. K. M. Qadri*, (1971) 2 An. L. T. 71.
11. *Harihar Mahapatra v. Hari Otha*, 1950 Orissa 257; *Lakshmi v. Raghavayya*, (1958) 1 Andh. W. R. 343.
12. *Sadavarthy v. Commissioner, Hindu R. C. Endowments*, (1962) Supp. (2) S. C. R. 276; 1962 S. C. D. 648; (1962) 2 Andh. L. T. 274; A. I. R. 1963 S.C. 510.
13. *Ibid.*
- 13-1. *Thiru Lakshmi v. Spl. Tahsildar, A. I. R. 1974 Mad. 182*; 86 Mad. L. W. 613; (1973) 2 M. L. J. 317.
14. *Sadavarthy v. Commissioner, Hindu R. C. Endowments*, (1962) Supp. (2) S. C. R. 276; 1962 S. C. D. 648; (1962) 2 Andh. L. T. 274;
- A. I. R. 1963 S.C. 510.
15. *Rawanandhan Sahay v. Jai Govind Pandey*, 1924 Pat. 213; I. L. R. 2 Pat. 839; 75 I.C. 965.
16. *Hem Chandra Roy v. Benayakdas*, 1925 Cal. 1037; 86 I.C. 538; *Promod Chandra v. Binayakdas*, 1923 Cal. 611; 27 C. W. N. 548; 75 I. C. 201.
17. *Shorshi v. Girish*, 20 C. 940; *Secretary of State v. Wazed Ali Khan*, 1921 Cal. 687; 65 I. C. 866; 34 C. L. J. 141; *Rainanandhan Sahay v. Jai Govind Pandey*, *supra* (1891) 15 M. 19 at pp. 24, 25; *Krishnamachariar v. Krishnamachariar*, 1915 Mad. 815; I.L.R. 38 M. 166; 19 I. C. 452; 24 M.L.J. 517; 1913 M.W. N. 355; 13 M.L.T. 385.

The record of the Revenue authorities is not conclusive of title, because it is only a record of possession and is made for fiscal purposes.<sup>19</sup> It affords no evidence on question of title.<sup>20</sup> The mere record is only presumptive evidence which can be rebutted by evidence.<sup>21</sup> The weight to be attached to it depends on the circumstances of each case.<sup>22</sup> Under the provisions of this Section, an entry in any public or other official register, stating a fact in issue or a relevant fact, and made by a public servant in the discharge of his official duties, becomes a relevant fact and is provable in the prescribed manner. So, where entries are made in the Khasra Register, which is a public and official register and made by a public servant in the discharge of his official duties, and maintained under a certain law, and the columns provided in such registers are to be filled up in the discharge of official duties of the public servant concerned, till they are proved to be false, they have to be taken as good evidence of what is stated therein.<sup>23</sup>

Diglott Register-entries are relevant evidence, but not on title.<sup>24</sup> Though the entries in the Diglott register may be evidence, they are, by themselves, not conclusive evidence of the facts which they purport to record. It may turn out that they are in accord with the general bulk of the evidence in the case and they may supply gaps in it. When viewed in the light of other compelling circumstances from which inference contrary to such entries can be drawn, they may become unimportant and their value insignificant.<sup>25</sup>

(i) *Record-of-rights.* (1) *General.* Entries in Record-of-rights prepared by public servants in the discharge of their official duty are relevant under this section to prove the facts recorded therein.<sup>1</sup> Even entries in the draft Record-of-rights have been held to be admissible.<sup>2</sup> But, although proceedings at the khanapuri and attestation stage are admissible for testing the correctness of the entries in the Record-of-rights, when such entries are challenged in a Civil Court, they must only be considered in conjunction with evidence given at the trial in which the entries are challenged.<sup>3</sup> Entries in the Record-of-rights are not only admissible but they have a much higher value, inasmuch as such entries carry with them the presumption of correctness and prevail until rebutted by proper evidence.<sup>4</sup> The presumption raised by them is not conclu-

19. Kamal Narayan v. Ram Kishore, A.I.R. 1958 Madh. Pra. 246.
20. Shahim v. Ganesh, 1961 M.P.L.J. 105.
21. Budhilal v. Jagannath Das, A.I.R. 1963 M.P. 344; 1963 M.P.L.J. 542.
22. National Investment v. Mohendra, A.I.R. 1960 Cal. 724.
23. Sheojee v. Premakuer, A.I.R. 1964 Pat. 187; 1964 B.L.J.R. 152.
24. Ramanna v. Sambamoorthy, A.I.R. 1961 Andh. Pra. 361.
25. Ibid. at p. 365.

1. Ganga Bai v. Fakirgowda, 1930 P.C. 93; 57 I.A. 61; I.L.R. 54 Bom. 336; 123 I.C. 166; 32 Bom.L.R. 368; 51 C.L.J. 592; 58 M.L.J. 322; 32 M.L.W. 34; Fazlur Rehman v. Golam Kader, 30 C.W.N. 689; 96 I.C. 959; A.I.R. 1926 C. 862; Pratap Chandra v. Jagdish Chandra, 40 C.L.J. 331; 82 I.C. 886; A.I.R. 1925 C. 116.
2. Hari Das v. Kishanchand, 1952 Cal.

- 393; I.L.R. (1949) 1 Cal. 433; see also the observations of Dawson Miller, C. J., in Chand Ray v. Bhagwati Charan, 1924 Pat. 248; I.L.R. 2 Pat. 814; 81 I.C. 326; Bansidhar Mahapatra v. Souri Samal, I.L.R. 1967 Cut. 163; 33 Cut.L.T. 601, 608 (Parcha Slips).
3. Ramranbijaya v. Naubat Rai, 1942 Pat. 346, 347; 200 I.C. 281; 8 B.R. 656; 23 P.L.T. 42.
4. Srinath Ray v. Udai Nath, 1932 P.C. 217; 82 I.C. 879; 28 C.W.N. 145; 1923 M.W.N. 702; Charu Chandra v. Kamakhy Narain, 1931 P.C. 5; 58 I.A. 17; I. L. R. 10 Pat. 284; 130 I. C. 620; 35 C.W.N. 201; 52 C. L. J. 512; 60 M.L.J. 245; 1931 M.W.N. 65; Hari Har Sahu v. Sheo Prasad, 1954 Pat. 173; Indian Iron Steel Co. v. Baragopal, 1935 Cal. 641; Jai Prakash v. Lilabai, A.I.R. 1963 B. 100; I.L.R. 1962 B. 417; 64 Bom.L.R. 322.

sive, but *prima facie* merely, and while it must prevail where there is no rebutting evidence, it may be repelled by other evidence and circumstances showing that the entries are not correct.<sup>5</sup> The presumption of correctness is a strong one,<sup>6</sup> and can be rebutted only by other evidence and not by other entries on the record, or by a presumption raised under the penal law.<sup>7</sup> But they are not conclusive evidence of the facts stated therein.<sup>8</sup> The record of rights prepared by the authorities under section 29 of the Kerala Land Reforms Act 1 of 1964 would be an item of evidence in respect of the several matters required by that Act and the Rules thereunder. But its evidentiary value will be great with the passage of title and might be practically conclusive in respect of the rights of the parties.<sup>9</sup> Though a presumption of correctness attaches to entries appearing in the Record-of-rights, such entries are not foundation of title, but are mere items of evidence.<sup>10</sup> Where the record of rights shows land in the plaintiff's name, it raises a presumption in his favour and the onus would be on the defendant to prove his agreement and his own independent title to half of the suit land and his illegal 'Korfa right'.<sup>11</sup> An entry in a record of rights neither creates nor extinguishes a right; it is merely a rebuttable piece of evidence.<sup>12</sup> It is the entry in the Record-of-rights and not the entry in the Tenancy Register that has a presumptive value.<sup>13</sup>

By section 135-J, Bombay Land Revenue Code, 1888, an entry in the record of rights is presumed to be correct unless it is proved to be incorrect or displaced by another.<sup>14</sup> Under section 45 (2) of the C. P. Land Revenue Act, 1917 a Khasra is a record of right and under section 80 (3) entries in it are presumed correct unless proved to be wrong.<sup>15</sup> Though the record of rights under Chapter V of the Manipur Land Revenue and Land Reforms Act 33 of 1961 is not finally published, the entries therein are admissible to show the mutation of the land in question in the name of the Tronglaobi Pisciculture Co-operative Society, Ltd.<sup>16</sup>

(2) *As evidence of title.* It is not part of the duty of the survey officer to determine questions of title or the nature of rights of persons in occupation

5. Ammar Ahmed Khan v. Union of India, 1955 Punj. 37.
6. Brajasunder Deb v. Rajendra Narain, 1941 Pat. 260 : 195 I.C. 313 : 22 P.L.T. 699 : 7 B.R. 897.
7. Ramranbijaya v. Naubat Rai, 1942 Pat. 346; Jagdeo Singh v. Mahendra Singh, 1934 Pat. 287 : 149 I.C. 149.
8. Brij Bhukan v. S.D.O., Siwan, 1955 Pat. 1 ; I.L.R. 1954 Pat. 690 (S.B.); Vassandmal Daval Das v. Hiromal Mohanmal, 1947 Sind 94 : I.L.R. 1946 Kar. 380 : 227 I.C. 638.
9. A. Iswara Wariyar v. State of Kerala, 1966 Ker.L.T. 1051, 1054.
10. Wali Mohammad v. Mohammad Baksh, 1930 P.C. 91 : 57 I.A. 86 : 122 I.C. 316; Ammar Ahmed Khan v. Union of India, 1955 Punj. 37; Salabat Mahata v. Shrimati Malati Mahatani, 1954 Pat. 481; Surpat Singh v. Gena Jha, 1936 Pat. 315 : 162 I.C. 999; Hanumantha v. Gawaiah, 1953 Mys. 44; Sakha Ram v. Shushila Bai, 1953 Nag. 339 : I.L.R. (1953) Nag. 507: 1953 N.L.J. 425.
11. Smt. Prafulla Nalini Bhowmick v. Sri Dajendra Garoo, A.I.R. 1968 Tripura 5; Barkat Ali v. Basant Nunia, 21 C.W.N. 175 : A.I.R. 1917 Cal. 79.
12. Brij Behari Singh v. Sheo Shankar Jha, A.I.R. 1916 Pat. 120; Kāñhu Lal Marwari v. Palu Sah, A.I.R. 1920 Pat. 1 (S.B.); Mohim v. Fariduddin, 1966 B.L.J. 761, 766 (Municipal parchas are not presumptive pieces of evidence under the section).
13. State v. Bharat Singh, 1961 (1) Cr. L.J. 649.
14. Bhima Ratnappa Janawade v. Rama Lingappa, (1969) 2 Mys. L.J. 202, 203.
15. Shikhan Chand v. D.J.P. Karini Sabha, A.I.R. 1974 S.C. 1178.
16. T. P. Co-op. Society Ltd. v. Chief Commissioner of Manipur, A. I. R. 1969 Manipur 84, 87.

of the lands. Whether occupants of lands are khadim or permanent tenants is a question to be decided on consideration of the materials, which may be of a varied kind, with respect to the several lands in the village. Where the entries in the survey records do not disclose, (a) the basis on which they were made, (b) the persons who were examined, (c) what documents, if any, were referred to, (d) nor is it clear by whom the entries were made, and (e) if any responsible officer checked it, and (f) whether the jotidar, who was the person affected, was examined at all about the correctness of the claim of any occupant, the entries cannot be conclusive on the question of title. The value to be attached to the entries depends on the evidence and probabilities in each case, and there is no hard and fast rule governing it.<sup>17</sup> An order by a Revenue Official directing that the name of a certain person be entered in the Record of Rights is not conclusive and will have no efficacy in a suit to establish title by the person aggrieved.<sup>18</sup> The entries in the survey and settlement records and other documents maintained by the revenue department are no evidence of title.<sup>19</sup> In *Kesho Prasad Singh v. Mst. Bhagjogna Koer*,<sup>20</sup> however, their Lordships of the Privy Council observed:

“Entries in such Government records are evidence of title mainly because they are good evidence of possession, but if contrary to the facts as to possession at the time they were made, they carry little, if any, weight. This would be specially applicable to entries made by the Tehsildar as of routine and without notice to any parties interested to oppose their being made.”

Though the Record-of-rights is not a document of title, but such old record supporting title of a complainant can be looked into as forming the basis of his title.<sup>21</sup> The Court is justified in taking into consideration the entry in it for coming to the conclusion that certain persons were at the time the raiyats of the land in question.<sup>22</sup> Where the entry in the record-of-rights shows that the suit lands stood in the name of the plaintiff, the onus rests on the defendant to prove that the said entry in favour of the plaintiff is not correct.<sup>23</sup>

Records of rights do not create or destroy title. They are admissible as corroborative evidence. Therefore omission of name of a transferee in record of rights would not destroy his title.<sup>24</sup>

(3) *More than one record-of-rights.* Where there are two Records-of-rights, prepared at different times, entries in both of them will be presumed to be correct entries of the state of things existing at the time when the entries were made; and there is nothing in the law which would entitle a party to say that

17. Hanumantha v. Gowdaiah, 1953 Mys. 44 at p. 45.
18. Payappa Nemauna v. Chamu Appayaya (1961) 2 Mys.L.J. 198.
19. S. Narayanacharya v. Kaliamardhana Sri Krishnadevaru, 15 Law Rep. 118, 128 : (1968) 2 Mys.L.J. 439.
20. 1937 P.C. 69 at 76 : I.L.R. 16 Pat. 258 : 167 I.C. 329 : 1937 A.L.J. 638 : 39 Bom.L.R. 731 : 65 C.L.J. 241 : 41 C.W.N. 577 : (1937) 2 M.L.J. 631 : 45 M.L.W. 580 : 1937 M.W.N. 593 : 1937 O.W.N. 396 : 1937 P.W.N. 290 : 18 P.L.T. 257.
21. Ganesh Das v. Jagabandhu Prusti,

- (1971) 37 Cut.L.T. 420.
22. Salabat Mahata v. Shrimati Malati Mahatani, 1954 Pat. 481, 482; see also Markhu Mahto v. Saharai, 1940 Pat. 16 : 134 I.C. 246 : 6 B.R. 33 : 20 P.L.T. 877; see also Pankajini Dehi v. Sudhir Dutta, A.I.R. 1956 C. 669; Kamalnarayan v. R. Kishore-lal, A.I.R. 1958 M.P. 246.
23. Ramkrishna v. Arjuno, A.I.R. 1963 Orissa 29.
24. Kuma Bewa v. Achuta Padhan, (1975) 1 Cut.W.R. 35; see also (1975) 2 Cal. L.J. 305; Murtu v. Giari, (1972) 2 Sim.L.J. (Delhi) 209.

the entry in the subsequent record is rebutted by the entry in the previous record; and that, as the later entry records the existing state of things, preference must, in the absence of evidence, be given to it. Mere production of a contrary entry in the earlier Cadastral Survey Record-of-rights does not, in law, rebut the presumption arising out of the subsequent entry in the Revisional Survey Record-of-rights.<sup>25</sup> When there is a conflict, the latter entry must prevail.<sup>1</sup>

(4) *Evidentiary value of settlement record.* The law as to the evidentiary value of settlement record is thus summarised by their Lordships of the Privy Council : "Records of that character take their place as part of the evidence in the case. They do no more. Their importance may vary with circumstances, and it is not any part of the Law of India that they are by themselves conclusive evidence of the facts which they purport to record. It may turn out that they are in accord with the general bulk of the evidence in the case they may supply gaps in it ; they may, in short, form a not unimportant part of the testimony as to fact which is available. But to give them any higher weight, than that, might open the way for much injustice and afford temptation to the manipulation of records or even of the materials for the first entry."<sup>2</sup>

A definition of shares in *khewals*, or other revenue papers, can be regarded as only a very slight indication of title; it is not the function of the officer who compiles such papers to decide questions of title. In particular, the nice distinctions which arise upon an issue whether or not there has been a separation are not for their determination.<sup>3</sup> The collector's book is kept for the purpose of revenue and not for purposes of title, and a definition of shares in revenue and village papers affords, by itself, but a very slight indication, for instance, of an actual separation in Hindu family; and in no case can it be regarded that such a definition of shares is sufficient evidence upon which to find, contrary to the presumption in law as to jointure, that the family to which such definition referred had separated.<sup>4</sup> Entry in Re-settlement Register of a land as "Poromboke" by itself does not prove Government's title in the land.<sup>5</sup>

"Hassab Parata Deh" entry only means that rent is equal to land revenue it does not indicate nature of possession.<sup>6</sup>

*Huddbandi* papers are to be accepted as *prima facie* accurate between Government and the zamindars and the boundaries given therein, unless shown

25. Ram Lal Ganjhee v. Lodha Mundha, 1952 Pat. 201, 202; Sheikh Banka v. Sheik Bartul, 1952 Pat. 157; Tengaroo v. Chatthu Bhar, 1929 Pat. 460 : 118 I. C. 316 (F. B.); Abhi Ram v. Chintamani, 8 P.L.T. 121 : A.I.R. 1927 Raj. 164; Rikh v. Sham Shankar, 1930 Pat. 410 : 12 P.L.T. 543; Naurangi v. Kanhiya, 123 I.C. 390 : 1930 Pat. 508; Matukdeo Narain v. Sadhu Saran, 134 I.C. 957 : 12 P.L.T. 304. See Bahuballa v. Shastri, (1957) Pat.L.R. 285.
1. Durga Singh v. Tholu, (1963) 2 S.C.R. 693 : (1963) 2 S.C.J. 306 : A.I.R. 1963 S.C. 361 : 64 Pun. L. R. 837.
2. Nageshar Baksh v. Mst. Ganesha, 1920 P.G. 46, 51 : 47 I.A. 57 : I.L.R. 42 All. 368 : 56 I.C. 306.
3. Durga Prasad v. Ghansham Dass, 1948 P.C. 210 : 1948 A.L.J. 279 : 50 Bom.L.R. 669 : 61 M.L.W. 517.
4. Brajraj Singh v. Yogendra Pal Singh, 1952 M.B.L.J. 389 ; 1952 M.B. 146; Parameshwari v. Khusali, A.I.R. 1957 Pat. 482 : I.L.R. 36 Pat. 715.
5. Kuppuswamy v. Narthan Gudi Panchayat, (1971) 1 M.L.J. 190.
6. Rasul v. Ghani Mir, A.I.R. 1973 J. & K. 53 : 1972 Kash.L.J. 398.

to be erroneous, ought to be regarded as the boundaries of the grant at the time of the permanent settlement.<sup>7</sup>

Partition papers are not of real assistance in the absence of detailed information as to the history of the document mentioned, when it was prepared, by whom, in whose presence, and for what purpose. There is some diversity of judicial opinion, probably more apparent than real, as to the admissibility of documents of this description. Weight will obviously have to be attached to the statutory provisions for the partition of States in operation at that time; and how far the proceedings did in fact conform to those rules, is plainly a relevant matter.<sup>8</sup>

Entries in Revenue Records were held evidence that the appellant was a Mohal Rajput.<sup>9</sup>

The measurement papers prepared by *batwara* amin do not,<sup>10</sup> but chittas of the revenue survey do,<sup>11</sup> come within the description given in this section. The *batwara khasra* is generally prepared by the amin on the admission of both the landlord and tenants regarding the latter's holdings and in case of difference on the basis of summary decisions by the batwara Deputy Collector, and as such is very valuable evidence in subsequent disputes. But a *khasra* prepared, not on the basis of admissions of all parties but on information supplied by one of them and without enquiry as to whether the rent resulting therefrom is that which is at the time payable, is absolutely valueless in evidence.<sup>12</sup>

Certified copies of papers in the Collectorate, which *prima facie* appear to be record of a partition, made in a proceeding under Regulation XIX of 1834 between the predecessors of the parties to a suit, are admissible in evidence, quite apart from anything contained in this section.<sup>13</sup>

A Survey and Settlement Report is a public document and is admissible in evidence. In *Martand Rao v. Malhar Rao*,<sup>14</sup> their Lordships observed that official reports regarding the nature of the estate are valuable and in many cases the best evidence of facts stated therein, but opinion therein expressed should not be treated as conclusive in respect of matters requiring judicial determination, however eminent the authors of such report may be. It may be said that in the absence of any other evidence, the settlement report which is an authorised document may be accepted as a safe guide.<sup>15</sup> A survey entry in a Record-of-rights that a particular land of certain *khata* jointly belongs

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| 7. <i>Haradas v. Secretary of State</i> , 1917.<br>P.C. 86 : 43 I.C. 361 : 26 C.L.J. 590; <i>Shrimati Rajnandi Debi v. Man mathapal</i> , 1941 Cal. 223 : I.L.R. (1940) 2 Cal. 393 : 197 I.C. 147. | 11. <i>Girindra v. Rajendra</i> , (1897) 1 C.W.N. 530.  |
| 8. <i>Tara Kumar v. Arun Chandra</i> , 1923 Cal. 261 : 75 I.C. 383 : 36 C.L.J. 389.  | 12. <i>Gulab Chand v. Salek Hussain</i> , 5 Pat. L. W. 6: 36 I. C. 513.   |
| 9. <i>Ghulam Rasul v. Secretary of State</i> , 1925 P.C. 170 : 52 I.A. 201 : I.L.R. 6 Lah. 269 : 86 I.C. 654; <i>Jagannath v. Kumar Bimal Chandra</i> , 25 Cut.L.T. 345.                           | 13. <i>Khetra Nath v. Mohamed Alla</i> , 23 C. W. N. 48: 45 I. C. 921.  |
| 10. <i>Mohi v. Dhiro</i> , (1880) 6 C.L.R. L.E.—142  | 14. I.L.R. 55 C. 403 : A.I.R. 1928 P. C. 10.  |
|  | 15. <i>State of Orissa v. Bharat Chandra</i> , I.L.R. 1956 Cut. 113 : A.I.R. 1955 Orissa 97; see also <i>Manu v. State of Orissa</i> , A.I.R. 1965 Orissa 49. |

to the branches of L and B, is deemed to be correct unless the contrary is shown. Mere possession of the defendants cannot rebut the presumption attached to the entry.<sup>16</sup>

(j) *Certificate of guardianship.* A certificate of guardianship is a document which is issued to a person appointing him the guardian of a certain person on the ground that that person is a minor. This certificate is neither a book nor a register, nor a record kept by any officer in accordance with any law but is a certificate, as it professes to be, and this is not a public record or register of any kind, but is a document issued to a particular person, giving to that particular person and only to him, a particular kind of authority. It is not evidence of minority under this section.<sup>17</sup>

So also an extract from a register of applications in respect of minors and lunatics is inadmissible in evidence on the question of age. It cannot be relied on as secondary evidence of the statement which may have been made in the petition, nor can it be regarded as a corroborative piece of evidence.<sup>18</sup> The recital of the date of birth in the application for appointment of a guardian is not by itself admissible in evidence upon mere production of the document but may be rendered admissible under certain circumstances.<sup>19</sup>

If, however, the conditions recited in Section 32 (5), Evidence Act, are satisfied, that is, a person who had made this statement had special means of knowledge of the relationship and he is now dead or cannot be found, such statement in the petition will be admissible. Further, the statement made in the application may be used under Section 155, Evident Act, to impeach the credit of the person who made the statement while he is being examined as a witness in the case.<sup>20</sup> The statement in the application may also, as being the former statement as to a fact be admissible under Section 157, Evidence Act, to corroborate the later testimony of the witness.<sup>21</sup>

(k) *Teiskhana register.* A *teiskhana* register (so called from the number of columns in the statement or register) prepared by a *patwari* under rules framed by the Board of Revenue under Section 166 of Regulation XII of 1817, is not a public document, nor is the *patwari* preparing the same a public

16. Harak Narain Singh v. Sham Behari Singh, A.I.R. 1968 Pat. 450, 453.
17. Satis Chunder v. Mohendro Lal, (1890) 17 C. 849 followed in Gunjra v. Pande, 18 A. 478; (Mst.) Naima Khatur v. Basant Singh, 1934 All. 406 : I.L.R. 56 All. 766 : 149 I.C. 781 ; Kishorilal v. Adhar Chandra, 1942 Cal. 438 : 199 I.C. 10 : 76 C. L.J. 61; Muktipada v. Aklema, 1950 Cal. 533; but see "Mehdi Ali v. Walayat Husain Khan, 1930 Oudh 97 : I.L.R. 5 Luck. 658 : 121 I.C. 277; Ameer Hasan v. Md. Ejaz Husain, 1929 Oudh 134: 117 I. C. 456; Mohanlal v. Md. Adil, 1926 Oudh 88 : 89 I.C. 69. But see contra Rajkumar v. Vijaykumar, A.I.R. 1969 All. 162 holding that it is a public document.
18. Gokhula Nand v. Baldeo Narayan, 1924 Pat. 796 : 86 I.C. 681 : 5 P.L.T. 403.
19. Krishna Mongul Saha v. Akbar Jumma Khan, 9 C.L.R. 213; Dhanmul v. Ram Chunder, 24 Cal. 265 : 1 C.W.N. 270; Mohan Roy v. Ram Krishna, 28 I.C. 595 : A.I.R. 1916 Cal. 529; Mahomed Syedol Arifin v. Yeohool Gark, 43 I. A. 256: 39 I.C. 401 : A.I.R. 1916 P.C. 242; Muktipada v. Aklema, A.I.R. 1950 Cal. 533.
20. Prahlad v. Ramsaran, 81 I.C. 680 : A.I.R. 1924 Cal. 420 : 38 C.L.J. 213; Muktipada v. Aklema, 1950 Cal. 533.
21. Harchand v. Dewan Singh, 1929 A.L.J. 615: A. I. R. 1929 All. 550; Muktipada v. Aklema, 1950 Cal. 533.

servant. It is a document prepared in the *zamindar's* *sherista* by the *patwari* who is paid by the *zamindar* but approved by the Collector. These registers are no doubt kept for the information of the Collector but that does not make them binding as official records of the facts contained in them.<sup>22</sup>

(l) *Register of minhai-dari-villages.* A register of *minhai-dari-villages* is an official document.<sup>23</sup> So is a Record-of-rights,<sup>24</sup> and a *batwara barawarda*.<sup>25</sup> The *pargana* and *Canoongo* registers are not kept punctiliously and are not admissible in evidence to prove an omission of any entry therein as to *lakherajes*. The *Canoongo* account and the general and *mauzawar* registers being intended to facilitate the collection of the Government dues, there was no authority to enter therein *lakherajes* of less than 100 bighas in area, *lakherajes* being not the subject-matter of resumption proceedings. The *thank* officers not being empowered to measure and record *lakherajes* of less than 50 bighas in area, the omission of *lakheraj* as in the *thank* statement was not of any probative value.<sup>1</sup>

(m) *Partition map and chitta.* The map and *chitta* prepared by the partition *amin* under the provisions of Section 54 of the Bengal Estates Partition Act, proved to have been accurately prepared, or to have been accepted and acted upon by the landlord, are, independently of the section, admissible in evidence against the landlord for the purpose of proving what lands were held and by what tenants.<sup>2</sup> Copies of judgments have been admitted under this section.<sup>3</sup>

(mm) *Dag chittas.* The *Dag chittas* prepared under Rule 66 of the Manipur Land Revenue and Land Reforms rules are in the nature of revenue records prepared by a public servant in the discharge of his duty under the present section. They cannot be declared as inadmissible because of their non-publication for the purpose of attestation.<sup>4</sup> Entries in a *Dag chitha* made in the course of a cadastral survey according to Manipur Land Revenue and Land Reforms Rules, 1961, Rules 55 (ii), 66 and Form VII, are relevant under Section 35 of the Evidence Act to show *prima facie* that the land in question was a 'village grazing ground'.<sup>5</sup> *Dag chitha* and *Jamabandi* are records of right prepared by public servants in discharge of their duties. They are admissible in evidence and persons recorded therein may be presumed to be in possession.<sup>6</sup>

(n) *Dharepatrak.* Statements of facts made by a Settlement Officer in the column of remarks in the *dharepatrak* are admissible as being entries in a public record stating facts, and made by a public servant in the discharge of

- 22. Baij Nath v. Sukhu, (1891) 18 C. 534; followed in Samar v. Jugalkishore, (1895) 23 C. 366; Chalho v. Jharo, 39 C. 995 : 18 I.C. 61.
- 23. (Rai Bhaiya) Dirgaj Deo Bahadur v. Beni Mahio, 1917 P.C. 197 (1) : 47 I.C. 1 : 20 Bom.L.R. 712.
- 24. Fazlar v. Golam, 1926 Cal. 862 : 96 I.C. 959 : 30 C.W.N. 689.
- 25. Ramsarup v. Ramnarain, 1929 Pat. 32 : I.L.R. 7 Pat. 85 : 114 I.C. 479; but not a batwara khasra, ib, foll. Nand Lal v. Chanurpat Das, 18 I.C. 143; 17 C. L. J. 462; 17 C.

- W.N. 779.
- 1. Bipradas v. Monorama, 45 C. 574 : 47 I.C. 49 : 22 C.W.N. 396 : A.I.R. 1919 C. 922.
- 2. Dinanath v. Nawab Ali, 49 I.C. 984.
- 3. Krishnaswami v. Rajagopala, (1895) 18 M. 73, 78.
- 4. Nurmukhmed v. Md. Abdul Karim, A.I.R. 1970 Manipur 7, 8 and 9.
- 5. Ningombam v. Chief Commissioner, Government of Manipur, A.I.R. 1969 Manipur 79, 82.
- 6. H. B. Sharma v. H. G. Sharma, A.I.R. 1975 Gauhati, 47.

his official duty; but the opinion of the survey officer as evinced by the effect of the *dharepatrak* and the place assigned to the defendant's ancestor in it, the survey officer not being at that time invested with authority to decide questions of tenure between the *khot* and his tenants, is not, even if regularly recorded, admissible.<sup>7</sup>

(o) *Ekrarnama etc.* The recital of an *ekrarnama* and its terms in an ancient public document whose authenticity had not been, nor could be, doubted, is admissible and furnishes strong secondary evidence of *ekrarnama*.<sup>8</sup> A report on a temple by a *khotwal* made in 1840 at the instance of a Political Agent has been held relevant to the question of ownership of temple.<sup>9</sup> A statement of a witness to a police officer under the provisions of Section 162 of the Criminal Procedure Code, reduced to writing, is not a record within the meaning of the section.<sup>10</sup> Neither is a *batwara khasra* prepared under the Estates Partition Act (V of 1897).<sup>11</sup>

(oo) *Khasra Girdwari.* The Khasra Girdwari is a public document within the meaning of Section 74 post.<sup>12</sup> In assessing the surplus area of land under Section 32-NN of the Pepsu Tenancy and Agricultural Lands Act 13 of 1955, if the jamabandi being old does not embody the correct position with regard to the land, then the Khasra Girdwares are relevant pieces of evidence for the inquiry.<sup>13</sup> Though admissible under Section 35 there is no presumption of correctness of a Khasra Girdwari.<sup>14</sup> Still they have some evidentiary value, unless proved to be false or at best suspicious, they can be relied upon without corroborative evidence.<sup>15</sup> It is valuable evidence and it is not necessary to produce the Patwari who made entries in Khasra Girdwari, they can be proved by the Patwari having its custody.<sup>16</sup>

*Tabdilat papers.* 'Tabdil' means to mutate, substitute or alter. Tabdilat papers maintained under the Revenue Rules are public documents which are admissible under the present section. Apart from the fact that reference to a document in the remarks column of the papers fully established that there was such a document, the Tabdilat papers are admissible in evidence to show that mutation was made in the names of different branches in accordance with their shares. Even if the document referred to could not be produced, the public document cannot lose its value.<sup>17</sup>

(p) *Statements in judgments and decrees.* A recital in a judgment not inter partes of a relevant fact is not admissible in evidence under this section.<sup>18</sup>

7. Madhavrao v. Deonak, (1896) 21 B. 695.
8. Biswambhar Singh v. State of Orissa, 1954 S.C. 139, 143, 144 : I.L.R. 1954 Cut. 398 : 1954 S.C.J. 219 : 1954 S.C.R. 842.
9. Baldeo v. Govind, 1914 All. 59 : I.L.R. 36 A. 161 : 23 I.C. 18 : 12 A.L.J. 79.
10. Isab v. R., (1900) 28 C. 348: 5 C. W.N. 65.
11. Nandlal v. Mohanta, 18 I.C. 143 : 17 C.L.J. 462 : 17 C.W.N. 779 .
12. Mohamed Bin v. Fateh Din, A.I.R. 1934 Lah. 698; Beant Singh v. Natha Singh, A.I.R. 1966 Him. Pra. 48, 49.
13. Tara Singh v. Financial Commis- sioner, Punjab, 71 P.L.R. 983, 986 : 1969 Punj. L.J. 310.
14. Gurcharan Singh v. Prithi Singh, A.I.R. 1974 S.C. 223: 1974 Rev. L.R. 22 : (1974) 1 S.C.C. 188 : 1974 Punj. L.J. 166 : (1974) 2 S.C.W.R. 130 : (1974) 2 S.C.J. 346 : 1974 Cur.L.J. 522.
15. Khiali Ram v. Sant Lal, A.I.R. 1972 Punj. 393: 1972 Punj. L.J. 118 : 1972 Cur.L.J. 402.
16. 1975 Punj. L.J. 151.
17. Gobardhan Gountia v. Labanya-nidhi, I. L. R. 1966 Cut. 816 : 33 Cut. L. T. 960, 967.
18. Seethapati v. Venkanna, 1922 Mad. 71 : I.L.R. 45 M. 332 : 66 I.C. 280 (F.B.).

A statement in a judgment that a witness admitted certain things is not admissible to prove the admission, unless it is proved that primary evidence is not available.<sup>19</sup> A statement amounting to an admission contained in a judgment *inter partes*, however, has been held to be admissible.<sup>20</sup> A statement in a decree that certain pedigrees were filed in evidence under this section is an entry in a public record.<sup>21</sup> Revenue officer's decision is entitled to great weight in subsequent suit between the same parties relating to the same subject-matter.<sup>22</sup>

(q) *Official reports.* In a case in which the question was as to the existence of a customary right and certain reports of former Collectors on the subject of this right, made under Sections 10 and 11 of Mad. Reg. VII of 1817, were used in evidence, the Privy Council observed :

"Their Lordships think it must be conceded that when these reports express opinions on the private rights of parties such opinions are not to be regarded as having judicial authority or force. But, being the reports of public officers made in the course of duty and under statutable authority, they are entitled to great consideration, so far as they supply information of official proceedings and historical facts, and also in so far as they are relevant to explain the conduct and acts of parties in relation to them, and the proceedings of the Government founded upon them."<sup>23</sup>

Though official reports regarding the nature of any estate are valuable and, in many cases, the best evidence of facts stated therein, opinions therein expressed should not be treated as conclusive in respect of matters requiring judicial determination, however eminent the authors of such reports may be.<sup>24</sup>

The words "an entry" in this section do not apply to the opinions of public officers based on, or inferences drawn from, the allegations made before them in the course of enquiries, but are confined only to such statements of facts in issue or relevant facts as are made by the public officers concerned in the course of their official duty and are required to be entered in any book, register or record intended for the purpose.<sup>25</sup> The entry in question should be one which can be regarded as an entry in any public or other official record

19. Medavarapu Narasayya v. Medavarapu Verraya, 1935 Mad. 268; 154 I. C. 753 : 40 L.W. 810.
20. Krishnasami v. Rajagopala, 18 Mad. 73; Chandulal v. Pushkar Raj, 1952 Nag. 271 : I.L.R. 1952 Nag. 318 : 1952 N.I.L.J. 213; Mukta Keshi v. Midnapur Zamindari Co., Ltd., 1935 Pat. 33 : I.L.R. 13 Pat. 517 ; 156 L.C. 136.
21. Martand Rao v. Malhar Rao, 1928 P.C. 10: 55 I.A. 45; I.L.R. 55 Cal. 403 : 107 I.C. 7 : 30 Bom. L. R. 251 : 47 C.L.J. 150 : 32 C.W.N. 621 : 54 M.L.J. 397 : 11 N.L.J. 26: 1928 M.W.N. 942; Malojirao v. State of Madhya Bharat, 1953 M.B. 97—the reports may be referred to for the purpose of gathering historical facts.
22. See Ghanava v. Mehtab, A.I.R. 1934 L. 890; I.L.R. 16 L. 377; Union of India v. Nand Kishore, A.I.R. 1966 H.P. 54.
23. Jaggannath Nanda v. Bishnu, I. L. R. (1974) Cut. 675 : (1974) 40 C.L.T 888.
24. Mutturamalinga v. Perianayagum, 1 I. A. 209, 238, 239; see also Leelalnund v. Lakhputtee, (1874) 22 W.R. 231; in which a report was rejected; H. Mathewson v. Secretary of State, 1924 Pat. 616 ; I. L. R. 3 Pat. 673, 682 ; 84 I.C. 405; Chandu

within the meaning of the section. Besides the entry must be one of a permanent nature, and the person making the entry should be invested with authority to record a decision which, so far as the matter before him is concerned, will be final. Opinions expressed by the public officer, before the final stage is reached, do not become relevant.<sup>1</sup>

(r) *Settlement Reports.* Settlement Reports, however valuable they may be in giving a history of the areas coming within the operation of the Settlement, are by no means conclusive of matters requiring judicial determination and they cannot, therefore, be taken as proof of title or division of shares.<sup>1.1</sup>

(s) *Orders in mutation proceedings.* It has been repeatedly laid down by the Judicial Committee that it is an error to suppose that the proceedings for the mutation of names are judicial proceedings, in which the title to, and the proprietary right in, immovable properties, are determined. They are nothing of the kind, they are much more in the nature of fiscal enquiries instituted in the interest of the State, and for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put in occupation of it with greater confidence that the revenue for it will be paid. Orders in mutation proceedings are not evidence that the successful applicant was in possession as sole legal owner in a proprietary sense to the exclusion, for example, of all claims of other members of the family, as co-owners, or for maintenance or otherwise, as revenue authorities have no jurisdiction to pronounce upon the validity of such a claim.<sup>2</sup> Mutation of names by itself confers no proprietary title upon a person.<sup>3</sup> Therefore, absence of mutation does not prove that the transaction of transfer was not made.<sup>4</sup> No presumption of correctness attaches to the date of death of the last holder given in a mutation order.<sup>5</sup> The decision of a Revenue Officer (Naib Tahsildar in the instant case) in a mutation proceeding even as a piece of evidence has little evidentiary value when it is founded on a material piece of evidence which was untrue.<sup>6</sup>

(t) *Judicial and Revenue inquiries, distinction between.* Different considerations may apply to judicial inquiries as distinct from revenue inquiries. While a judicial inquiry is to be based merely on evidence adduced before the officer, a revenue enquiry is not so limited and is to a substantial extent based on personal observation and information.<sup>7</sup> In *Mallikarjuna v. Secretary of State*<sup>8</sup> a report was called for from the Tehsildar who asked the village Munsif to report. The Tehsildar's report was sought to be put in evidence to show that the village Munsif had reported that certain charities were not commenced on a particular date. It was held that the Tehsildar's report was not admissible in evidence of the fact that the charities had not been commenced

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1. See *Ghulam Mohammad v. Samundar Khan*, A.I.R. 1936 L. 37 : 38 P.L.R. 748; *Union of India v. Nand Kishore*, A.I.R. 1966 H.P. 54.
- 1-1. See *Mg Sin v. Mg So*, A. I. R. 1931 Rang. 40; *Cromartie v. Iswar Radha*, 62 C.L.J. 10; *Gurdit v. Mst. Bhago*, 26 P. L. R. 673.
2. *Nirman Singh v. Lal Rudra Pratab*, 1926 P.C. 100 : 53 I.A. 220 : I.L.R. 48 All. 529 : 98 I.C. 1013; *Tirtha Naik v. Lal Sadanand Singh*, 1952 Orissa 99 : I.L.R. (1949) 1 Cut. 139.
3. *Abid Ali Khan v. Secretary of State*, 1951 Nag. 327; I.L.R. 1950 Nag. 633.
4. *Kanwarani Madanawati v. Raghu Nath Singh*, A.I.R. 1976 Him. Pra. 41; see also *Hetrahan v. Bhader Ram*, 1973 W. L. N. 981 (Raj.)
5. *Dalpat Singh v. Rajwant Singh*, 1954 Punj. 33.
6. *Dayaram v. Dawalatshah*, A. I. R. 1971 S.C. 681, 689.
7. *Matheshwar Naik v. Sailendra Narayan*, 1951 Orissa 327, 332; I. L. R. (1949) 1 Cut. 312.
8. 35 Mad. 21; 14 I. C. 401.

by that date. In *Subhag Singh v. Raghunath Singh*,<sup>9</sup> the District Judge asked the Collector to report which of the three persons suggested was the fittest to be appointed as the guardian and the Collector called for a report from the *Canoongo*. The report of *Canoongo* was not admitted in evidence. This is intelligible on the ground that the District Judge had to decide the matter judicially and according to law by taking evidence himself, and not on the report of the *Canoongo*. Statements in mere official correspondences, which have no finality are not admissible in evidence.<sup>10</sup> It has been held by their Lordships of the Privy Council that a letter from one official to another, the purpose of which is to report that a certain estate should be taken under the superintendence of the Court of Wards and that orders of the Lieutenant-Governor should be taken on the matter, is not such an entry as is referred to in this section.<sup>11</sup> But different considerations apply to reports of public officials, made in discharge of their official duties, which are admissible under this section. Thus, a report by a Deputy Magistrate, relating to jungle rights in a forest, was held to be admissible.<sup>12</sup> Entries relating to disappearance of persons, whose names appear in revenue papers made by a *patwari* after obtaining the orders of the Court, are considered admissible.<sup>13</sup> Canal papers are admissible under this section.<sup>14</sup> Inspection notes of a Revenue Officer, who inspected a land to be acquired, cannot be read as evidence under the section.<sup>15</sup>

In a dispute, as to whether a certain institution is a Sikh Gurudwara or not, reports of Tehsildar and Extra Assistant Commissioners prepared in inquiry into *muafi* of the land, at a time when there was no such dispute, were held to be relevant and entitled to considerable weight.<sup>16</sup> Peon's return in execution proceedings, being an official record made by a public servant in the discharge of his official duty, is admissible in evidence.<sup>17</sup> But where a process-server whose duty was to serve notice of an injunction, inserted in his report a statement, which it was not his duty to include it was held that the statement was not evidence of the facts stated therein.<sup>18</sup> The words "an entry" in this section are not intended to apply to the opinions of public officers based on or inferences drawn from the allegations made before them in the course of inquiries conducted under Section 202, Cr. P. C., or under Order 26, C. P. C., but is confined only to such statements of facts in issue or relevant facts as are made by the public officers concerned in the course of their official duty, and are required to be entered in any book, register or record intended for the purpose.<sup>19</sup>

9. 36 All. 282; A. I. R. 1914 All. 474; 22 I. C. 115.
10. Ghulam Mohammad v. Samundar Khan, 1936 Lah. 37; 165 I.C. 626.
11. Keolapati v. Amar Krishna Narain Singh, 1939 P.C. 249; 188 I. C. 662; 44 C. W. N. 66; 6 B.R. 1; 1939 O. L. R. 553.
12. Maheshwar Naik v. Sailendra Narayan, 1951 Orissa 327; I. L. R. (1949) 1 Cut. 312.
13. Ram Pheran v. Shri Ram, 1947 Oudh 174; I. L. R. 22 Luck. 164; 230 I. C. 50; 1947 O. W. N. 59; 1947 A. W. R. (C.C.) 23.
14. Isar Nonia v. Karinam Pandey, A. I. R. 1958 Pat. 353.
15. Sub-Collector, Ongole v. Yerra Anumanchamma, (1966) 2 Andh. W. R. 186; A. I. R. 1967 Andh. Pra. 230, 233.
16. Ram Kishan v. Bur Singh, 1934 Lah. 39; I. L. R. 15 Lah. 270; 151 I. C. 738; 36 P. L. R. 442.
17. Heramba v. Surendra, 53 I. C. 20; A. I. R. 1919 Pat. 454; see also (Mrs.) Lall v. Raj Kishore Narain Singh, 1933 Pat. 658; 147 I. C. 101; (Mst.) Rewati v. Mohan Lal, 1940 Lah. 312; 192 I. C. 45; 42 P. L. R. 288.
18. Fatch Muhammad v. Hakim Khan, 1926 Lah. 629; 96 I. C. 825.
19. Ghanaya v. Mehtab, 1934 Lah. 890.

(u) *Order sheet, entries in.* An entry in an order sheet of the Court has been held to be evidence under this section of service of notice on a party.<sup>20</sup> But the order sheet or *roznama* merely records as to what happened on the day on which the suit was fixed for hearing. In the absence of a separate order of consolidation of suits, a mere entry in the *roznama* that certain suits were consolidated does not amount to a judicial order consolidating the suit.<sup>21</sup>

(v) *Official communications.* Where, according to the official practice, a book (a file of papers) is maintained, containing the copies of the communication sent, the book of copies thus maintained is itself an official register within the meaning of Section 35, and a public document within the meaning of Section 74 of the Act.<sup>22</sup> An estate note-book maintained in pursuance of the rules in the Court of Wards Manuals is an official document prepared by a public authority in pursuance of a statutory duty and is evidence, though not conclusive evidence of the facts stated therein.<sup>23</sup> Documents proved to have been received in official correspondence by the witnesses and found to be genuine are admissible under this section.<sup>24</sup>

(w) *First information report.* A first information report of an offence recorded by the officer in charge of a police station is relevant under this section, but is not substantive evidence against the accused.<sup>25</sup>

First Information Report is filed by the prosecution generally through informant and tendered under one or other of the provisions of the Act, namely, as corroboration under Section 157 of the Evidence Act or in a proper case under Section 32 (1) of the Evidence Act as to the declaration of the cause of the informant's death, or under Section 8 of the Evidence Act, as part of the informant's conduct.<sup>1</sup> As held in *Mohan Singh v. Emperor*,<sup>2</sup> a first information report may be admissible under this section without formal proof to show that the implication of the accused is not an after thought. In *Azimuddly v. Emperor*,<sup>3</sup> the first information report was held to be of value as one of *res gestae* apart from its use. The first information report is admissible even if the informant is not examined, in which case, it can be used to corroborate or con-

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- 20. *Aswini Kumar v. Karamat Ali*, 1948 Cal. 165; 82 C. L. J. 278; *Gai-bandha Loan Office v. Mst. Saiyadunnessa Khatun*, 1943 Cal. 114; I. L. R. (1943) 1 Cal. 22; 205 I. C. 523; 46 C. W. N. 967.
- 21. *Krishnaji v. Raghunath*, 1954 Bom. 125.
- 22. *Public Prosecutor v. Sadagopan*, 1953 Mad. 785; 1954 Cr. L. J. 1429; (1953) 1 M. L. J. 636; 1953 M. W. N. 291; *Sevugan Chettiar v. Raghunatha*, 1940 Mad. 273; 1939 M. W. N. 841; but see *Biswabhusan Naik v. State*, 1952 Orissa 289; I. L. R. 1952 Cut. 107; 1953 Cr. L. J. 1533.
- 23. *Kuar Shyam Pratap Singh v. Collector of Etawah*, 1946 P. C. 103; 225 I. C. 188; 1946 A. L. J. 280; 50 C. W. N. 729; (1946) 2 M. L. J. 235; 59 L. W. 483; 1947 O. W. N. 5.
- 24. *Desa v. Union of India*, A. I. R. 1958 M. P. 297.
- 25. *Mohan Singh v. Emperor*, 1925 All. 413; 85 I.C. 647; 26 Cr. L. J. 551; I. L. R. (1974) Him. Pra. 948.
- 1. *Sankaralinga Tevan, In re*, A. I. R. 1930 Mad. 632 (2); 31 Cr. L. J. 712; I. L. R. 53 M. 590; 124 I.C. 506; *Emperor v. Mohammad Sheik*, A. I. R. 1943 Cal. 74; 44 Cr. L. J. 322; I. L. R. (1942) 2 C. 114; 205 I.C. 92; *Ram Naresh v. Emperor*, A. I. R. 1939 All. 242; 40 Cr. L. J. 559; *Azimuddly v. Emperor*, A. I. R. 1927 Cal. 17; 28 Cr. L. J. 99; I. L. R. 54 C. 237; 99 I. C. 227.
- 2. A. I. R. 1925 All. 413; 85 I.C. 647.
- 3. A. I. R. 1927 Cal. 17; 28 Cr. L. J. 99; I. L. R. 54 C. 237; 99 I. C. 227.

tradict him. The defence can also use the first information, in such a case, under Sections 145 and 155 (3) of the Act.<sup>4</sup> It is incorrect to state, as is often done, that the first information is admissible under Section 154. A first information report would be admissible in evidence even if it be not signed by the informant.<sup>5</sup>

Entries in the book prescribed under Section 154, Cr. P. C. may be relevant under this section. But a report made to a Magistrate, as provided under Section 157, Cr. P. C., is not relevant under this Section, being a report, though it may be a public document.<sup>6</sup>

(x) *Endorsement of Registrar.* An endorsement by a Sub-Registrar that a certain person presented a document for registration and acknowledged execution of the document is a relevant fact under this section.<sup>7</sup> The Court is not bound to treat the endorsement as conclusive proof of the fact of execution,<sup>8</sup> but it is open to the Court to treat it as sufficient evidence.<sup>9</sup>

(y) *War Diaries.* The documents admissible under section 35 are not only public documents but also records of official acts. War diaries are records of official acts required to be maintained under the rules applicable to the units of the army which maintained those diaries. They are, therefore, admissible under the section.<sup>10</sup>

**9. School Registers.** (a) *General.* The Headmaster of a school, recognized by the Government, is a public servant and a certificate duly prepared by him according to authority is admissible in evidence.<sup>11</sup> Entries as to age, of a scholar in a government or municipal school register are admissible under this section. An entry made by a public servant in a public or official register is in the discharge of his official duty; whether he had any special means of knowledge so as to make the entry relevant under Section 32 (5), Evidence Act, does not affect the admissibility of the entry under this section though it may affect its value. This section stands by itself, independently of Section 32 (5).<sup>12</sup> But an entry in a school register is not of much

4. See *Inchan v. Emperor*, A. I. R. 1943 Cal. 647; 45 Cr. L. J. 210; 210 I. C. 322.

5. *Ratan v. State*, I. L. R. 1960 Bom. 192; A. I. R. 1960 B. 146.

6. *Hasan Abdulla v. State of Gujarat*, A. I. R. 1962 Guj. 214; 1962 Guj. L. R. 107.

7. *Ganpatrao Yadorao v. Nagorao Vinayakrao*, 1940 Nag. 382; 1940 N. L. J. 437; *Fateh Mohammad v. Mst. Ghosia Bibi*, 1953 Ajmer 19.

8. *Jagannath v. Mst. Dhiraja*, 1918 Oudh 120; 46 I. C. 279.

9. *Ganpatrao Yadorao v. Nagarao Vinayakrao*, *supra*; *Sri Ram v. Mohammad Abdul Rahim*, 1938 Oudh 69; I. L. R. 13 Luck. 723; 172 I.C. 882; 1938 O. W. N. 67; *Mst. Shams-un-nissa v. Sh. Ali Asghar*, 136 Oudh 87; 159 I. C. 780; 1935 O. W. N. 1376; A. I. R. 1936

Oudh 87.

10. *Bakshish Singh v. State of Punjab*, (1967)- 1 S. C. R. 211; 1968 S. C. D. 68; 1967 Cr. L. J. 656; 1967 A. W. R. (H. C.) 68; 1967 M. L. W. (Cr.) 130; 69 P. L. R. 107; A. I. R. 1967 S. C. 752, 760.

11. *Maharaj Bhanu Das v. Krishnabai*, 1927 Bom. 11; I. L. R. 50 Bom. 716; 99 I.C. 307; 28 Bom. L. R. 1925; *Manikchand v. Krishna*, 1932 Nag. 117; 140 I. C. 66; 28 N. L. R. 127; *Liladhar v. Mabibi*, 1934 Nag. 44; 149 I. C. 660; 16 N. L. J. 232; *Vishnu v. Kurwillia*, A. I. R. 1957 Ker. 103; I. L. R. 1957 Ker. 367; *Bhim Mandal v. Mangaram Gosami*, A. I. R. 1961 Pat. 21.

12. *Aga Jan Khan v. Kesheo Rao*, 1940 Nag. 217; 186 I. C. 613; 1940 N. L. J. 150; *Latafat Husain v. Onkar mal*, 1935 Oudh 41; I. L. R. 10

evidentiary value, when there is no evidence to show on what materials the entry in the register about the age of the scholar was made.<sup>13</sup> But, there is a presumption, when a boy is admitted into the school, he was accompanied by some close relative of his who must have been aware of his age.<sup>14</sup> Entries in registers of schools, other than Government or State schools, are not admissible in evidence under this section,<sup>15</sup> "because it is said that the registers are not presumed to have been kept in the performance of duty,"<sup>16</sup> and also because the employee of such school is not a public servant within the meaning of section 21, I. P. C. and the registers are not public or official.<sup>17</sup> But if by a statutory provision school authorities of non-Government schools are enjoined to maintain the General Register and to issue the school leaving certificates, the entry of the birth date in that certificate from the General Register would be relevant.<sup>18</sup> An entry in any record of even a private school as to the age of any student may be admissible if run under the Education Code framed by or under the authority of a State Government.<sup>19</sup>

Entries in the conduct book maintained by primary school authorities, entries in application forms for admission in High School, and monthly progress reports, all admittedly maintained under the rules of the Education Department, are relevant as evidence of conduct of the parties.<sup>20</sup>

A transfer certificate granted by the Headmaster of the school in a Native State certified by the Resident was held to be admissible,<sup>21</sup> but not so a certificate issued by the Manchester Chamber of Commerce that there was a coal strike.<sup>22</sup>

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- 12. Luck. 423; 152 I. C. 1042; 11 O. W. N. 1589; Indian Cotton Company Ltd. v. Raghunath, 1931 Bom. 178; 130 I. C. 598; 33 Bom. L. R. 111; Manik Chand v. Krishna, A. I. R. 1932 Nag. 117, 118 (school register); Liladhar Bania v. Mabibi, A. I. R. 1934 Nag. 44, 45 (copies of school registers); B. Kala Ram v. Fazal Bari Khan, A. I. R. 1941 Pesh. 38, 39 (school register); A. Subba Rao v. P. Venkata Rama Rao, A. I. R. 1964 Andh. Pra. 53 (school register of admissions and withdrawals); Ram Bharose v. Jagannath Singh, 1968 Jab. L. J. (S.N.) 5 (school registers and certificates).
- 13. Janaki Nath Roy v. Jyotish Chandra, 1941 Cal. 41; I. L. R. (1940) 1 Cal. 234; 193 I. C. 419; Jagannath v. Moti Ram, 1951 Punj 377; 52 P. L. R. 324; Lakshmi Narain v. State, 70 P. L. R. (S.N.) 31; see also Superintendent and Remembrancer of Legal Affairs, Bengal v. Forhad, 1934 Cal. 766; 153 I. C. 493; Asanand v. Gian Chand, 1936 Lah. 598; 164 I. C. 751; 38 P. L. R. 69.
- 14. Kala Ram v. Fazal Bari, 1941 Pesh. 38; 194 I. C. 824; see also Parmodh Chand v. Narain Singh, 1936 Lah. 104; 163 I.C. 81, as to genuineness of entries in registers more than 30 years old.
- 15. Hoak Saing v. Ma E Hla, 1940 Rang. 191; 191 I. C. 21; 1940 Rang. L. R. 481.
- 16. Gopalan v. Kannan, I. L. R. 1958 Ker. 916; A. I. R. 1959 Ker. 12.
- 17. Anant Ram v. State of Punjab, A.I.R. 1975 Punj. 198; (1975) 77 Punj. L. R. 75; 1975 Cur. L. J. 126.
- 18. Ganchi Vora Samsuddin Isabhai v. State of Gujarat, 1970 Cr. L. J. 1348; A. I. R. 1970 Guj. 178; Bhim v. Harish Chander, 1971 Punj. L. J. 859; 74 Punj. L. R. 33; 1972 Cur. L. J. 13.
- 19. Radha Krishan v. Bhushan Lal, A. I. R. 1971 J. & K. 62; Bhim Mandal v. Magaram, A. I. R. 1961 Pat. 21 (school register as required by Bihar and Orissa Education Code); Chunni Bai Madhoram v. Girdharilal Chunnilal, 150 I.C. 1007; A. I. R. 1934 Nag. 1 (entries in application for admission to High School maintained under rules of Education Department).
- 20. Chunnilai Madhoram v. Girdharilal Chunnilal, 1934 Nag. 1; 150 I. C. 1007; 16 N. L. J. 319; 30 N. L. R. 62; Soonkoro Sayamma v. Soonkoro Areec, 4 I. C. 1045.
- 21. Mahraj Bhanudas v. Krishnabai, 1927 Bom. 11; I. L. R. 60 Bom. 716; 99 I. C. 307; 28 Bom. L. R. 1225.
- 22. Girdhar Das v. Kerawala, 1926 Bom. 253; 93 I. C. 622; 8 Bom. L. R. 232.

Matriculation certificate and entries in the admission register are admissible as proof of the age of the candidate.<sup>23</sup> But they are not conclusive proof of the date of birth.<sup>23-1</sup>

School admission register of a Municipal High School is prepared by a clerk, who, under Section 358 of the Dt. Municipalities Act is a public servant. The entry is admissible under this section, which embodies an exception to the rule of hearsay. The clerk need not therefore be examined; but his non-examination may be material, if, through negligence or other bad motive, the necessary entries had not been made.<sup>24</sup>

An unproved and unexhibited School Certificate cannot be treated as evidence on the question of age which the court can act upon.<sup>25</sup>

As against age given in admission form and school transfer certificate, medical opinion based on epiphyses has been held to be more reliable.<sup>1</sup>

A school register has not much evidentiary value.<sup>2</sup> The entry of age in a school register is a relevant piece of evidence but slight evidence to the contrary may displace it. Where no such evidence to the contrary was led, the failure to produce the parents is immaterial.<sup>3</sup>

(b) *Recent cases.* In *Anadi Mohan v. Rabindra-Nath*,<sup>4</sup> the appellate Court, in arriving at its finding of fact on the question of age, relied upon the statement as to age contained in the matriculation certificate issued by the Calcutta University. It was contended that the certificate was not admissible in evidence. But the contention was rejected on the ground that the certificate was admissible under this Section. In *Abdul Majeed v. Bhargavan*,<sup>5</sup> it was said that the admission registers of Government schools, being admissible under this Section, could not be discarded on the ground that the appellant failed to examine the parents or guardians in support of the school records; and that it could not be laid down that under no circumstances entries as to the date of birth in school registers have any value. In *Subbarao v. Venkata Ramarao*,<sup>6</sup> it was said that extracts from the registers of admissions and withdrawals of municipal schools are extracts from official registers, maintained by public servants in the discharge of official duties enjoined by law, and are

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23. *Hrishikesh v. Sushil*, 60 C. W. N. 1053; A. I. R. 1957 Cal. 211; *Jagdannanda v. Rabindranath*, 62 C. W. N. 336; 1958 Cal. 533; *Vaidyanath v. Rambadan*, A. I. R. 1966 Pat. 383; 1966 B. L. J. R. 571; *Bhim Mandal v. Magaran Gosain*, A. I. R. 1961 Pat. 21; *Vaidyanath v. Rambadan*, 1966 B. L. J. R. 571; A. I. R. 1966 Pat. 383, 385; *Anadi Mohan Ghose v. Rabindra Nath Dutta*, A. I. R. 1962 Cal. 265, 268.  
 23-1. *K. Venkatraman v. Union of India*, 1974 Lab. I. C. 1190 (Orissa).  
 24. *Siram Reddi, In re*, (1959) 2 Andh. W. R. 249; 1959 M. L. J. Cr. 651; see also *Vaidyanath v. Rambadan*, *supra*.  
 25. *Ram Murli v. State of Haryana*, 1970 S. C. Cr. 510; (1970) 1 S. C. W. R. 767; 1970 Cr. L. J. 991; 1970 Cur. L. J. 528; 72 P. L. R. 1000; A. I. R. 1970 S.C. 1029, 1032 (question of age of prosecutrix in cases under sections 366 and 376 I. P. C.).  
 1. *Karam Singh v. State*, 71 P. L. R. (S.N.) 21.  
 2. *Janaki Nath Roy v. Jyotish Chandra Acharya*, A. I. R. 1941 Cal. 41.  
 3. *Bhagwan Das Singh v. Harchand Singh*, A. I. R. 1971 Punj. 65 at pp. 72, 73.  
 4. A. I. R. 1962 C. 265: 65 C. W. N. 1165.  
 5. I. L. R. (1962) 2 Ker. 65; A. I. R. 1963 Ker. 18.  
 6. A. I. R. 1964 A. P. 53: (1963) 2 Andh. W. R. 307.

public documents which can be proved by secondary evidence. They fall within the ambit of this Section and cannot be rejected on the ground that the originals were not called. In *Shiv Ram v. Shiv Charan Singh*,<sup>7</sup> it was held, that an entry in a birth and/or death register as to age is excellent evidence, and may have to be preferred to entries in the records of educational institutions. But the same rule cannot apply in cases where the evidence furnished by the birth registers is not available. It cannot be laid down that entries of age, in school registers, have little or no evidentiary value. Each case must depend upon its own facts and circumstances and must be decided on the net balance or the various counts of proof offered therein. In *Bansi Ram v. Jit Ram*,<sup>8</sup> it was said that the evidentiary value of entries in records of educational institutions has seldom been considered to be great. The evidence as to age in birth registers has generally been considered to be of superior quality in comparison to entry in school records. In *Brij Mohan Singh v. Priya Brat Narain Sinha*,<sup>9</sup> it was observed : "However much one may condemn such an act of making a false statement of age with a view to secure an advantage in getting public service, a judge of facts cannot ignore the position that in actual life this happens not infrequently. We find it impossible to say that the Election Tribunal was wrong in accepting the appellant's explanation." Taking all the circumstances into consideration, the Supreme Court was of opinion that the explanation may very well be true, and so it will not be proper for the Court to base any conclusion about the appellant's age on the entries in the admission registers of schools, or the certificate issued by the Bihar School Examination Board.

Where there are two documents, one, an entry in the school admission register, and the other, an entry in the staff card, and both of them have been found to be genuine, and all that was proved was that there was an entry to that effect in the school admission register, there was no reason to prefer the entry in that register to the entry in the staff card as the school register has not much evidentiary value.<sup>10</sup>

**10. Municipal Register.** If a Municipality is a public body and its functionaries are public officials, a book or a register maintained by that body is a public book or register within the meaning of this section. Extracts from *khewat khasra* and the register of immovable property of 1931 kept by the Municipal Board under the orders of the Government, are public documents.<sup>11</sup> Extracts from the register of a Town Area Committee (a local body) is admissible in evidence in support of the title of parties in respect of house property.<sup>12</sup> The *khasra paimaish* is not a record of title, but a mere record of survey and carries with it no presumption of correctness so far as the question of ownership is concerned.<sup>13</sup> It is true that no presumption of correctness attaches to these documents, but this is a different matter altogether from holding them

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| <p>7. I. L. R. 1964 Raj. 26: A. I. R. 1964 Raj. 126.</p> <p>8. A. I. R. 1964 Punj. 231.</p> <p>9. (1965) 3 S. C. R. 861: (1964) 1 S. C. J. 644; (1964) 1 S. C. W. R. 588; 1964 B.L.J.R. 538: (1964) 2 Andh. L. T. 410: (1964) 2 Andh. W. R. (S.C.) 140: (1964) 2 M. L. J. (S.C.) 140: A.I.R. 1965 S.C. 282, 287.</p> <p>10. Tata Iron and Steel Co., Ltd. v. Abdul Wahab, A. I. R. 1966 Pat.</p> | <p>458.</p> <p>11. Municipal Board, Aligarh v. Mumtaz Khan, 1948 All. 309: 1948 A.L.J. 87; Jassa Ram v. Puran Bhagat, 1938 Lah. 440: 40 P. L. R. 693: 118 I. C. 52; Jagan Kocri v. Chairman, Gaya Municipality, 1937 Pat. 567: 171 I.C. 732; 18 P. L. T. 464. 1978 All. 298.</p> <p>12. Harilal v. Anrik Singh, A. I. R. 1934 Lah. 885.</p> <p>13. Kartar Singh v. (Mst.) Mehr Nishan,</p> |
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inadmissible in evidence.<sup>14</sup> There is a presumption that an assessment list prepared by a Municipality was duly published at the time the assessment was made, and that after due publication it became final, and if an assessee alleges in the face of any entry in such a list that an alleged tax was never paid by him or his predecessor-in-interest but by third person, the burden is on him to prove that it was so realized.<sup>15</sup> Where it has not been shown that a record plan was prepared by a public servant in the discharge of his official duty, or by any other person in pursuance of his duty specially enjoined by the law of the country, nor has it been established by evidence that the said document formed the act or record of the act of public officers within the meaning of Section 74, the record plan cannot be admitted in evidence either under Section 35 or Section 74, in the absence of proper evidence and of necessary particulars.<sup>16</sup>

**11. Jail register.** Jail registers are official records kept by public servants in the discharge of their official duties, and as such are admissible under this section.<sup>17</sup>

**12. Crime note-book.** Where there is an official duty cast upon any officer to make an entry, and in pursuance of such a duty he makes an entry in his register, such entries are admissible in evidence under this section. Entries in the Village Crime Note-Book are, therefore, admissible to prove that certain crimes were reported and registered, but, of course, they are no proof against persons named as suspects in them.<sup>18</sup>

**13. Forest marking book.** Entries in a forest marking book, made by the forest guard and checked and initialled by the officer responsible for the correctness of the marking, are entries in an official record which are admissible in evidence under this section.<sup>19</sup>

**14. Vaccination report.** Entries of vaccination in a vaccination report are relevant and certified copies of such entries are admissible.<sup>20</sup> But, where an entry in the vaccination register, which includes a statement by a woman that a person, bearing the name of the alleged father of her illegitimate child, was the father of the illegitimate child, is made three years after its birth, it is doubtful if the statement is admissible under this section.<sup>21</sup>

**15. Hospital register.** Entries in a prescription register maintained by a Government compounder in a Government dispensary are admissible under Section 35, although the particular compounder or compounders who made these entries have not been called as witnesses to prove their handwriting.<sup>22</sup>

An outdoor ticket and the discharge certificate granted by authority of a public hospital, as they show the entries in the official register made by a

14. Jassa Ram v. Puran Bhagat, 1938 Lah. 440.
15. Bhagalpur Municipality v. Maulvi Faik, 1930 Pat. 370; 126 I.C. 908.
16. Gouri Shankar v. Emperor, 1930 All. 26; 120 I.C. 547; 1930 A. L. J. 244.
17. Rama Rao v. Emperor, 1943 Oudh 17; 203 I.C. 143; 1942 O. W. N. 530; 1942 A. W. R. (C.C.) 333.
18. Amdumiyam Guljar Patel v. Emperor, 1937 Nag. 17 at 27; I. L. R.
19. Barikrat Kunbi v. Emperor, 1943 Nag. 139; I. L. R. 1943 Nag. 358; 205 I. C. 564; 1943 N. L. J. 130.
20. Manik Rao v. Deorao Baliram, 1955 Nag. 290; I. L. R. 1954 Nag. 709.
21. Kanniappan v. Kullammal, 1930 Mad. 194; 126 I.C. 613; 1929 M. W. N. 696.
22. D'Cruz v. D'Cruz, 1927 Oudh 310; 103 I. C. 512.

public servant in the discharge of his official duties, are public documents and are admissible in evidence on the combined effect of this section and Section 74.<sup>23</sup>

**16. Recovery list.** A recovery list duly made as directed by Sec. 103 of the Cr. P. C. (now sec. 100) would be admissible under this section,<sup>24</sup> but not so if it contains a confession.<sup>25</sup>

**16-A. Voters' list.** The earlier view of the Orissa High Court was that in the absence of evidence from the person preparing the voters' list and without knowing as to who gave the information and what was the nature of enquiry made, the voters' list could not be relied upon in proof of the facts stated therein such as father's name etc.<sup>1</sup> However, in a later Full Bench case,<sup>2</sup> it was held that voters' lists prepared in accordance with the relevant Act are public documents under section 74 (1) (iii) of Evidence Act and are admissible under section 35. It is not necessary to examine the official who prepared it or the person who gave the information. The Court has to regard the facts entered therein as proved unless disproved. The same view was taken in the undenoted cases.<sup>3</sup> The burden to disprove the fact lies on the person who disputes it.<sup>4</sup> If a person is recorded in voters' lists of two villages all that can be inferred is that when the lists were being prepared he was living at both, the places.<sup>5</sup>

**17. Register of power-of-attorney.** An entry in the register of power-of-attorney maintained by the registering officer under the Registration Act is relevant under this section to prove the contents of a power-of-attorney register.<sup>6</sup>

**18. Entries consequent on decree.** Entries in public records consequent on a decree are admissible under this section.<sup>7</sup>

**19. (a) General Diary.** Section 44 of the Police Act V of 1861 prescribes the maintenance of the general diary. So, an official duty is cast upon the station house officer and therefore entries made by him in the register are admissible under this section. To prove these entries the person who made them need not necessarily be called.

**(b) Accident Register.** This is a register prescribed by the Civil Military Code of each State and the State of Madras is regulated by the Madras Civil Code, Vol. 1, 4th edition, 1928, paragraph 769 (4). It is thus a docu-

23. Ramani Bala v. Kanai Lal, A. I. R. 1965 Tripura, 17.
24. Baloch v. Emperor, 1933 Sind 220: 144 I.C. 772.
25. Ib., Mahfuz Ali v. State, 1953 All. 110: 1953 A. L. J. 193.
1. Sulei Bewa v. Gurusari Rana, A. I. R. 1971 Orissa 299; (1971) 37 C. L. T. 297; Paramananda Sahu v. Babu Sahu, (1970) 36 C. L. T. 1211.
2. Uma Sahuani v. Thakur Sahu, A. I. R. 1972 Orissa 158; 38 C. L. T. 82; (1972) 1 Cut. W. R. 57: I. L. R. (1971) Cut. 161.
3. Wandjee Singh v. Shiv Prasad, 1978 B. L. J. R. 165; Anadi Charan v.

- Madan Ojha, (1973) 89 Cut. L. T. 1013; Chellammal v. Angamuthu, 1978 Cri. L. J. 752 (Mad.); (1977) L. W. (Cr.) 217; Linga v. Ajodhya, A. I. R. 1974 Orissa 107; (1975) 2 Cut. W. R. 1108.
4. (1972) 49 Ele. L. R. 545 (Punj.).
5. Thayammal v. M. Gounder, A. I. R. 1971 Mad. 282; (1970) 1 M. L. J. 222.
6. Pattu Kumari v. Nirmal Kumar, 1939 Cal. 569; 185 I.C. 691; 43 C. W. N. 907.
7. Kesho Prasad Singh v. Mst. Bhag-jogna Kuer, 1937 P. C. 69.

ment falling under this section, and the relevant entries therein can be exhibited. It is not a privileged document and should be produced in answer to summons as laid down in *In re Venkanna*.<sup>8</sup>

(c) *Report of Court of Enquiry on accident to aircraft.* The report of a Court of Enquiry on accident to aircraft by crash while navigating, is an official report of a formal investigation by a Court under Rule 75 of the Indian Aircraft Rules. The investigation is to be conducted by an authority who is designated in the statute and or rule as a Court. Though designated as a Court, the Court of Enquiry is not a civil Court which can deliver judgments and pass a decree. Such a report is not admissible as a judgment under Sections 40, 41 and 42 of the Act, but is admissible under this section. The report is, however, entitled to adequate weight and its findings, as to matters of fact, cannot be rejected or set aside unless sufficient acceptable evidence is tendered before the Court hearing the suit to indicate the contrary findings.<sup>9</sup>

The report of the Court of Enquiry cannot be regarded as an entry in a public or official book, register or record within the meaning of this section. Yet this enquiry is a formal and statutory enquiry under Section 7 of the Aircraft Act, 1934, read with Rule 75 of the Indian Aircraft Rules. It is not a private enquiry. The report is a relevant fact under Section 5 of the Act, because it bears on the question of the existence or non-existence of every fact in issue and of such other facts which are regarded as relevant under this Act. This report is also a fact which speaks of the occasion, cause or effect or facts in issue under Section 7 of the Act. The report is further admissible as a fact under Section 9 of the Act because it is a fact necessary to explain or introduce a fact in issue or relevant fact, or which supports or rebuts an inference suggested by a fact in issue or relevant fact, or fixes the time and place at which any fact in issue or relevant fact happened. For these reasons the report of the Court of Enquiry on the accident is a relevant fact and as such is admissible. The report is a printed report and published by the Government under Rule 75 of the Indian Aircraft Rules. The report bears all the authentic marks of official recognition. Therefore, under Section 81 of the Act the Court is bound to presume the genuineness of this report. Therefore, the report is both relevant and admissible, but the evidence tendered before the Court of Enquiry is not necessarily evidence.<sup>10</sup>

(d) *Wound certificate.* The wound certificate is a copy of the entries in the accident register and the opinion of the doctor noted as to the nature of the injuries and the probable cause thereof. It is admissible only when proved by the evidence of the person giving it, apart from the special authority like Section 509, Cr. P. C. (now Section 291 of the 1973 Code).

(e) *Post-mortem certificate and post-mortem note.* The post-mortem certificates occupies the same place as wound certificate. It is an elaborate record summarising the salient facts observed by the doctor in autopsy with the opinion as to the cause of death and instructions as to any further action that may be necessary in the circumstances of the case. The post-mortem certificate by itself proves nothing; it is not evidence; it can only be used by the witness who conducts the post-mortem enquiry as an aid to memory while giving evidence. In the absence of the evidence of the medical witness, the post-mortem

8. A. I. R. 1940 Mad. 240; 189 I.C. 816.

9. Madhuri v. I. A. Corporation, A.

I. R. 1962 C. 544.  
10. Indian Airlines Corporation v. Madhuri, A. I. R. 1965 C. 252.

certificate cannot be referred to. It can also be used as a record of what he observed at the time to corroborate or perhaps to contradict whatever he might say in the witness-box. The post-mortem certificate cannot by itself be a substantive evidence.<sup>11</sup>

Sections 159 to 161, Indian Evidence Act, permit a limited use being made of the post-mortem notes, namely, that they can be used by the witness who made them for the purpose of refreshing his memory or by a party for the purpose of contradicting the witness. The post-mortem notes contain an elaborate record of what was observed at the autopsy and of which the post-mortem certificate is a summary.

(f) *Bedhead ticket.* In *Bechu v. The King*,<sup>12</sup> it was held that as the doctor who had made entries in a bedhead ticket was not examined the bedhead ticket was not admissible in evidence. But the bedhead ticket kept in a Government hospital is a public record maintained by a public servant in the course of his duty and admissible without examining the doctor or compounder who made entries in it.<sup>13</sup>

(g) *Possession receipt.* In *Rewti v. Mohanlal*,<sup>14</sup> it has been held, that where the duty of the process-server is to deliver possession and to record what he had done, his record is a public record of an official act and the process server's report of the giving of possession is admissible in evidence, without his being called as a witness.

(h) *Meteorological records.* Records kept by the weather bureau or signal services or by public officers who are required to keep such records as part of their official duty are admissible in evidence as to the condition of the weather at a certain time and place, as they come within the rule which admits in evidence official registers or records kept by persons in public offices in which they are required either by statute or the nature of their office to write down particular transactions occurring in the course of their public duties or under their personal supervision.<sup>15</sup>

(i) *District Gazetteer.* A district gazetteer even if not admissible under Section 35 may be read for what it is worth. But it is no substitute for a family pedigree.<sup>16</sup> The Bengal District Gazetteer may be referred to see, if the duties of *Simanadars* are the same as the duties of *chowkidars*.<sup>17</sup>

(j) *Official Reports.* Reports made by public officers within their province and within their line of duty are not of judicial force or authority, but, being made in the course of duty and under statutable authority, are entitled to great consideration.<sup>18</sup> C.I.D. officer is a public servant and when he is deputed to watch and report the proceedings of an election meeting his report is in discharge of his official duty, and as such is relevant under first part of Section 35. It can be used as corroborative evidence of fact of such meeting being held.<sup>19</sup>

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| 11. In re Ramaswami, A. I. R. 1938 Mad. 336; 47 L. W. 272.               | 52 I. C. 851.   |
| 12. A. I. R. 1949 Cal. 613; 51 Cr. L. J. 158.                            | 17. Lalu v. Bejoy, 33 I. C. 553.  |
| 13. Smt. Top Kanwar v. L. I. C., 1975 Raj. L. W. 161; 1975 W. L. N. 858. | 18. Mutturamalinga v. Perianayagam, 1 Indian Appeals 209.   |
| 14. A. I. R. 1940 Lah. 312; 192 I. C. 45.                                | 19. Kanwarlal Gupta v. Amarnath Chawla, A. I. R. 1975 S.C. 308; (1976) 1 S. C. J. 45; (1975) 3 S.C. C. 646; (1975) 2 S. C. R. 259; P. C. Purushottama v. S. Perumal, A. I. R. 1972 S.C. 608; (1972) 1 S.C.C. 9. |
| 15. 10 R. C. L. 1129.  |   |
| 16. Bal Mukund v. Bishwanath Singh,                                      |   |

A Tahsildar's report regarding the fact of cattle fair being held at a particular place is not admissible under this section.<sup>20</sup>

A Revenue officer's report to Tahsildar in compliance with the latter's direction regarding possession of a field may be admissible but has no evidentiary value.<sup>21</sup>

(k) *Other instances.* Other instances of entries held admissible under Section 35 are an entry made by a Mohammadan Registrar of Marriages under Act I of 1876,<sup>22</sup> an entry in a register to prove previous convictions,<sup>23</sup> an entry in the register of civil suits that a suit was disposed of in a particular manner; and entries in public records consequent upon a decree.<sup>24</sup>

Where the reports of the Patwari and the Baqui Nawis show that the petitioner was in cultivating possession of the land as a tenant, the presumption should be in favour of the correctness of the reports under the section.<sup>25</sup>

The voters' list on the question of a person being the adopted son of another is irrelevant, particularly when there is no evidence of the person who prepared it nor of the authenticity of the record.<sup>1</sup> A voters' list in which the name of the father of a person was given cannot be relied upon in proof of the relationship of father and son when the person who prepared the voters' list was not examined in the suit.<sup>2</sup>

Some instances of entries in documents not admissible under this section are: statement of a witness made to a police officer under the provisions of Section 162, Cr. P. C., though reduced to writing, is not a public or official document and the writing in question cannot be used as evidence in any proceeding to prove that the statement contained therein was in fact made;<sup>3</sup> a recital in a judgment not *inter partes* of a relevant fact is not admissible in evidence under this section.<sup>4</sup> The opinions of public officers based on, or inferences drawn from, the allegations made before them in the course of enquiries conducted under Section 202, Cr. P. C.<sup>5</sup> or under Order XXVI, C. P. C. are not admissible, because the word 'entry' in this section is confined only to such statements of facts in issue or relevant facts as are made by public officers concerned in the course of their official duty and are required to be entered in any book, register or record intended for the purpose.

(I) *Pleadings.* The following extract from the Civil Justice Committee (1924-25) Report will be interesting<sup>6</sup>:

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| 20. State of U. P. v. Smt. Ram Sri, A. I. R. 1976 All. 121: 1975 A. W. C. 632: 1975 R. D. 339.<br>21. Chakradhar Raut v. State, (1974) 1 Cut. W. R. 115: 41 Cut. L. T. 52.<br>22. Khadam Ali v. Tajimunnissa, 10 Cal. 607.<br>23. Maung Tha v. Emperor, 19 Cr. L. J. 11.<br>24. Tarak Chandra v. Prasanna Kumar, A. I. R. 1924 Cal. 654: 78 I. C. 719.<br>25. Piare Lal v. Assistant Registrar-cum-Managing Officer, 1967 Cur. L. J. | 283: 69 P. L. R. 495, 498.<br>1. Sulai Bewa v. Gurubari Rana, A.I.R. 1971 Orissa 299: (1971) 37 Cut. L. T. 297.<br>2. Paramananda Sahu v. Babu Sahu, (1970) 36 Cut. L. T. 1211, 1218.<br>3. Isab Mandal v. Queen-Empress, 28 Cal. 348.<br>4. Seethapathi v. Venkanna, F. L. R. 45 M. 332: 66 I.C. 280: A. I. R. 1922 Mad. 71 (F.B.).<br>5. Ghanaya v. Mehtab, A. I. R. 1934 Lah. 890.<br>6. Page 497. |
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"Section 35 relates to the relevancy of any entry in the public record made in the performance of a duty. In a decision reported in *Seethapathi v. Venkanna*,<sup>7</sup> the Madras High Court held that the summary of pleadings given in a judgment is not relevant evidence as to the contents of those pleadings. The pleadings in old suits are often not available and the only evidence available to prove their contents is not infrequently the recitals thereof in the judgments in such suits. Such recitals are entries in public records relating to a fact-in-issue or a relevant fact, and made by a public servant in the discharge of his official duty. Rule 4 of Order XX of the Code of Civil Procedure requires a concise statement of the case to be given in the judgment and this usually takes the form of a summary of the pleadings. It is difficult to see why such recitals cannot be treated as coming within the purview of Section 35. Even if they are not covered by Section 35 as it stands, it should be made to embrace them. Otherwise valuable evidence of a reliable character will be lost, letting open the door for perjured testimony. The possibility of the summary being not altogether accurate affects the weight and not its admissibility."

(m) *Other public documents.* A single document may be a public record within the meaning of this section, and a report made by a District Officer in the discharge of his duty, as such officer, has been held admissible in evidence.<sup>8</sup> But the question whether such a document is an entry in an official book, register or record, will depend on the circumstances of each case. Thus, it has been held, that answers to official enquiries made under the direction of Government are *prima facie* admissible,<sup>9</sup> and in another case where a Tahsildar reported in response to a Collector's requisition that according to a village Munisif certain charities had not yet been commenced, it was held that this was not admissible under the first part of this section to prove that the charities were not performed at that date.<sup>10</sup> A document purporting to be a certified copy of a will taken from the Protocol of Record in Ceylon was held not to be admissible under this section.<sup>11</sup> But a certified copy of an entry in a register of births and deaths has been admitted under this section,<sup>12</sup> and a certified copy of an order of a Probate Court and grant of Letters of Administration has been held admissible under Sections 66 and 74.<sup>13</sup> Referring to Mr. Allen's Settlement Report of 1888–1898 for Chittagong (page 27), and to his "Note upon *itmamdaars* and *dar itmamdaars* in Chittagong" to be found in Vol. V of the selections from the Records of the Board of Revenue L.P. (p. 200, esp. p. 225) and to the District Gazetteer of Chittagong, the Calcutta High Court observed: "It may be that such reports and books not strictly speaking evidence or that they do not come, or do not at all come within the scope of Section 35 of the Evidence Act, but we see no objection to their being read for what they may be worth."<sup>14</sup> A passage in a District Gazetteer describing the lineage of one of the leading families of the district cannot supply the want

7. I.L.R. 45 Mad. 332; 66 I.C. 280 : A.I.R. 1922 M. 71 (F.B.).
8. Raman v. Secretary of State, 11 Mad. L.J. 315 ; I.L.R. 24 Mad. 427; Krishna v. The State, A.I.R. 1958 Pat. 166 : 1958 B.L.J.R. 6.
9. Parbati v. Chandrapal, (1909) 36 I.A. 125 ; 31 All. 457 and Jijoyamba v. Bengalakshmi, 7 M. L. T. 117 : (1910) M.W.N. 547; 5 I.C. 827.
10. Mallikarjuna v. Secretary of State, 35 M. 21.
11. Ponnmamal v. Sundaram, (1900) 23

- M. 499, 503.
12. Krishnamachariar v. Krishnamachariar, (1916) 38 M. 166 : 19 I. C. 452 ; A.I.R. 1915 M. 815.
13. Habiram v. Hem Nath, 1916 Cal. 676; 30 I. C. 590; 19 C.W.N. 1068.
14. Cf. Garuradhwaja Prasad v. Superundhwaja Prasad, 27 I.A. 238 : 23 All. 37 (P.C.); Jogesh Chandra v. Mokbul Ali Chowdhury, 1921 Cal. 474 ; 60 I.C. 984; see also Kali Prossanna v. Nagendra Nath, 44 C.W.N. 873.

of a pedigree showing the family and the members of it.<sup>15</sup> It has been held by the Allahabad High Court that, when the original notification or order under Section 15 of Arms Act, 1878, is not traceable and has been lost, para. 92 in the Orders and Rules under the Act published under the authority of U.P. Government, being a record made by a public servant in the discharge of his official duty, can be admitted in evidence and relied upon.<sup>16</sup> An assessment order of the Sales-tax Officer is a public document. The order is relevant to show whether a person was a partner of a firm. The return of sales-tax by an assessee under the U.P. Sales Tax Act is a public document under this section and is also admissible under Section 11.<sup>17</sup> A map brought into existence by a survey under the Calcutta Survey Act, 1887 (Bengal Act 1 of 1897), depicting the disputed property would be admissible in evidence in a suit for declaration of title.<sup>18</sup> A levy demand notice is not admissible to prove possession of the notice on the survey plot number mentioned in it without examining the person preparing it.<sup>19</sup> Report of the Statistical Department of the State Government prepared on sample survey basis to ascertain market value of property is not necessarily a safe guide to fix market value of a particular plot acquired under the Land Acquisition Act.<sup>20</sup>

**20. Proof by public record.** If the entry states a relevant fact, the entry itself becomes, by force of the section, a relevant fact; that is to say, it may be given in evidence as a relevant fact, because being made by a public officer or other person in performance of a special duty, it contains an entry of a fact which is relevant.<sup>21-22</sup> The entry is evidence, though the person who made it is alive and not called as a witness. For the proof of public and official documents, see Sections. 76 to 78 *post*. Though the register may be *prima facie* evidence of matters directed or authorised to be inserted therein, yet the person relying on the register may, by offering other evidence, displace the presumption which the register affords.<sup>23</sup> A person, who is not a party to the making of the entry, is not bound by the statements in it, in the sense of being estopped or concluded by them. They are only received as evidence and are open to be answered, and the statements in them may be rebutted.<sup>24</sup> Where a deposition of a witness had been recorded in the ordinary way, that record, and not an abstract of the evidence in the judgment, was the proper evidence to give of the statement.<sup>25</sup> But, if the Court acted upon an oral admission and recorded it in its judgment, which constitutes the only official record of it, it would be admissible in evidence under this section.<sup>1</sup>

**21. Facts of which public records are evidence.** This section does not make the public book evidence to show that a particular entry has not

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- 15. *Balmukund v. Bishwanath Singh*, 52 I.C. 851; but see *Lalu v. Bijoy Chand*, 43 C. 227: 33 I.C. 553: A.I.R. 1916 C. 842.
- 16. *Amir Khan v. State*, 1950 All. 423, 425: 1950 A.L.J. 407: 1950 A.W.R. 328. See now the Arms Act, 1951, Section 4.
- 17. *Allah Bux v. Ratan Lal*, A.I.R. 1958 All. 829.
- 18. *Chunilal Dutta v. Purna Laxmi Pal*, 69 G.W.N. 759, 761.
- 19. *Thunga Bai v. Vishalakshi*, A.I.R. 1975 Karn. 111.
- 20. *The Collector of Kamrup v. Raj Chandra Sarma*, A.I.R. 1975 S.C. 1905.
- 21-22. *Lekhraj v. Mahpal*, 7 I.A. 63: 5 C. 744; *Parbutty v. Purno*, 9 Cal. 586.
- 23. *Ram Das v. Official Liquidator*, 9 A. 386, and so it has been held that a Magistrate's certificate as to the voluntariness of a confession is *prima facie* but not conclusive evidence; *Nur Singh v. R.*, (1922) 25 O.C. 299: 25 Cr.L.J. 561.
- 24. *Lekhraj v. Mahpal*, 7 I.A. 63: 5 C. 744, 755.
- 25. *Saradamba v. Pattabhiramayya*, 1931 Mad. 207: I.L.R. 53 Mad. 952: 129 I.C. 463.
- 1. *Subarayya Chettiar v. Sellamuthu*, 1933 Mad. 184: 142 I.C. 548.

been made in it.<sup>2</sup> An entry is evidence of those matters which, under the provisions of a particular law, it is the duty<sup>3</sup> of a particular person to enter in the register, kept in accordance with the direction of that law or of matters entered by a public servant in the discharge of his official duty.<sup>4</sup> But, entries of matters, which there is no duty to record, are inadmissible.<sup>5</sup> Statements about a person's family, which it is not the function of the *wajib-ul-arz* to record, are not admissible under this section.<sup>6</sup> So, a statement in a record-of-rights as to the status of a person as an adopted son of another,<sup>7</sup> is not admissible. But a register can be received to prove incidental particulars concerning the main transaction, where these are required by law to be included in the entry. Thus, a birth certificate, in conjunction with evidence as to identity, is some evidence of the marriage of the parents.<sup>8</sup> Again, if the record is made by an officer in the discharge of his official duty, the mere fact that he acts under a misconception about his official duty does not take an entry made by him out of the class referred to in this section.<sup>9</sup> Where a husband and wife (Mahomedans) registered their marriage under Bengal Act, I of 1876, setting out in the form prescribed in Schedule A to the Act as a "special condition" that the wife, under certain circumstances therein set out, might divorce her husband, it was held, in a suit by the husband, that the "special condition" was a matter which, under the provisions of the Act, it was the duty of the Mahomedan Registrar to enter in the register, and that, therefore, a copy of the entry in the register was legal evidence of the facts therein contained.<sup>10</sup>

An entry of a particular fact is nonetheless evidence, though the person enjoined to make that entry has no personal knowledge of that fact, as to where it is reported to him.<sup>11</sup> Although many cases seem to have required personal knowledge by the public officer making the record, there are some cases in which the official responsible for the accuracy of the records did not actually make the entries but maintained only a general supervision over them. In these cases, the personal knowledge of the actual recorder is regarded as sufficient, but the entries must have been made under the supervision of the responsible public officer who must satisfy himself of their truth.

2. In the matter of Juggan, (1880) 7 C.L.R. 356; and see R. v. Grees, (1884) 10 C. 1024; Ali Nasar v. Manikchand, (1902) 25 A. 90; but see Imambandi v. Haji Mutsaddi, 1918 P.C. 11 : 45 I.A. 73 : I.L.R. 45 Cal. 878 : 47 I.C. 513.
3. Doe v. Andrews, (1850) 15 Q.B. 756; Roscoe, N.P. Ev., 124.
4. Cf. Lekhraj v. Mahpal, 7 I.A. 63 : 5 C. 744; and Parbutty v. Purno, 9 Cal. 586.
5. Lyell v. Kennedy, (1899) 14 App. Cas. 437, 448. The section does not extend to entries which a Police Officer is not expected to and is not permitted to make. Ali Nasar v. Manik Chand, (1902) 25 A. 90 at p. 104, the presumption as to truth and accuracy cannot be extended to entries which were never intended to find a place in the record, ib., at p. 103; see also Uman Prasad v. Gandhar Singh, 14 I.A. 127 : I. L. R. 15 Cal. 20; State Government v. Kamruddin, I.L.R. 1956 Nag. 282 : 1956 Nag. 74; Prabhu Narain v. Jitendra Mohan, 1948 Oudh 307 : I.L.R. 22 Luck. 522; Nambdeo v. Ramrao, 1933 Nag. 310 : 146 I.C. 152; Tarakumar v. Kumar Arun, 1923 Cal. 261 : 74 I.C. 383; Murli Prasad v. Sheo Kishore Narain, 1950 Pat. 432 : I.L.R. 29 Pat. 448.
6. Sukhdeo Singh v. Mathra Singh, 1933 Lah. 412 : 142 I.C. 606 : 34 P.L.R. 115.
7. Harihar Singh v. Deonarayan, 1954 Nag. 319 : I.L.R. 1954 Nag. 692.
8. *In re Stollery*, (1926) 1 Ch. 284.
9. Prem Jagat Kuer v. Harihar Singh, 1946 Oudh 163 : I.L.R. 21 Luck. 1 : 223 I.C. 3/3 ; 1946 O.W.N. 26 ; 1946 A.W.R. (C.C.) 32.
10. Khadem Ali v. Tajimunnissa, 10 C. 607.
11. Doe v. Andrews, (1850) 15 Q.B. 756.

In *Henry v. Leigh*,<sup>12</sup> where, in order to prove a certificate of discharge in bankruptcy, a clerk from the Lord Chancellor's office was called to produce a book kept in the office. Lord Ellenborough rejected the book, but said<sup>13</sup> that had it been kept by order of the Lord Chancellor, had it from time to time been laid before him and had he referred to it and acted upon it, the book would have been admissible. As Erle, J., said in *Doe v. Andrews*,<sup>14</sup> admissibility depended upon the public duty of the person who kept the register to make such entries in it, after satisfying himself of their truth.<sup>15</sup>

**22 Personal knowledge not necessary.** The admissibility of this class of evidence does not depend upon personal knowledge (v. ante.). And so, when the manner in which certain *wajib-ul-arz* (or village papers) were directed to be made by Regulation VII of 1882, with respect to custom, appeared to be that the officer recorded the statements of persons who were connected with the villages in the *pargana* in which the *taluka* in suit was situated, and objection was taken to their reception in evidence on the ground that they were not prepared or attested by the Settlement Officer in person, as required by the Regulation, and that the papers on the face of them did not show that the officers had passed any judgment upon the information they received, it was held that it was no valid objection that the papers had been prepared, and attested by officers subordinate to the Settlement Officer, and that the fact that the officers recorded these statements and attested them by their signature amounted to an acknowledgment by them that the information they contained was worthy of credit and gave a true description of the custom.<sup>16</sup> And, in a case in the Calcutta High Court, it was held, that entries in a public register, kept in the Survey Office for the public benefit and under sanction of official duty are admissible under this section, even when they appear to be copies of earlier entries, which had needed re-copying and therefore presumably made without personal knowledge.<sup>17</sup> The Court must assume that the public servant concerned did his duty to the best of his ability, and based the entries on the material of the accuracy of which he was satisfied.<sup>18</sup> As observed by their Lordships of the Privy Council in *Lekhraj Kuer v. Mahpal Singh* :<sup>19</sup>

"When documents are found to be recorded as being properly made up, and when they are found to be acted upon as authentic records, the rule of law is to presume that everything had been rightly done in their preparation, unless the contrary appears. The mere fact then that the settlement records of this Province were prepared and attested by officers subordinate to the Settlement Officer, and not by the Settlement Officer in person, cannot be accepted as in any way invalidating the records themselves."

In *Saraswati Dasi v. Dhanpat Singh*,<sup>20</sup> Garth, C. J., said that he thought the entries in a register made by the Collector under Bengal Act, VII of 1876

12. (1813) 3 Camp. 499.

13. Ibid at p. 501.

14. *Doe v. Andrews*, (1850) 15 Q.B. 756 at p. 759.

15. See also *Stollery, Re, Weir v. Treasury Solicitor*, (1926) Ch. 284, where at p. 320 Scrutton, L. J. said: "No doubt the registrar usually acted upon information supplied to him by others, but he was quite at liberty to reject such statements if he saw reason to believe

that they were untrue."

16. *Lekhraj Kuer v. Mahpal Singh*, 5 C. 744, 751, 753.

17. *Graham v. Phanindra*, 1916 Cal. 617 : 31 I.C. 41 : 10 C.W.N. 1038.

18. *Shyam Pratap Singh v. Collector of Itawah*, 1946 P.C. 103 : I.L.R. 1946 Kar. (P.C.) 111 : 225 I.C. 188 : 1946 A.W.R. (P.C.) 135.

19. 5 Cal. 744 at 752 : 7 I.A. 63.

20. 9 C. 431.

(Bengal Land Registration) could never be evidence of title nor even of possession, except perhaps in the case of entries made under the fifty-fifth section,<sup>21</sup> and that he understood this section (Section 35) to relate to that class of cases where public officer has to enter in a register or other book some actual fact, which is known to him : as for instance, the fact of a death or marriage. But the entry that any particular person is the proprietor of certain land is not properly speaking, the entry of a fact, but is a statement that the person is entitled to the property, and is the record of a right, not of a fact.<sup>22</sup> But, in a subsequent case,<sup>23</sup> in which the plaintiffs tendered in evidence extracts from the Collector's Register, kept under the same Act, for the purpose of showing that certain persons were the registered proprietors of a block of land and the quantity of land held by them, and his evidence as such was rejected by the lower Courts on the authority of *Saraswati Dasi v. Dhanpat Singh*,<sup>24</sup> it was held dissenting from the *dictum* of Garth, C. J., which it was pointed out, was not assented to by Field, J., and was opposed to the decision of the Privy Council in *Lekhraj Kuer v. Mahpal Singh*,<sup>25</sup> that the entries, being of matters as it was the Collector's duty to record in the form directed by the law to be kept, and certified copies thereof were admissible in evidence *quantum, valeat*,<sup>1</sup> In the undermentioned case,<sup>2</sup> the Court said with regard to these entries, "as evidence of ownership their value may be, and I think is very small, but it is impossible to say that they are not evidence, and I therefore admitted them."<sup>3</sup> And, in a case, where there was no settlement of rent under the Bengal Tenancy Act, Chapter X, it was held, that the entry in the record-of-rights, if it was duly published, would be only *prima facie* evidence in favour of the landlord and is rebuttable by the tenant.<sup>4</sup> It has been held, in Bombay High Court that a Collector's book is kept for purposes of revenue, not for purposes of title, and the fact of a person's name being entered in the Collector's book as occupant of land, does not, necessarily, of itself, establish that person's title, or defeat the title of any other person.<sup>5</sup>

**23. Admissibility under special provisions of law.** In certain cases, the law has expressly declared of what particular facts these entries shall be evidence, as in the case of Marriage Registers. A certified copy under the 9th section of Act VI of 1886 is admissible in evidence for the purpose of proving the marriage to which the entry relates.<sup>6</sup> A Register of Parsi Mar-

21. Bengal Act VII of 1876 which provides for cases in which there is a dispute between two persons as to which is entitled to be registered and the Collector has to ascertain which of those persons is in possession.
22. *Saraswati Dasi v. Dhanpat Singh*, 9 C. 431; and see *Ram v. Jebili*, (1882) 8 C. 853.
23. *Shoshi v. Girish*, (1893) 20 C. 940.
24. 9 C. 431.
25. 5 C. 744.
1. *Shoshi v. Girish*, (1893) 20 Cal. 940.
2. *Gungamoojee v. Apurby*, Suit No. 632 of 1901 Cal. H.C. 28 Nov. 1902.
3. *Per Henderson, J.* The value of these entries (which have frequently been admitted in other cases) must to some extent depend upon the cir-

- cumstances proved. In the cases cited, the following documents were admitted : Collectorate Registers, Registers under the Land Registration Act, Land Revenue Chalans, Municipal Bills, Collectorate Bill Registers, Mutation Proceedings, Assessment Registers of Calcutta Municipality and Pattah granted by Government. As to the nature of the latter, see *Freeman v. Fairlie*, 1 M. I.A. 305, 338, 346.
4. *Abdul v. Jogesh*, (1906) 11 C.W. N. 153.
5. *Fatina v. Darya*, (1873) 10 Bom. H. C.R. 187; *Bhagoji v. Bapuji*, (1888) 13 B. 75; *Khaver v. Rukha*, (1904) 6 Bom. L. R. 983.
6. Act VI of 1886 (Births, Deaths and Marriages Registration Act), Sec. 9.

riages is admissible as evidence of the truth of the statements therein contained.<sup>7</sup> So also, is a Marriage Certificate Book under the Special Marriage Act 13 of 1954.<sup>8</sup> A certified copy under the Indian Christian Marriage Act, 1872, is admissible as evidence of the marriage purporting to be so entered or of the facts purporting to be so certified therein.<sup>9</sup> So also is the Hindu Marriage Register and certified extracts therefrom.<sup>10</sup>

A certified copy of certain registers of marriage made otherwise than in performance of a special duty is admissible under Act VI of 1886 for the purpose of proving the marriage to which the entry relates.<sup>11</sup> The solemnization of a marriage between Christians in British India may be proved in England by the production of a certificate of the marriage from the India Office.<sup>12</sup> Foreign Registers of Marriages and Baptisms or certified extracts from them are receivable in evidence in England as to those matters which are properly and regularly recorded in them when it sufficiently appears that they have been kept under the sanction of public authority and are recognized by the tribunals of the country where they are kept as authentic records.<sup>13</sup> A marriage certificate issued under the circulars of the Ecclesiastical Department of the Hyderabad State have been held to be admissible under this section.<sup>14</sup>

**24. Births, Deaths.** Entry in the register of births, deaths and marriages is by statute "*prima facie* but not conclusive evidence of all the facts" required by statute to be entered therein.<sup>15</sup> Such registers are public documents and are admissible under this section, because it is the public duty of the person, who keeps the register, to make such entries, after satisfying himself of the truth. And when it becomes the duty of a public servant to make such entries in any public or official register, it becomes admissible to prove the truth of the facts entered, as well as the fact that the entries were made by the officer. Entries in registers of births, deaths or marriages are at least *prima facie*, though they may not always be conclusive evidence. It is not necessary to prove who made the entries and what was the source of the information.<sup>16</sup>

Without doubt, the identity of the person, whose birth or death is entered in the register, has to be established by other evidence, if that is in dis-

7. Act III of 1936 (Parsi Marriage and Divorce Act), Secs. 6, 8.
8. Act 43 of 1954 (Special Marriage Act), Sec. 47.
9. Act XV of 1872 (Christian Marriage Act), Secs. 79, 80; W.D. v. E.D., 1933 Sind 27 : 141 I.C. 284 : 26 S.L.R. 423.
10. Act XXV of 1955 (Hindu Marriage Act), Sec. 8 (4).
11. Act VI of 1886, Sec. 35 (and as to Muhammedan Marriage Act 1 of 1876) (B.C.) *See* Khadem v. Taji-munnissa, 10 Cal. 607.
12. Westmacott v. Westmacott, (1899) P. 183 : 3 C.W.N. cxlii.
13. Lyell v. Kennedy, (1899) 14 App. Cas. 437, 448.
14. Mohammad Hashim v. Aminabai, 1952 Hyd. 3 : I.L.R. 1952 Hyd 7.
15. MacCardie, J. in Brierly v. Brierly, (1918) L.R.P. 257 : 87 L.J.P.

- 153 : 119 L.T. 343 : 62 S.J. 704; see also Allianz Und Stuttgarter Life Insurance Co., Ltd. v. Hemanta Kumar Das, 1938 Cal. 641 : I.L.R. (1938) 2 Cal. 457 : 178 I.C. 554 : 42 C.W.N. 855; Bharat Basi Naik v. Gopi Nath Naik, 1941 All. 385 : 197 I.C. 866; 1941 A. L. J. 560; Manicka Mudaliar v. Aminakannu, 1942 Mad. 129 : 201 I.C. 39 : 54 L.W. 411; State of H.P. v. Mt. Kala, 1957 Cr.L.J. 847; Govinda v. Lakshmi, 1957 Ker.L.T. 804; Chirutha v. Neelakanta, I.L.R. 1957 Ker. 408 : A.I.R. 1957 Ker. 106.
16. Dasi Ram v. Emperor, A.I.R. 1947 A. 429; Bhujawan Singh v. Shyama, A.I.R. 1964 Pat. 301; Bishwanath Gossain v. Dudhia Lalmuni, I.L.R. 47 Pat. 636 : A.I.R. 1968 Pat. 481, 485.

pute. Where the identity of the person in question with the child whose birth is recorded is not established, it cannot be said that the person in question is the child of the parent mentioned in the birth register.<sup>17</sup> But, when the identity of the person is established, the description of the person in the entry, as the person in question, can be accepted.<sup>18</sup> A birth register maintained by a village munsif in course of his official duty is public record and an entry of the names of father and mother of a child in it is admissible in evidence under this section.<sup>19</sup> Even, if the information, regarding birth or death of a particular person, is not given within the prescribed time, yet, on that account, it cannot be held that the entries regarding birth or death are not admissible, inasmuch as these entries can safely come within the purview of this section. The birth or death register is maintained by a public servant in the discharge of his official duty and it cannot be ignored.<sup>20</sup> In order to admit into evidence a birth entry it is not essential that the person who actually makes the entry must come forward and connect the entry with the person to whom it is said to relate. But the rule, that the identity of the person relating to whose birth an entry in a birth register is sought to be proved should be established is unexceptionable.<sup>21</sup>

Where there is a dispute as to the date of birth or death of a person, an extract from the register of births or deaths is bound to be accepted as conclusive of the matter, if there is no controversy that the extract does not relate to the person, the date of whose birth or death is in question. A birth or death register is covered by the language of this section.<sup>22</sup>

A register of births and deaths kept at police stations is a public document within the meaning of this section and a certified copy, of an extract therefrom, is admissible in evidence.<sup>23</sup> It is not necessary to prove the manner in which the entry was made.<sup>24</sup> It was held in *Sampat v. Gauri Shankar*,<sup>25</sup> that, assuming that a chaukidar's register of births and deaths is a public or other official book within the meaning of Section 35, Evidence Act, the entry produced as evidence in such a register must be shown to have been made by a public servant in the discharge of his official duty, and that failing this, it cannot be accepted as evidence. This ruling was doubted in *Baldei v. Abhey Ram*,<sup>1</sup> and referring to this case it was said in a subsequent Oudh case:<sup>2</sup> "Whatever the state of the law as to chaukidar's death registers may have been in 1910, it is perfectly clear that the register of which a copy is before me is an official register made by a public servant in the discharge of his official duty, and as such is admissible under this section." The case was

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- 17. Hazara Singh v. Attar Kaur, A.I.R. 1976 Punj. 24 : 1975 Rev. L. R. 537.
- 18. Dasi Ram v. Emperor, A.I.R. 1947 A. 429.
- 19. Chellammal v. Angamuthu, 1978 Cr. L.J. 752 (Mad.) : (1977) L.W. (Cr.) 217.
- 20. Manickchand v. Bhagwan Das, A. I. R. 1964 Pat. 358.
- 21. Bansi Ram v. Jit Ram, A.I.R. 1964 Punj. 231.
- 22. Bagiammal v. Kamalammal, A.I.R. 1965 M. 205 : 77 M.L.W. 679.
- 23. Tamizuddin v. Taju, 1919 Cal. 721 : I.L.R. 46 Cal. 152 : 46 I.C. 237 : 22 C.W.N. 822; Shib Deo Misra v. Ram Prasad, 1925 All. 79 : I.L.R. 46 All. 637 : 87 I.C. 938 : 22 A.L. J. 690; Dasi Ram v. Emperor, 1947 All. 429 : 229 I.C. 546 : 48 Cr.L.J. (H.C.) 88; Manikrao Jairamji v. Deorao Baliram, 1955 Nag. 290 : I. L.R. 1954 Nag. 709 : 1955 N.L.J. 149; Mst. Zaibunnissa v. Mst. Hasratunnissa, 1919 Oudh 426 : 52 I.C. 162 : 22 O.C. 124.
- 24. Ghura Devi v. Shyamal Mandal, A. I.R. 1974 Pat. 68.
- 25. (1911) 14 O.C. 68 : 10 I.C. 713.
- 1. A.I.R. 1914 All. 99 : 24 I.C. 540.
- 2. Mst. Zaibunnissa v. Mst. Hasratunnissa, A.I.R. 1919 Oudh 426 at p. 428.

again considered along with other rulings by the same Court in *Mohammed Jafar v. Emperor*,<sup>3</sup> and was explained as follows :

"In all these rulings it is admitted that the question whether any particular entry in a *chaukidar's* register of births and deaths is admissible in evidence depends primarily on Section 35, Evidence Act. Under that section it is not enough to prove that the *chaukidar's* register is an official book, but it is also necessary to prove that any entry relied on in it was either made by a public servant in the discharge of his official duty or made by some other person in performance of a duty specially enjoined by the law of the country. It has not been contended that the *chaukidar's* register is a private register, and such contention appears impossible in the face of the fact that paras, 367 and 368 of the Police Manual published by Government in 1900, which was in force at the time of the entry in question in this register, make it the duty of the head constable-writer at the *thana* to make the entries in the *chaukidar's* register to the direction of the *chaukidar*. What we have to decide is whether this particular entry answers the other conditions of Section 35. The cases referred to in *Sampat v. Gauri Shankar*<sup>4</sup> and *Habib Ullah v. Emperor*<sup>5</sup> indeed only call attention to the necessity of this and do not dispute that if these conditions are fulfilled an entry in a *chaukidar's* register would be relevant. The case reported as *Baldei v. Abhey Ram*<sup>6</sup> does not correctly state the attitude taken by Mr. Chamier in *Sampat v. Gauri Shankar*.<sup>7</sup> As pointed out in *Devarappalli Ramalinga Reddi v. Srigiraju Kotayya*,<sup>8</sup> if it can be proved that the entry was made by a public servant in the discharge of his official duty it will not be necessary to show that there was any enactment specially enjoining the performance of the duty. This necessity only exists where the person who makes the entry is not acting officially."

In a Patna case,<sup>9</sup> the *chaukidar* examined in Court was unable to say who had made the entry and on what date the particular person had died. The witness who was produced to depose that he had made the entry denied that he had made it and it appeared that the entry was not actually in his handwriting. In these circumstances, it was said<sup>10</sup> :

"In the present case, we do not know who made the entry, and in what circumstances. In the absence of reliable evidence as to who made the entry and in what circumstances, it cannot be said that the conditions laid down in Section 35, Evidence Act, have been fulfilled."

In *Ghantalayya v. Ramanna*,<sup>11</sup> it was held that an entry made contrary to Section 8, Proviso II of Act III of 1899, was not admissible because the entry was not made in discharge of public duty. In *Madho Saran v. Manna Lat*<sup>12</sup> where the entry was made by a *dafadar* as the *chaukidar* was illiterate

3. (1919) Oudh 75 at p. 76 : 54. I.C. 166 : 21 Cr.L.J. 22 : 22 O.C. 250 : 6 O.L.J. 577.  
 4. (1911) 14 O.C. 68 : 10 I.C. 713.  
 5. (1912) 15 O.C. 351 : 18 I.C. 655.  
 6. 1914 All. 99 : 24 I.C. 540.  
 7. (1911) 14 O.C. 68 : 10 I.C. 713.  
 8. (1918) 41 Mad. 26 : 41 I.C. 286 : 1918 M. 451.  
 9. *Sanatan Senapati v. Emperor*, 1945 Pat. 489 : 11 Cut.L.T. 40 : 26 P. L.E.—145

L.T. 225.  
 10. *Mahabir v. Jadunandan Prasad Singh*, A.I.R. 1945 Pat. 491 : I.L.R. 24 Pat. 389.  
 11. (1958) 1 Andh.W.R. 527.  
 12. 1933 Pat. 473 : 149 I.C. 129 : 14 P.L.T. 441. But see *Brij Mohan Singh v. Priya Brat Narain Sinha*, A.I.R. 1965 S.C. 282 : (1964) 2 M.L.J. 140 ; 1964 B.L.J.R. 558.

and the *dafadar* said that he wrote the entry at the request of the *chaukidar*, it was held that the entry was admissible under this section, as the person who wrote the entry was definitely known; it is submitted that this decision is not correct in view of the clear language of the section which contemplates the entry being made by the public servant himself.

Entries of births and deaths, in an official book, maintained by the village *mukaddam*,<sup>13</sup> or police patel,<sup>14</sup> or by a village *munisif*,<sup>15</sup> have been held to be admissible. Only entries made in the birth and death registers by persons in the discharge of their official duty are admissible under this section, and the identity of the child that it was born to a particular person has to be corroborated by other evidence.<sup>16</sup>

An entry made in a *chaukidar's* register of births and deaths is not admissible in evidence, where it neither purports nor is proved to be signed by the station writer, the register not being one directed to be kept by any law.<sup>17</sup> A *chaukidar's* *hath chitta* in respect of which there is no proof as to who made the entry relating to a death and whether it was made in the discharge of any official duty, is not admissible in evidence.<sup>18</sup>

Entries in Birth and Death Registers maintained by public servants under the local Acts have been held to be admissible under this section to prove the date of birth or death.<sup>19</sup>

In respect of children born out of lawful wedlock, no presumption of paternity can arise merely upon the entries in the birth register, where there is no evidence to show that the alleged father was the informant, or that he gave some information constituting an admission of paternity.<sup>20</sup> The Section makes the entries in the birth register relevant facts, if the entries had been made by the public servants acting in the discharge of their duties.<sup>21</sup> Though the entry regarding the birth in a birth register is receivable in evidence under this section, it is wrong to assume that mere filing of a copy of an entry in the birth register proves *ipso facto* that the entry relates to or proves the birth of

- 13. Shri Kisan Bhikamchand v. Jagoba Mahipat, 1937 Nag. 264 : I.L.R. 1937 Nag. 382 : 172 I.C. 287 : 20 N.L.J. 139.
- 14. Manikrao v. Deorao, 1955 Nag. 290.
- 15. Chakrabarthi Nainar v. Pushpavathi Ammal, 1926 Mad. 985 : 95 I.C. 1005 : 23 M.L.W. 688; Chellammal v. Angamuthu, 1978 Cr.L.J. 752 (Mad.); (1977) L.W. (Cr.) 217.
- 16. State v. Kamruddin, A.I.R. 1956 Nag. 74. See also Bulli Tatayya v. Nakaraju, (1957) 2 Andh.W.R. 308 : A.I.R. 1958 A.P. 611.
- 17. Mohammad v. R., 1919 Oudh 75 : 21 Cr.L.J. 22 : 22 O.C. 250 : 54 I.C. 166.
- 18. Ram Prasad Sharma v. State of Bihar, (1970) 1 S.C.R. 694 : (1969) 2 S.C.C. 359 : 1970 S.C.C.R. 247 : (1970) 1 S.C.J. 184, 186 : 1970 B.L.J.R. 144, 148 : (1970) 1 Cr. L.J. 184 ; 1969 Jab.L.J. (S.N.) 117 (S.C.) ; 1969 Ker.L.T. (S.N.) p.
- 21 : 1970 M.L.J. (Cr.) 102 : 1970 P.L.J.R. (S.C.) 189, 192 : A.I.R. 1970 S.C. 326, 329.
- 19. Mst. Komal v. Gur Chajan Prasad, 1938 All. 242 : 175 I.C. 263 : 1938 A. L. J. 235 : 1938 A.W.R. 168; Mst. Anwari Jan v. Baldua, 1936 All. 218 : 159 I. C. 190 : 1936 A.L.J. 404 : 1935 A.W.R. 1248; Maniklal Shah v. Hira Lal Shaw, 1950 Cal. 377 : 54 C.W.N. 225; Lal Bhagwan v. Guttoo, 1934 Oudh 167 : 148 I.C. 418 : JI O.W.N. 416; Naiv Service Society v. R. M. Palat, A.I.R. 1966 Ker. 311 : I.L.R. (1966) 2 Ker. 54. See Shvam Lal v. Munni Lal, A.I.R. 1972 Punj. 199 (case re. Punjab Municipal Act, 1911).
- 20. Mahadeva Rao v. Yesoda Bai, A.I.R. 1962 M. 141 : 75 L.W. 17.
- 21. Mahadeva Rao v. Yesoda Bai, A.I.R. 1962 M. 141 : 75 L.W. 17.

the person concerned. Evidence has to be introduced to connect that entry with the person whose date of birth has to be established. Connection of the identity of the person under the entry must be established by other evidence.<sup>22</sup>

An entry of birth made in an official record made by an illiterate *chaukidar*, by somebody else at his request, does not come within the section.<sup>23</sup>

The entry of the birth of a child in the *hath chitta* book of a *chaukidar* cannot be brushed aside because the name of the child was not given.<sup>24</sup> Nor can it be ignored on the ground that only one leaf and not the whole book was produced.<sup>25</sup>

It is only the entry made by a public servant in the discharge of his official duties that is admissible as a relevant fact.<sup>1</sup> Other particulars not strictly covered by the entries are not admissible under the section.<sup>2</sup> In a case from Madras, in the birth register extract, Col. 7 related to particulars of the child's nationality and caste but no such information was required to be recorded with reference to the particulars of the child's parents in Cols. 9 to 11. Such entries in relation to the child's father are not admissible with reference to the parentage of the father.<sup>3</sup>

**25. Certified copies of entries admissible.** When entries in public documents are relevant under this section, certified copies of such entries are admissible in evidence in proof of the original entries under Section 77 read with Section 78 *post*.<sup>4</sup> The Khasra Girdawari is a public document and entries made therein may be properly proved by the production of a certified copy thereof as provided by Section 77 *post*. The document is also relevant under the present section,<sup>5</sup> and it is not obligatory to produce the *patwari* who prepared the document.<sup>6</sup> The admission register is maintained in a school as per Government rules in the course of business and a true copy of the entry therein issued by the Head Master after verification with the original is relevant and

22. Paryani Bai v. Bajirao, I.L.R. 1961 B. 963 : A.I.R. 1963 B. 25 : 64 Bom.L.R. 86.

23. Brij Mohan Singh v. Priya Bint Narain Sinha, (1965) 3 S.C.R. 861 : (1964) 1 S.C.J. 644 : (1964) 1 S.C.W.R. 588 : (1964) 2 Andh.L.T. 410 : (1964) 2 Andh.W.R. (S.C.) 140 : 1964 B.L.J.R. 538 : (1964) 2 M.L.J. (S.C.) 140 : A.I.R. 1965 S.C. 282, 286; Keluni Bewa v. Sadhu Das, 33 Cut. L.T. 49 at pp. 52, 53; State v. Jawan Singh, 1971 Cr.L.J. 1656 (Raj.); Jaladhar Samal v. Malati Dei, A. I. R. 1971 Orissa 230 (231); Banchaniani Sahu v. Suka Bewa, 1973 (1) C.W.R. 797.

24. Jaladhar Samal v. Malati Dei, A.I.R. 1971 Orissa 230, 231; Joginder Kaur v. Balbir Kaur, A.I.R. 1974 Punj. & Har. 31.

25. Dasrath v. Gura Bewa, A.I.R. 1972 Orissa 787.

1. Ramalinga v. Kotayya, I.L.R. 41 Mad. 26 : 41 I.C. 286 : A.I.R. 1918 Mad. 451; see also Bagiammal v. Kamalammal, A.I.R. 1965 Mad.

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2. Venkayamma v. Gangayya, A. I. R. 1934 Mad. 16 (entry in death register, extract not admissible to prove age of death though that fact also recorded); Gurusami Nadar v. Iru-lappa Konar, A.I.R. 1934 Mad. 630 (death register extract describing a particular person as a Christian); State Government, M. P. v. Kamrud-din, A.I.R. 1956 Nag. 74 (entries not required to give name of child). Nagasami v. Kochadi, (1969) 1 Mad. 459 : 81 M.L.W. 436 : A.I.R. 1969 Mad. 329 at pp. 334, 335.

3. Manikrao v. Dcorao, 1955 Nag. 290; Maniklal Shah v. Hiralal Shaw, 1950 Cal. 377, 378 : 54 C.W.N. 225; Shibdeo v. Ram Prasad, 1925 All. 79 : I.L.R. 46 All. 637 : 87 I.C. 938; Jai Bhagwan v. Gutto, 1934 Oudh 167 : 148 I.C. 418.

4. Mohammed Bin v. Fateh Din, A.I.R. 1934 Lah. 698; Beant Singh v. Nathu Singh, A.I.R. 1966 Him. P.R.A. 48, 49.

5. Beant Singh v. Nathu Singh, supra.

admissible.<sup>7</sup> A certified copy of a birth certificate, signed by the Chief Executive Officer of the Municipal Corporation is automatic evidence as a public document under Sections 35 and 77 *post* read together and it is conclusive evidence unless disproved.<sup>8</sup> Such certified copies shall be presumed to be correct in view of Section 79.<sup>9</sup>

Mere production by a returned candidate of a copy of an entry in a death register cannot, as a matter of law, connect it with that person's father whom that entry concerned, particularly when the person, for reasons best known to him, omitted to say anything about it in his statement as a witness. Such a document will be excluded from consideration.<sup>10</sup>

The entry in a birth and death register can be presumed, in the absence of evidence to the contrary, to be made by the police official in the discharge of his official duty. Such entry is proved by the production of a copy certified in the manner provided by Section 76. And the contents are automatically proved under Section 77 if not objected to or disputed.<sup>11</sup>

**26. Evidentiary value.** An entry in a register of deaths is evidence of the fact of death. Other particulars, such as the cause of death the deceased's age, etc., as to which the officer concerned can have no personal knowledge or any means of checking, cannot be treated as evidence.<sup>12</sup> It is not conclusive evidence of the date of death.<sup>13</sup> In fact any entry made by a public servant in discharge of his official duty, though relevant under this section, has no conclusive presumptive value.<sup>14</sup> A birth certificate does not prove itself, and is no proof of the age of any particular person, unless the person connected with that entry, either by making the entry, or giving information, comes forward and speaks to the entry and connects the entry with the individual concerned.<sup>15</sup> Where the exact date of the death is of the highest importance and a difference of a day or two days is material (as for instance where there is a question of limitation), an entry in a register prepared on these lines would be an unsafe guide but the entry will as a rule be reliable to within a few days and even where the date may not be absolutely exact, the entry will often be most valuable evidence where the question is as to the relative order in which the deaths took place.<sup>15-9</sup>

7. Sadasivan, A. v. State of Kerala, 1966 Cr.L.R. 210 (2), 212.
8. Dalim Kumar v. Nandarani Dassi, 73 C.W.N. 877 : A.I.R. 1970 Cal. 292; Nanak Lal v. Baijnath Agarwala, A.I.R. 1935 Pat. 474; Anil Krishna Basak v. Sailendra Nath Paul, 69 C.W.N. 593, 602.
9. (1974) 1 Cr.L.T. 550 (Punj.).
10. Didar Singh v. Sohan Singh, A.I.R. 1966 Punj. 282, 285.
11. Mehan v. Kishi, 71 P.L.R. 225, 230.
12. Maniklal Shah v. Hirralal Shaw, 1950 Cal. 377, 378 : 54 C.W.N. 225; see also Guruswami Nadar v. Irulappa Konar, 1934 Mad. 630 : 67 M.L.J. 389; Tanneru Venkayamma v. Tanneru Gangaya, 1934 Mad. 16 :

- 149 I.C. 335 : 65 M.L.J. 703 : 1933 M.W.N. 1310 : 38 L.W. 779.
13. Swarnalata Devi v. Krishna Iron Foundry, A.I.R. 1974 Cal. 393 : 78 C.W.N. 1031.
14. Abdulla v. State, A.I.R. 1972 Raj. 272.
15. Biseswar Misra v. The King, 1949 Orissa 22, 24; I.L.R. (1949) 1 Cut. 194; Hemanta Kumar v. Allianz Und Stuttgarter Life Insurance Co. Ltd., 1938 Cal. 120 : 177 I.C. 517; State v. Kamruddin, I.L.R. 1956 Nag. 282 : 1956 Nag. 74; Manikrao v. Deorao, A.I.R. 1955 Nag. 290.
- 15-9. Zaibunnissa v. Hasaratunnissa, 52 I.C. 162 : 22 O.C. 124 : 1919 Oudh 426.

In the matter of proof of minority, a Horoscope is not of very great evidentiary value but the birth register.<sup>10</sup>

A statement by a father that a child was born to him may be some evidence of the legitimacy of the child,<sup>11</sup> but where the name of the child's mother is given by the informant and not that of the father, how far that fact would bear on the question of child's legitimacy would depend, even if assumed to be relevant, largely on the means that the informant may be shown to have possessed of the knowledge in connection with the child's birth. If the informant happens to be a stranger who did not know the father, his statement may be, even if relevant wholly, unimportant.<sup>12</sup>

The register of members of a company is *prima facie* evidence of any matters by the Companies Act directed or authorized to be inserted therein.<sup>13</sup> A certificate of shares is *prima facie* evidence of the title to the shares.<sup>14</sup> The reports of Inspectors of Companies are admissible as evidence of the opinion of the Inspectors in relation to any matter contained in such report.<sup>15</sup> The minutes of all resolutions and proceedings of general meetings are admissible in evidence in all legal proceedings.<sup>16</sup> Where a company is being wound up, all documents of the company and liquidators are, as between the contributories, *prima facie* evidence of the truth of all matters purporting to be therein recorded.<sup>17</sup>

All copies given under Section 52 of the Indian Registration Act, 1908, are admissible for the purpose of proving the contents of the original documents.<sup>18</sup>

An office copy of a declaration under the Press and Registration of Books Act, 1867, is *prima facie* evidence that the person whose name is subscribed to such declaration was printer or publisher, or printer and publisher of the periodical work mentioned in the declaration.<sup>19</sup> The Register of Patents and Designs is *prima facie* evidence of matters inserted therein in accordance with the Act.<sup>20</sup> And a certificate under the hand of the Controller as to any entry, matter or thing (made by him in accordance with the Act or the Rules thereunder) is *prima facie* evidence of the entry having been made, and of the contents thereof and of the matter or thing having been done or left undone.<sup>21</sup>

Certified copies of documents of Literary, Scientific and Charitable Societies filed with the Registrar are *prima facie* evidence of the matters therein contained.<sup>22</sup> Certified and sealed copies of proceedings taken and had under the

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- 10. Bharat Bai v. Gopinath, 1941 All. 385, 386; 197 I.C. 866; 1941 A.L. J. 560; Ram Dhani Lal v. Collector of Basti, 1959 All.W.R. (H.C.) 140.
- 11. Mohammad Ebrahim v. Safia Bai, 1937 M.W.N. 1282.
- 12. Manicka Mudaliar v. Ammakannu, 1942 Mad. 129, 131; 201 I.C. 39; 54 L.W. 411.
- 13. Act VII of 1913 (Indian Companies), S. 40; Act I of 1956, S. 164; Ram Das v. Official Liquidator, 9 All. 386.
- 14. Act VII of 1913, (Indian Companies), S. 29, and English Act, 1948, S. 581; Act I of 1956, S. 84.
- 15. Act VII of 1913, S. 149; Act I of 1956, S. 246.
- 16. Act VII of 1913, S. 83; Act I of 1956, S. 194.
- 17. Act VII of 1913, S. 240; Act I of 1956, S. 548.
- 18. Act XVI of 1908, S. 57; see also Act VII of 1876 (Bengal Land Registration); Ram v. Jebli, 8 C. 853; Saraswati v. Dhanpat, I.L.R. (1883) 9 Cal. 431; Shoshi v. Girish, I.L.R. (1893) 20 Cal. 940.
- 19. Act XXV of 1867, Ss. 7, 8.
- 20. Act II of 1911, S. 20 (3).
- 21. Ib., S. 71.
- 22. Act XXI of 1860, ('Registration of Literary, Scientific and Charitable Societies), S. 19.

Insolvent Debtors Act are, without proof of seal or other proof whatsoever, sufficient evidence of the same.<sup>23</sup> Entries in registers prescribed to be kept by the various Municipal Acts, and the proceedings of Municipal Committees recorded in accordance with the provisions of the particular Act applicable thereto, are also relevant under this section, as also are all other entries in any public and official books, registers and records directed to be kept by any law for the time being (v. ante. Cognate References to section and Appendix). Entries in Ledger Account of High Commissioner for India in London, could be accepted as having been made in the regular performance of official duties.<sup>24</sup>

In England it has been considered doubtful how far a register can be received to prove incidental particulars concerning the main transaction, even where these are required by law to be included in the entry. It is said that if such particulars are necessarily within the knowledge of the Registering Officer they will be admissible, otherwise they seem to be evidence only when expressly made so by statute.<sup>25</sup> But it is submitted from a consideration of the words of the section and on the authority of the cases previously cited, that (even where not so expressly declared), a public register in India is evidence of all particulars required by law to be inserted therein, whether they relate to the main or incidental fact or transaction. Under this section a statement made by a Survey Officer, in a Village Register of Lands, that the name of this or that person was entered as occupant, would be admissible, if relevant, but it would not be admissible to prove the reasons for such an entry as facts in another case.<sup>1</sup> So also statements of facts made by a Settlement Officer in the column of remarks in the *dharepatrak*, but not his reasons for the same even though they may consist of statements of collateral facts, which it was no part of his duty to enquire into, are admissible in evidence.<sup>2</sup> A recital in a public record as to statement made by a public servant with reference to a particular statement of the grant by the Government may be admitted under this section as proving that the public servant made the statement that he is stated to have made, if the fact that he made such statement is a relevant fact. But such a recital would not be admissible under Section 48 in a case where a specific right claimed by a particular individual and not a general right is being dealt with.<sup>3</sup> When a register is clearly an official document it is admissible in evidence under this section. But if it could be shown in the case of such a document that any particular part was in excess of the official duty by reason of which it came into existence, that part might not be admissible. On the question of the admissibility in evidence of the contents of a register of Minhaidari villages it was held that the register being clearly an official document, in the absence of anything to show that any particular part of it was in excess of the official duty, by reason of which it came into existence, and that in consequence that part might not be admissible, was admissible in evidence under this section.<sup>4</sup> As to register of previous convictions, see the case cited.<sup>5</sup>

23. 11 & 12 Vict. C. 21, S. 74, and see S. 78.
24. Ghulam v. Government of Jammu & Kashmir, A.I.R. 1960 J. & K. 136.
25. Phipson, Ev., 11th Ed., 463; Doe v. Barnes, (1834) 1 M. & R. 386; Huntley v. Donovan, (1850) 15 Q.B. 96.
1. Govindrao v. Ragho, (1884) 8 B. 543, followed in Madhavarao v. Deonak, (1896) 21 B. 695; as to Collector's books as evidence of title,

- vide Fatma v. Darya, (1873) 10 Bom. H.C.R. 187; Bhogaji v. Bapuji, (1888) 13 B. 75.
2. Madhavrao v. Deonak, (1896) 21 B. 695.
3. Sankaracharya v. Manali, 51 I.C. 876.
4. Rai Bhaiya Dirgraj Deo Bahadur v. Beni Mahto, 1917 P.C. 197 (1): 47 I.C. 1 : 20 Bom.L.R. 712; see also State v. Qamruddin, 1956 Nag. 74.
5. Maung Tha v. R., 19 Cr.L.J. 11: 62 I.C. 923.

A presumption of correctness attaches to entries in a birth and death register and heavy onus lies on the party who wants to displace the presumption.<sup>6</sup>

Entries in birth registers generally furnish the best evidence of the date of birth and can be safely accepted unless they are shown to be wrong. Entries in the registers of public schools, though relevant under Section 35, are of far less evidentiary value and of little avail to show correct age.<sup>7</sup>

**27. Proof of identity of parties named in record.** The identity of the parties named in the register must be proved independently. Thus, in the case of a register of marriages, as the register affords no proof of the identity of the parties, some evidence of that fact must be given, as by calling the minister, clerk or attesting witnesses or others present, the handwriting of the parties may be proved.<sup>8</sup> To prove the handwriting of the parties in the register, it is not necessary to produce the original register for that purpose, but the witness may speak to the handwriting in it without producing.<sup>9</sup> A photographic likeness may often be used for the purpose of identification; this is constantly done in action for divorce,<sup>10</sup> and has even been allowed in a criminal trial. So, where a woman was tried for bigamy, a photograph of her first husband was allowed by Wills, J., to be shown to the witness present at the first marriage, in order to prove his identity with the person mentioned in the certificate of that marriage.<sup>11</sup> A mere entry in a birth and death register to the effect that a daughter was born to a person without any statement as to the identity of the girl is not sufficient to prove the birth of a particular person. The identity of that person has to be fully established by other evidence<sup>12</sup>

**28. Facts contained in Judgment not inter partes are not admissible under Sections 40 to 43.** The Act does not make a finding of fact arrived at on the evidence before the Court in one case and evidence of that fact in another case. A judgment not *inter partes*, which is not admissible under Sections 40 to 43 of the Act, does not become relevant, merely because it contains a statement as to a fact which is in issue or relevant in the suit, and to such a judgment this section has no application. Where a judgment is neither *in rem*, nor relates to matter of a public nature, nor between the parties to a subsequent suit, the fact that the Court by that judgment decides a point in a particular way is not relevant for the purpose of the decision of the same point in the subsequent suit. Therefore, the statement of a relevant fact in a previous judgment, not *inter partes*, is not admissible under this section.

6. Bishwanath Gosain v. Duhia Lalmuni, I.L.R. 47 Pat. 636; A.I.R. 1968 Pat. 481, 485; Gopichand Arya v. Bedamoo Kuer, A.I.R. 1966 Pat. 231, 233.
7. Krishnarajan v. Doraswamy Chettiar, 1966 Ker.L.J. 545; 1966 Ker.L.T. 1129; A.I.R. 1966 Ker. 305, 311; Kunhiraman v. Krishna Iyer, 1962 Ker.L.J. 289.
8. Roscoe, N. P. Ev., 194.
9. Ib. Saver v. Glossop. (1848) 2 Exch. 409.
10. In Martin v. Martin, (1899) 3 C. W.N. lxxviii the respondent was identified by her photograph. However in Frith v. Frith and Pearce,

- (1896) P. 74, it was held that in Matrimonial cases, except under very special circumstances, the Court will not act upon identification by a photograph only. But this dictum of Sir G. Barnes, P., has not been followed see Halsbury, 3rd Edn. Vol. 12, p. 377.
11. Roscoe, N. P. Ev., 194; R. v. Tolson, 4 F. & F. 103.
12. State v. Kamruddin, 1956 Nag. 74, 76; Hemanta Kumar v. Allianz Und Stuttgarter Life Insurance Co. Ltd., 1938 Cal. 120, 177 I.C. 517; Bisewar Misra v. The King, 1949 Orissa 22; I.L.R. (1949) 1 Cut. 194.

A statement of fact in a previous judgment, not *inter partes*, cannot be used as evidence in a subsequent suit to decide a point which is in issue in that case.<sup>18</sup>

**36. Relevancy of statements in maps, charts and plans.** Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of<sup>14</sup>[the Central Government or any State Government], as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

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|---|---|
| s. 3 ("Fact in issue".)                   | of Government maps or plans.)                                     |
| s. 3 ("Relevant".)                        | 8. 83 (Proof of maps or plans made for the purpose of any cause.) |
| s. 3 (A map or plan is a "document".)     | 8. 87 (Presumption as to any published map or chart.)             |
| s. 57 (13) (Reference to maps by Courts.) | 8. 90 (Presumption as to map or plan 30 years old).               |
| ss. 74–77 (Proof of public documents.)    |   |
| s. 83 (Presumption of accuracy in case    |   |

Taylor, Ev., ss. 1674, 1767–1773, 1777 ; Starkie, Ev., ss. 284–391, 404–408 ; Roscoe, N. P. Ev., 194–196 ; Phipson, Ev., 11th Ed., 311, 498 ; Steph. Dig. Art. 35 ; Wills Ev., p. 234.

#### SYNOPSIS

|                                       |                                     |
|---------------------------------------|-------------------------------------|
| 1. Principle.                         | sion.                               |
| 2. Scope.                             | 6. As evidence of title.            |
| 3. Maps, charts and plans.            | 7. Evidential value of survey maps. |
| 4. Sections 36 and 83.                | 8. Chittahs.                        |
| 5. Survey maps as evidence of posses- | 9. Rennell's map.                   |

**1. Principle.** This section includes two classes of maps, (a) published maps or charts generally offered for public sale, and (b) maps or plans made under the authority of Government. The admissibility of the first class depends on the ground that the publication being accessible to the whole community and open to the criticism of all, the probabilities are in favour of any inaccuracy being challenged and exposed, and of the second class on the ground that being made and published under the authority of Government, they must be taken to have been made by, and to be the result of study or inquiries of, competent persons ; and further (in the case of surveys and the like), they contain or concern matters in which the public are interested.<sup>18–19</sup>

**2. Scope.** A map or plan is a form of statement, combining diagram, and description, which ordinarily is proved by the direct oral evidence of the map maker himself.<sup>17</sup> A map by itself is nothing but statements made by the maker by means of lines and pictorial representation instead of by word of mouth as to the state or configuration of a particular site and the

13. Khedia v. Turia, A.I.R. 1962 Pat. 420 : 1962 B.L.J.R. 323. Govt. in British India.  
 15–16. Cf. Taylor, Ev., s. 1767.  
 14. Subs. by the A. O. 1948 for any 17. Wills Ev., p. 234.

objects standing thereon. To admit in evidence a map, without calling the maker thereof, is the same as admitting in evidence statements made by a third party who is not called as a witness. In other words, it amounts to admitting hearsay.<sup>18</sup> In England, published maps generally offered for public sale are admissible to show the relative positions of towns, countries, and other matters of geographical notoriety.. Maps and surveys may be admissible (1) as public documents; (2) as quasi public documents to prove general geographical facts; (3) as reputation; and (4) private maps and plans may be received under English Evidence Act, 1938, as admissions against the party under whose authority they were prepared, or his successors in title; though not in their favour as against strangers; or as evidence of public rights. Maps on the back of a lease or conveyance, however, are part of the contract, and as such evidence for or against both parties and their successors, of what was demised or conveyed.<sup>19</sup>

**3. Maps, charts and plans.** This section is a considerable extension of the English rule.<sup>20</sup> In the well-known English case of *R. v. Orton*,<sup>21</sup> maps of Australia were given in evidence to show the situation of various places at which the defendant said he had lived. So also, in the case of *Prahlad Sen v. Baboo Budhoo Singh*,<sup>22</sup> the Privy Council compared one of the maps in the suit with, "any good general map of India".<sup>23</sup>

Printed maps, showing the different wards of a city, are admissible not only under Section 83, but also under Sections 36 and 87, Evidence Act, as well as Section 213, Bombay Land Revenue Code.<sup>24</sup> Superimposed maps and plans may be relied on if they are brought to the same sale.<sup>25</sup> A copy of a map sold by mistake, after a sale of copies of the map has been stopped by Government, is not admissible under this section.<sup>1</sup> A *mahalwari* map is relevant under this section.<sup>2</sup> A map which is not a published map, generally offered for public sale, or a map made under the authority of Government, but of land in a suit regarding disputes as to certain lands showing the boundary lines of a particular revenue *mahal* is not within this section. It is on the contrary within the provision of Section 83 that maps made for the purposes of any cause must be proved to be accurate.<sup>3</sup> As to the rule, that maps drawn for one purpose are not admissible in a suit for another purpose, see Note to Section 83.

The maps and plans made under the authority of Government referred to in this section are (as has also been held in the case of Section 83) maps

18. Dwijesh Chandra v. Naresh Chandra, 1945 Cal. 492 : 49 C.W.N. 791.
19. Phipson, Ev., 11th Ed., 498.
20. v. Taylor, Ev., ss. 1770, 1771; Steph. Dig. Art. 35.
21. Steph. Dig. Art. 35, p. 47 note and for case on admissibility of railway maps, see Blue and Deschamps v. Red Mountain Railway Co., (1909) A.C. 361 (P.C.).
22. (1869) 2 B.L.R. 111 (P.C.); 12 W.R. (P.C.) 6.
23. Prahlad Sen v. Baboo Budhoo Singh, (1869) 2 B.L.R. 111 (P.C.) at L.E.—146
24. p. 139 : 12 W.R. (P.C.) 6.
25. Secretary of State v. Chimanlal, 1942 Bom. 161 : I.L.R. 1942 Bom. 357: 201 I.C. 420.
26. State of Andhra Pradesh v. P. V. Raju, 1959 Andh.L.T. 305.
1. Gadadhar Chowdhary v. Sarat Chandra Chakravarty, 1941 Cal. 193 : 195 I.C. 412 : 44 C.W.N. 935.
2. Madhabi v. Gajendra, (1904) 9 C. W.N. 111, 113.
3. Kesho Prasad Singh v. Mst. Bhagjogna Kuer, 1937 P.C. 69; I. L. R. 16 Pat. 258: 167 I.C. 329.

or plans made for public purposes, such as those of the survey which have been in numerous cases referred to and admitted in evidence (*v. post*). The provisions of the section are not applicable to a map made by Government for a particular purpose, which is not a public purpose, such as the settlement of the silted bed of a certain river.<sup>4</sup> The statement must be as to matters usually represented or stated in such maps, i.e. (generally speaking), in the first class of maps, the physical features of the country, the names and position of towns, and the like; and in the second class, not only such features, but, also boundaries of villages, estates and (in khasra maps) fields.<sup>5</sup> In a case decided under the thirteenth section, the corresponding section of Act II of 1855, it was held that "Government survey maps are evidence not only with regard to the physical features of the country depicted but also with regard to the other circumstances which the officers deputed to make the maps are specially commissioned to note down, and that an ordinary Government survey map was for this reason evidence as to the boundaries of any plots or estates which stand under a separate number in the Collector's books. Further than this, they are not evidence as to rights of ownerships."<sup>6</sup> Pencil memoranda on a Government survey-map were held to be admissible.<sup>7</sup> In another case,<sup>8</sup> the Court observed with reference to a chart of the River Hooghly :

"The chart, to which I have already referred, is issued under the authority of Government, and the notes thereon may be referred to as authoritative. I find one note, which is worthy of attention, worded thus: 'Caution'—Owners of vessels are strongly advised not to risk their vessels laying at anchor awaiting orders at the Sandheads between the months of April and November inclusive. Vessels are recommended to go into Satigore roads, where there is a safe anchorage and telegraph station."

The record of the proceedings and the maps of the survey, being public documents, are provable by means of certified copies.<sup>9</sup>

Maps or plans made by Government are to be presumed to be accurate but maps or plans made for the purpose of any cause must be proved to be so.<sup>10</sup> A map prepared by a municipality under the Calcutta Survey Act is a map prepared under the authority of Government and a presumption of correctness attaches to it under Section 83, although the Calcutta Survey Act contains no provision for a statutory presumption of correctness.<sup>11</sup> The maps prepared by *patwaris* who are Government servants, by the authority of Government and for a public and not a private purpose must be presumed to be accurate under Section 83, and the statements contained in them are relevant under this section.<sup>12</sup> The provision refers to maps or plans made by Government for a public purpose only; a map made by Government for a particular purpose, which is not a public purpose, may be admissible, but its accuracy must be proved by the party producing it.<sup>13</sup> The Court may, however, pre-

4. *Kanto v. Jagat*, (1895) 23 C. 335.
5. *Whitley Stokes*, Vol. II, p. 878.
6. *Koomodinee v. Poorno*, (1868) 10 W.R. 300 ref. in *Chowdhury Nazirul Huq v. Abdul*, (1922) 1 Pat. 65 : A.I.R. 1922 Pat. 58.
7. *Shusee Mookhee v. Bissessuree*, (1868) 10 W.R. 343.
8. *In re S. S. "Drachenfels"*, (1900) 27 C. 860, 871.

9. *Ss. 74–77 post*.
10. *S. 83 post*.
11. *Jogen Koeri v. Chairman, Gaya Municipality*, 1937 Pat. 567 : 171 I.C. 732 : 18 P.L.T. 464.
12. *Rahmat Ullah Khan v. Secretary of State*, 18 I.C. 799: 63 P.R. 1913; 113 P.L.R. 1913 : 2 P.W.R. 1913.
13. *Kanto v. Jagat*, (1895) 23 C. 335.

sume that any published map or chart, the statements of which are relevant facts, was written and published,<sup>14</sup> by the person and at the time and place by whom or at which it purports to have been written or published. The Court may resort for aid to maps as documents of reference.<sup>15</sup> The presumption provided for by Section 90 *post* is applicable to maps or plans as well as to any other document purporting or proved to be thirty years old.<sup>16</sup> The thirteenth section, the corresponding section of Act II of 1855, included—but the present section is silent as to—maps made under the authority of any public municipal body.

**4. Sections 36 and 83.** This section mentions two kinds of maps, namely—

- (1) published maps or charts generally offered for public sale, and
- (2) maps or plans made under the authority of Government.

The first kind is considered relevant, because, the publication being accessible to the whole community and open to criticism of all, the probabilities are in favour of any inaccuracy being challenged and exposed. But the statements made in such maps or charts are merely relevant. There is no presumption as to their accuracy. On the other hand, Section 83 lays down that the Court shall presume that maps or plans purporting to be made by the authority of the Central Government or any State Government were so made, and are accurate; but maps or plans made for the purpose of any cause must be proved to be accurate.<sup>17</sup>

The question about the admissibility of maps or charts generally offered for public sale has to be considered in the light of this section. It must be shown that the map or chart in question was generally offered for public sale. Without proof of the fact that the map or chart in question would be irrelevant. It is true that Section 83 provides that the Court shall presume that maps or plans purporting to be made by the authority of the Central Government or any State Government were so made, and are accurate; but maps or plans made for the purpose of any cause must be proved to be accurate. The presumption of accuracy can thus be drawn only in favour of maps which satisfy the requirements prescribed by the first part of section 83.<sup>18</sup>

**5. Survey maps as evidence of possession.** There are numerous decisions as to the true, effect and value which should be assigned to survey maps<sup>19</sup> in evidence. "If these cases are carefully examined it will be found

14. S. 87, *post*.

15. S. 57, *post*.

16. S. 8, *Illust. ante*, and S. 90 *post*; see *Madhabi v. Gajendra*, (1904) 9 C.W.N. 111, 118.

17. *Brij Mohan v. Tiiya Brat*, A.I.R. 1965 S.C. 282.

18. *Ram Kishore v. Union of India*, (1966) 1 S.C.R. 430: A.I.R. 1966 S.C. 644, 649.

19. For a description of the maps of the Trigonometrical Survey, *thakbust* (boundary mark) and *khasra* (de-

tailed measurement maps) and *chittahs*, see *Field, Ev.*, 4th Ed., 215, 216; *ib.*, 5th Ed., 166–168; and *Field's "Land Holding and the Relation of Landlord and Tenant."* As to maps other than those of the survey, see *Junmajoy v. Dwarkanath*, (1879) 5 C. 287; *Kanto v. Jagat*, (1895) 23 C. 335; and Note to S. 83 and remarks of *Jackson, J.*, in *Collector, Rajshahye v. Doorga*, (1865) 2 W.R. 210 at pp. 211, 212.

that there is no real conflict of decisions between them—reasonable allowance being made for observations, which were directed, not to the consideration of a general proposition, but to the particular facts of the case which happened to be at the time before the Court.<sup>20</sup> The co-operation of the parties, interested in the measurement, is required to be sought by the Survey Officers. It is reasonable to presume that the parties were present at, and had notice of, the survey proceedings.<sup>21</sup> If the survey was effected in due course, it was made on notice; and in the absence of evidence to the contrary, the survey must be presumed to have been rightly carried out. The survey map, therefore, is evidence between the parties and must be taken into account.<sup>22</sup> That it is good evidence of possession has been declared by many decisions.<sup>23</sup> When the question is simply one of title, and the available evidence is proof of possession at a particular period, a survey map is, and ought to be, cogent evidence.<sup>24</sup> But it is not conclusive evidence of possession.<sup>25</sup>

A survey map is evidence of possession at a particular time, the time at which the survey was made.<sup>1</sup> Maps prepared after due enquiry are presumed to be correct, unless they are shown to be wrong.<sup>2</sup> They are not conclusive, but in the absence of evidence to the contrary they will be presumed to be accurate.<sup>3</sup> The presumption may be rebutted.<sup>4</sup> Such a map may be shown to be incorrect by the admission of parties, or adjudication by a Court, or by evidence intrinsic or extrinsic to the map in question.<sup>5</sup> But, where the parties consent to be bound to regard the boundary line, as laid by the survey authorities, as conclusive, they cannot afterwards question the correctness of the same.<sup>6</sup>

A plan prepared by a Commissioner in a suit, even if not an integral part of the trial and appellate judgment, is nevertheless admissible to render those judgments intelligible.<sup>7</sup>

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- 20. Nobo v. Gobind, (1881) 9 C.L.R. 305, per Field, J. at p. 307.
- 21. Ram v. Mohesh, (1873) 19 W.R. 202.
- 22. Radha v. Gireedharee, (1873) 20 W.R. 243; Nazirul Haq v. Abdul Wahab Khan, 1922 Pat. 58 : I.L.R. 1 Pat. 65 : 64 I.C. 326.
- 23. Gour v. Huree, (1868) 10 W.R. 338; Shusee v. Bisssesree, (1868) 10 W.R. 343 (P.C.); Prahlad v. Budhu, (1869) 2 B. L. R. 111; 12 W.R. (P.C.) 6; Gudadur v. Tara, (1871) 15 W.R. 3; Radha v. Gireedaree, (1873) 20 W.R. 243; Kashee v. Bama, (1875) 23 W.R. 27; Jugdish v. Chowdhry, (1876) 24 W.R. 317; Charoo v. Zubeda, (1875) 25 W.R. 54; Prosonno v. Land Mortgage Bank, (1876) 25 W.R. 453; Mohesh v. Juggut, (1879) 5 C. 212 discussed in Shyam v. Luchman, (1888) 15 C. 353; Joytara v. Mohamed (1882) 8 C. 975; Debendra Nath v. Surendra Nath, 1927 Cal. 345; 102 I.C. 370: 31 C.W.N. 419; Ramanandhan Sahay v. Jaigovind Pandey, 1924 Pat. 215 : I.L.R. 2 Pat. 839 : 75 I.C. 955, and see cases cited ante and post.
- 24. Mohesh v. Juggut, (1879) 5 C. 212, per Jackson, J., at p. 214.
- 25. Mahomed v. Sheeb, (1886) 6 W.R. 267, and for a reason why it is not, see remarks of the Court in the same; Gudadur v. Tara, (1871) 15 W.R. 3; Prosonno v. Land Mortgage Bank, (1876) 25 W.R. 453.
- 1. Syam v. Luchman, (1888) 15 C. 353.
- 2. Tarakdas v. Secretary of State, 1935 P.C. 125, 128 : 156 I.C. 548 : 37 Bom.L.R. 698.
- 3. Secretary of State v. Birendra Kishore, 1916 P.C. 141 : 43 I.A. 303 : I.L.R. 44 Cal. 328 : 38 I.C. 379.
- 4. Kānakhyā v. Abhiman, 1934 P.C. 182 : 41 I.A. 333 : I.L.R. 13 Pat. 589 : 150 I.C. 807.
- 5. Taramoni v. Gopal Das, 65 I.C. 182.
- 6. Raghunath Prasad Singh v. Rameshwar Singh, 1922 Pat. 87.
- 7. Joseph v. Makkaru, A.I.R. 1960 Ker. 7.

6. As evidence of title. Evidence of possession, however short, is evidence of title; if statements are evidence of possession, they are also evidence of title.<sup>8</sup> There are some cases which seem to imply the contrary.<sup>9</sup> "But the proposition which is to be deduced from all the cases is this : a survey map is not direct evidence of title in the same way as a decree in a disputed cause is evidence of title, for the Survey Officers have no jurisdiction to enquire into and decide question of title. Their instructions are to lay down the boundary according to actual possession at the time; and this is what they do, ascertaining such actual possession as well as they can, and if possible, by the admissions of all the parties concerned. A survey map is, therefore, good evidence of possession, according to the boundary demarcated thereupon, and which may be taken to have been admitted by those concerned to be correct, regard being had to what has been said about the nature of this admission in each particular case. In several of the cases quoted, this Court has very properly, refused to lay down any general rule as to the weight to be assigned to a survey map as a piece of evidence, and, in one case,<sup>10</sup> a learned Judge of this Court declined to say whether in any particular case maps ought not to be corroborated by independent evidence. A survey map is then direct evidence of possession, and with reference to particular circumstances of each case, the Court must decide whether this evidence of possession is sufficient to raise a reasonable presumption of title."<sup>11</sup> In *Syam Lal v. Luchman*,<sup>12</sup> the High Court said :

"We are not prepared to say that in no case can evidence of survey maps be sufficient evidence of title. Each case must be decided upon its own merits."

But though evidence of title, maps and survey proceedings are not conclusive<sup>13</sup> the Privy Council have held that maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were made. They are

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- 8. Shusee v. Bissessuree, (1868) 10 W.R. 343 (P.C.) per D. N. Mitter, J., at p. 344; Gooroo v. Bykunto, (1866) 6 W.R. 82; Oommot v. Bhujjo, (1870) 13 W.R. 50; Ram v. Mohesh, (1873) 19 W.R. 202; Pogose v. Mokoond, (1876) 25 W.R. 36; Syam v. Luchman, (1888) 15 C. 353; Satcowri v. Secretary of State, (1894) 22 C. 252, 258; Krishnacharya v. Lingwa, (1895) 20 B. 270.
- 9. Mahima v. Rajkumar, (1868) 1 B.L.R. (A.C.) 1: 10 W.R. 22 (This decision, however, must be understood with reference to the facts of that particular case, in which the award and the maps were the very subjects of litigation); Field, Ev., 6th Ed., 169; Gourmonee v. Huree, (1868) 10 W.R. 338; following Collector, Rajshahye v. Doorga, (1865) 2 W.R. 210, Jackson, J., doubting (Explained in Oommot v. Bhujjo (1870) 13 W.R. 50; Ram v. Mohesh, (1873) 19 W.R. 202; and in Mohesh v. Juggut, (1879) 5 C. 212).
- 10. Ram v. Mohesh, (1873) 19 W.R. 202, ref. to in Nazirul Haq v. Abdul Wahab Khan, 1922 Pat. 58: I.L.R. 1 Pat. 65: 64 I.C. 326.
- 11. Nobo v. Gobind, 9 C.L.R. 305 per Field, J., at p. 309. And so a survey or Kistwari map has been held to be evidence between the parties quantum valeat both as regards possession and title. Nazirul Haq v. Abdul Wahab Khan, 1922 Pat. 58: I.L.R. 1 Pat. 65: 64 I.C. 326; and see Debendra v. Surendra, 1927 Cal. 345: 102 I.C. 370: 31 C.W.N. 419, per C.C. Ghose, J.
- 12. (1888) 15 C. 353.
- 13. Pogose v. Mokoond, (1876) 25 W.R. 36; Luleet v. Narain, (1864) 1 W.R. 333; Koylash v. Rajchunder (1969) 12 W.R. 180 (Survey award).

not conclusive, and may be shown to be wrong, but in the absence of evidence to the contrary they may be judicially received in evidence as correct when made.<sup>14</sup> This decision was followed in the undermentioned case,<sup>15</sup> in which it was held that the object of the *thak* map being to delineate the various estates borne on the revenue-roll of the district, the entry in *thak* map that certain lands formed part of a certain estate becomes a relevant fact under this section and such entries in *thakbust* maps are evidence on which a Court may act. It is open to a Court to hold that the same state of things existed at the time of the Permanent Settlement. As to comparison of land with map<sup>16</sup> and of *thak* map with survey map.<sup>17</sup>

In the undermentioned case it was held, that a *thakbust* map was not only evidence but very good evidence as to what the boundaries of the property were at the time of the Permanent Settlement, and also as to what they (by the admission of the parties) were in 1859, when the survey was made and maps prepared.<sup>18</sup> As to maps used in a subsequent suit admitted to be correct in prior arbitration proceedings,<sup>19</sup> and as to the amount of accuracy to be expected in a *thak* map.<sup>20</sup>

In a case where the ownership of land was disputed and the plaintiff produced survey maps of the year 1852-53, and also a *thakbust* map which contained a statement supporting his case, and it was shown that the predecessor of the defendant had full notice of the *thak* proceedings, it was held that the evidentiary value of the plaintiff's *thakbust* and survey maps was greater than that of an unsupported survey map of the year 1855-56 produced by the defendant; and that the statement of zamindars or their agents contained in *thakbust* maps may amount to admissions that the land belonged to one village, and that such admissions should be greatly relied on as made at a time, when there was no dispute as to boundaries.<sup>21</sup>

Where there is a discrepancy between the Gangetic survey map of 1865 and the cadastral survey map of 1892-93, the latter must be given preference. The cadastral survey map being the latest map of the locality is entitled to great weight, and where there is a conflict between it and the revenue survey map, there may, in certain cases, be good reasons for preferring it to the latter.<sup>22</sup>

14. Jagadindra v. Secretary of State, (1902) 30 C. 291 and Secretary of State v. Birendra, 1916 P.C. 141 : 43 I.A. 303 : I.L.R. 44 Cal. 328 : 38 I.C. 379; Mst. Bibi Wakilan, v. Deonandan Prasad, 1921 Pat. 268 : 59 I.C. 298 : 2 P.L.T. 81.
15. Abdul v. Kiran, (1903) 7 C.W.N. 849 and see Gajhoo v. Kotwor, (1906) 11 C.W.N. 230 : 11 C.L.J. 415.
16. Radha v. Anund, (1871) 15 W.R. 444.
17. Burn v. Achumbit, (1873) 20 W.R. 14.
18. Syama v. Jogo, (1888) 16 C. 186. See also Satcowri v. Secretary of State, (1894) 22 C. 252, had it not been questioned, it would have

seemed almost unnecessary to state that oral evidence is sufficient to prove boundaries; Surut v. Rajendra, (1868) 9 W.R. 125.

19. Huronath v. Preonath, (1867) 7 W.R. 249; v. note, S. 33 ante.
20. Monmohini v. Watson & Co., (1899) 4 C. W. N. 113; 27 C. 336.
21. Dunne v. Dharani, (1908) 35 C. 621 and see Abdul v. Kiran, (1903) 7 C.W.N. 843.
22. Radha Kishun v. Shyam Das, 1933 Pat. 671 : I.L.R. 13 Pat. 51 : 15 P.L.T. 28; see also Mst. Bibi Wakilan v. Deonandan Prasad, 1921 Pat. 268 : 59 I.C. 298 : 2 P.L.T. 81; Brindrabhan Prasad v. Gopal Saran, 1928 Pat. 36 : 104 I.C. 514.

7. **Evidential value of survey maps.** "Thak maps are, as has been pointed out in many decisions of this Court, good evidence of possession, but the value of that evidence varies enormously. In the case of a *thak* map, containing definite landmarks and undisputed boundaries signed by the parties or their accredited agents, and representing land which has been brought under cultivation and is in the possession of raiyats whose names are known or can be discovered from the zamindary papers, a *thak* map is very valuable evidence of possession. But the value of such a map is greatly diminished, when we find that there are no natural land-marks delineated thereupon; that the land was jungle when measured; that the boundaries are not discoverable from a mere inspection of the map; and that neither the zamindars, nor their agents have by their signatures admitted the correctness of the *thak*.<sup>23</sup> The officers engaged in survey operations are required to seek the co-operation of the parties interested in the measurement. These parties are to be induced, if practicable, to make themselves acquainted with the contents of the *thak* and khasra plans, and to sign them or state their objections in writing. Persons who are familiar with what takes place in these provinces when Survey Officers commence operations in a locality, are well aware that neighbouring proprietors do, as a rule, carefully watch their proceedings; and if the persons interested consider that the boundary demarcated by those officers between any two estates is incorrect, they take immediate and prompt action to object and to have the map rectified. We must then look at the matter somewhat in this way: the proprietors of estates have reasonable notice, and may be presumed to be well aware, that the boundaries are about to be demarcated on a map by Imperial Government Officers and which is by consent and usage regarded as important evidence in cases of boundary dispute; they are invited to co-operate and to point out to the Survey Officers what they admit to be true boundaries between their estates.<sup>24</sup> If they or their agents point out the boundaries, and the boundaries so pointed out are demarcated on the survey map, which is then signed by them, this map is good evidence of an admission as to the correctness of the boundaries shown thereon.<sup>25</sup> If the proprietors or their agents do not actively point out the boundaries but afterwards sign the map, it is still evidence of an admission though not of so strong a nature as in the case first put. If these Survey Officers, without active assistance from those interested, demarcate the boundaries, and no objection is raised to their correctness, the reasonable supposition is that objections would have been raised, if the boundaries were not correct; and we have here evidence of admission by conduct. If objections are raised and abandoned, or

23. *Joytara v. Mahomed*, 8 C. 975, per Field, J. at p. 983; see also *Radha v. Gireedharee*, (1873) 20 W.R. 243 (conduct of parties important); *Brionath v. Lal*, (1870) 14 W.R. 391 (map not questioned); *Romanath v. Kally*, (1872) 18 W.R. 346 ('map admitted to be correct'); *Radhakia v. Gunga*, (1873) 21 W.R. 115 and *Mohesh v. Juggut*, (1879) 8 Cal. 212 (map not objected to); *Satcowri v. Secretary of State*, (1894) 22 C. 252, 257 ref. to in *Chowdhry Nazirul Haq v. Abdul Wahab Khan*, 1922 Pat. 58 : I.L.R. 1 Pat. 65 : 64 I.C. 326 : 3 P.L.T. 140; see also *Ramanandhan Sahay v. Jai Govind Pandey*, 1924

Pat. 213 : I.L.R. 2 Pat. 839 : 75 I.C. 955.  
 24. See remarks of Jackson, J., in *Collector, Rajshahye v. Doorga*, (1865) 2 W.R. 210  
 25. Ib. at p. 212 : "The map shows that at the time of the survey the plaintiff alone laid claim to the land and that no one disputed his claim. Such a public assertion of a right of ownership is also, I think, important evidence of his title. In the absence of direct title-deed, acts of ownership are the best proofs of title. In connection with the subject of this class of evidence, S. 18, cl. (b) ante, should be kept in mind."

if objections taken before the Survey Officers unsuccessfully, are not persisted in, no attempt being made to have the survey map rectified by a suit brought for this purpose, we have again evidence of admission by conduct, the value of which varies according to the circumstances supposed. If a suit has been brought to rectify the map, and brought successfully, or unsuccessfully, there is a judicial decision as to the accuracy of the map or otherwise. The value of any particular survey map in evidence will vary according as the above circumstances are, or are not brought out in evidence; and of course as time passes on, and the production of living witnesses of what took place at the time of the survey proceedings becomes more or less impossible, the difficulty is increased of producing evidence which will enable the Court to weigh the value of a particular map in nice scales.<sup>1</sup> Unless, however, it can be proved that a person against whom a *thak* or survey is attempted to be used expressly consented to the delineation or admitted the correctness of such maps, they have no binding effect.<sup>2</sup> But, in the absence of evidence to the contrary, they may be judicially received in evidence as correct when made.<sup>3</sup> The question of proof is a question of procedure and is capable of being waived by a party. Failure to produce the field-book affects the weight to be attached to the map, and not its admissibility.<sup>4</sup> This class of evidence has been said to be valuable because it is not within the power of the parties to manufacture, and it comes from a public office.<sup>5</sup> But a survey map is a piece of evidence, like other evidence in a case and can be of no effect in determining the burden of proof.<sup>6</sup> A *thakbust* map is in no sense a record of tenures subordinate to Government revenue paying estates; and is of no value as evidence in a suit in which the extent of the interest of *shikmee talooqdar* is matter for determination.<sup>7</sup> In every case, the question what lands are included in the Permanent Settlement of 1793 is a question of fact and not of law. The onus of proving that the Government Revenue fixed in 1793 was assessed up on any particular lands was as being included in the Permanent Settlement is on those who affirm that such was the case. Assuming lands not to be within the Permanent Settlement of 1793, the last survey made under the third section of Act IX of 1847 is to be taken as the starting point for deciding, when the next survey is made, whether lands are within the fifth and sixth sections of that Act. But when the question is, whether lands shown on a particular *thak* or survey map made since 1793 were or were not included in the lands charged with the assessment permanently fixed in 1793 the enquiry is at once enlarged; and thus the last *thak* or survey map cannot in all cases be acted upon or treated as decisive in the absence of evidence to the contrary.<sup>8</sup> It cannot be presumed as a matter of law that the state of things described in the *thak* and survey maps existed at the time of the Permanent Settlement. The question, what lands were included in the Permanent Settlement, is a

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1. *Nobo v. Govind*, (1881) 9 C.L.R. 309, per Field, J., at pp 308, 309. See also *Dunne v. Dharani*, (1908) 35 Cal. 621.
2. *Kristo v. Secretary of State*, (1898) 3 C. W. N. 99, 104.
3. *Jagadindra v. Secretary of State*, (1902) 30 C. 291; see also *Mazharul Ekbal v. Raja Gopal Lal*, 1924 Pat. 719: 84 I.C. 488; *Brindaban Prasad v. Gopal Saran*, 1928 Pat. 36: 104 I.C. 514: 8 P.L.T. 817.
4. *Shashi Bhushan Banerji v. Ramjas Agarwala*, 1924 Pat. 402: I.L.R. 8 Pat. 85 : 85 I.C. 205.
5. *Gudadur v. Tara* (1871) 15 W.R. 3.
6. *Narain v. Narendro*, (1874) 22 W. R. 296.
7. *Mohima v. Wise*, (1876) 25 W. R. 277.
8. *Jagadindra v. Secretary of State*, (1902) 30 C. 291; see also *Kumar Raj Krishna Prasad Lal Singh Deo v. Barabani Coal Concern Ltd.*, 1935 Cal. 368: I.L.R. 62 Cal. 346: 156 I.C. 98: 60 C.L.J. 477; *Sri Gobinda v. Secretary of State*, 1937 Cal. 574: 176 I.C. 341.

question of fact, and not of law which may or may not be satisfactorily proved by subsequent survey maps. The onus of proving that any particular lands were included in the Permanent Settlement of 1793 is clearly on those who affirm that such was the case, and the burden of proof is not necessarily shifted by the production of the *thak* and survey maps showing that specific lands are included in a particular estate. The *thak* and survey maps are valuable evidence of the state of things at the time they were made, but it does not follow that they show conclusively what was the state of things at the time of Permanent Settlement.<sup>9</sup> It may be clearly presumed that the boundaries mentioned in the maps were the boundaries which existed at the time of Permanent Settlement, but they do not go further, and do not show that the lands measured and included in a particular *mauza* were settled, at the time of a Permanent Settlement, with a particular man. This has to be proved by evidence *aliundi*. The onus of proving that the lands shown in the survey map as belonging to a particular *mauza* were included in the Permanent Settlement of 1793 is upon the plaintiffs who affirm that such was the case.<sup>10</sup> Where a Diara map is not prepared with reference to the Revenue Survey trijunction of three particular villages the correctness of the Diara map can under no circumstances depend upon the correct location of the trijunction. The presumption of correctness of the Diara map is not rebutted by the mere fact that the particular trijunction has not been located.<sup>11</sup>

8. **Chittahs.** Chittahs are accounts compiled from actual measurement, and made in the presence of the raiyats of all the lands in a village divided into dags or parcels, and contain the quantity of land in, and lengths and breadths of, each dag, its boundaries, the species of cultivation and the name of the raiyat who holds it. It may be otherwise, when the zamindar and raiyats are not amicable; but a *chittah* made, when there is no dispute going on, is valuable as an admission by the parties concerned of the state of things at a time when there was no controversy. *Chittahs* are admissible under appropriate sections of the Act. What their value should be is a matter to be determined by the Court in the particular circumstances of the particular case.<sup>12</sup> In the case of *Gopeenath Singh v. Anundmoyee Debia*,<sup>13</sup> certified copies of *chittahs* and a field-book of the Survey Department were received in evidence.<sup>14</sup> Bayley, J., remarking that these papers are the primary records out of which a survey map is made and are originally component parts of the map, and evidence of fact of demarcation of lands and properties measured and surveyed at or about the date of such map and for the purposes of the State and litigated questions, respectively; that notice of their being made is issued to the parties, so that these records cannot be said to be made in the absence of parties, for legally they were present when they had the oppor-

9. Secretary of State v. Wazed Ali, 1921 Cal. 687 : 65 I.C. 866 : 34 C.L.J. 141; see also Secretary of State v. Upendran Narain Roy, 1923 Cal. 247: 71 I.C. 849: 36 C.I.J. 336.

10. Ramanandhan Sahay v. Jai Govind Pandey, 1924 Pat. 213 : I.L.R. 2 Pat. 899 : 75 I.C. 965.

11. Sri Gobinda Chowdhury v. Secretary of State, 1937 Cal. 574 : 176 I.C. 341.

12. Sarat Chandra Rakshit v. Sarala L.E.—147

Bala Ghosh, 1928 Cal. 68 : 105 I.C. 61.

13. (1867) 8 W.R. 167.

14. In the following cases also survey chittahs were received as evidence; Sudukhina v. Rajmohan, 3 B.L.R. (A.C.) 377; Mohamed v. Ozeeddeen, (1868) 10 W.R. 340; Surossutty v. Umbica, (1875) 24 W.R. 192; Taruknath v. Mohendranath, (1870) 13 W.R. 56; Moocharam v. Bissambhur, (1875) 24 W.R. 410.

tunity of being present. This was a decision under the eleventh and thirteenth sections of Act II of 1855 but on the view there taken of the nature of *chittahs* they would also have been admissible under this section. But whether admissible or not under this section, as component parts of maps or as plans, "a *chittah* of the revenue survey is a public record, viz., the record of public work carried on by a public officer—the Superintendent of Survey—under the directions of the Government of Bengal;"<sup>15</sup> and is, therefore, admissible under the thirty-fifth section.<sup>16</sup> Any *chittah*, moreover, if made by the persons and under the circumstances mentioned in the eighteenth section, may be admissible under that section as documentary admissions; or under the thirteenth section as an assertion of right.<sup>17</sup> The Privy Council in the case of *Eckowrie Singh v. Hira Lal Seal*,<sup>18</sup> speak of *chittahs* as no evidence of title in boundary disputes between rival proprietors when they are without further account, introduction or verification. "By these words", said Hobhouse, J., "it seems to me, their Lordships held that, if *chittahs* are relied upon without any account given or verification made of them, then they are not to be considered as evidence; but here an account was given of the *chittahs* and they were properly introduced and verified, and therefore that remark of their Lordships does not seem to me to apply to the *chittahs* now before us. They were, therefore, I think properly used as evidence in this case."<sup>19</sup> "It may here be observed," says Mr. Field, "that the reports do not always show what was the precise nature of the *chittahs* offered in evidence in each particular case; and to this may be attributable some of the difference of opinion which seems to prevail upon the subject in question. There is, and ought to be, a wide distinction as regards both weight and admissibility, between the *chittahs* and other measurement papers of the revenue survey of the country, designed and carried out as an executive act of State; the similar paper of a decennial survey made under the provisions of Act IX of 1847 (*v. ante*); the *chittahs* of a measurement of a particular *khas mahal* made by Government as zemindar,<sup>20</sup> the *chittahs* of a measurement made by a private zemindar,<sup>21</sup> at a time when the relations between him and his raiyats were friendly; and the *chittahs* of a measurement made by the same zemindar when disputes had arisen as to enhancement of rents. If the original records of the reported cases were examined with reference to this distinction, it is more than probable that any seeming difference of opinion may be found reconcilable with sound and uniform principle."<sup>22</sup> Where *chittahs* were produced by the plaintiff as evidence of certain lands being *mal*, it was held that they were sufficiently attested by the deposition of the village *gomasta* that they were the *chittahs* of the village while he was *gomasta*, and that he had been present when, with their assistance, a *purtal* (new, revised) measurement had been carried out in the village.<sup>23</sup>

15. Per Jackson, J., in *Surossutty v. Umbica*, (1875) 24 W. R. 192.

16. See *Girindra v. Rajendra Nath*, (1897) 1 C.W.N. 530, 533.

17. See remarks of Jackson, J., in *Colector, Rajshahe v. Doorga*, (1865) 2 W.R. 210 (*v. post*); Taylor, Ev., s. 1770.

18. (1868) 2 B.L.R. 4 (P.C.); 11 W.R. 2: 12 M.I.A. 136.

19. Sudukhina v. Rajmohan, 3 B.L.R. (A.C.) 377; see *Dinomoni v. Brojomohini*, (1901) 29 C. 187.

20. See *Junmajoy v. Dwarkanath*, (1879) 5 C. 287; *Ram v. Bunseedhur*,

(1883) 9 C. 741; *Taruknath v. Mohendranath*, (1870) 13 W.R. 56; see *Sarat Chandra Rakshit v. Sarala Bala Ghosh*, 1928 Cal. 63: 105 I.C. 61, where the case in 9 Cal. 741 has been explained.

21. As to *chittahs* other than those of the survey, see *Gopal v. Madhub*, (1873) 21 W.R. 29; *Krishno v. Meer*, (1874) 22 W.R. 326; *Sham v. Ramkrishto*, (1873) 19 W.R. 309.

22. Field, Ev., 226; ib. 6th Ed., 168.

23. *Debee v. Ram*, (1968) 10 W.R. 443.

**9. Rennell's map.** Major Rennell, the Director of Survey, made his celebrated maps between the years 1764 and 1773. Whatever else may have been the purpose of their preparation, that purpose undoubtedly included the delineation of roads and waterways, and, so their Lordships of the Privy Council in *Haradas Acharjya Choudhuri v. Secretary of State*,<sup>24</sup> adopted the position of the river there in question as shown in Rennell's map. Although Rennell's map was not contemporaneous with the Permanent Settlement, it having been made some 22 years or so before the Decennial Settlement on which the Permanent Settlement proceeded, yet it may be used, on the presumption of continuity, as evidence of a state of things at the time of the Permanent Settlement. The presumption of continuity is one which varies with the circumstances of each case and is applicable to things which are continuous in their nature. If they are that, then the Court may presume that they continue in the state in which they were last known in the absence of evidence to the contrary. Where Rennell's map is referred to as evidence, there is a presumption of its accuracy under Section 83 of the Evidence Act in respect of such matters as to which it is admissible in evidence.<sup>25</sup> So far as river surveys and road surveys are concerned, Rennell's maps are scientific and accurate ones, only the village sites shown in his map are approximate. They can be made the basis of adjudication of land revenue.<sup>1</sup> Rennell's map indicates correctly the course of rivers, but cannot be regarded as giving correctly the direction of villages.<sup>2</sup> If Rennell's map shows a river it may be taken into account as showing its position and inferences may be drawn from that fact.<sup>3</sup> But Rennell's map only shows the more important rivers and the mere fact that a certain rivulet is not shown in it is no evidence of the non-existence of the rivulet.<sup>4</sup> In *Haradas Acharjya Choudhuri v. Secretary of State*,<sup>5</sup> the Judicial Committee referred to Rennell's map for the purpose of finding the position of the river shown there, and adopted that map as far as possible to be the evidence before the Court.

**37. Relevancy of statement as to fact of public nature, contained in certain Acts or notifications.** When the Court has to form an opinion as to the existence on any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament<sup>6</sup> [of the United Kingdom], or in any<sup>7</sup> [Central Act, Provincial Act, or<sup>8</sup> [a State

24. 43 Ind. Cas. 361 : 26 C.L.J. 590 : 22 M.L.T. 438 : (1918) M.W.N. 28 : 20 Bom.L.R. 49 (P.C.) ; 1917 P.C. 86.

25. *Secretary of State v. Ananda Mohan Roy*, 66 I.C. 287 : 34 C.L.J. 205 : A.I.R. 1921 C. 661.

1. *Secretary of State v. Midnapore Zamindary Co. Ltd.*, 1941 Cal. 520 : 197 I.C. 5 : 46 C.W.N. 218.

2. *Nanda Lal Roy v. Pramatha Nath Roy*, 1933 Cal. 222 : 143 I.C. 179 : 56 C.L.J. 369.

3. *Secretary of State v. Upendra Narain Roy*, 1923 Cal. 247 : 71 I.C. 849.

4. *Benode Lal Chakravarty v. Secretary of State*, 1931 Cal. 239 : 133 I.C. 573 : 34 C.W.N. 1113.

5. 1917 P.C. 86 : 43 I.C. 361 (P.C.)

6. Ins. by the A.O. 1950.

7. The original words "Act of the Governor-General of India in Council, or of the Governors-in-Council of Madras or Bombay, or of the Lieutenant-Governor in Council of Bengal, or in a notification of the Government appearing in the Gazette of India, or in the Gazette of any L.G., or in any printed paper purporting to be the London Gazette or the Government Gazette of any colony or possession of the Queen, is a relevant fact," were successively amended by Act 10 of 1914, A.O. 1937, A.O. 1948 and A.O. 1950 to read as above.

8. Subs. by Act 3 of 1951, S. 3 and schedule, for "An Act of the legislature of a Part A state or a Part 'C state."

Act] or in a Government notification or notification by the Crown Representative appearing in the Official Gazette or in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty is a relevant fact].

8-1[\* \* \* \* \*]

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| s. 3, ("fact".)                     | s. 78. (Proof of Notification.)                                  |
| s. 3 ("Relevant".)                  | s. 81 (Presumption as to Gazettes, Newspapers and Private Acts.) |
| s. 57 (2) (Judicial notice of Act.) |  |

Steph. Dig. Art. 33; Taylor, Ev., s. 1660; Starkie, Ev., 278; Roscoe, N. P. Ev., 187, 188; Phipson, Ev., 11th Ed., 453; 31 & 32 Vict. c. 37 (The Documentary Evidence Act, 1868, s. 21 amended by the Documentary Evidence Act, 1832), Act XXXI of 1863 (Gazette of India); Act III of 1909, s. 116.

### SYNOPSIS

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| 1. Principle.                          | expressly rendered evidence of various matters. |
| 2. Recitals in Acts and Notifications. |   |
| 3. By statute the "Gazette" has been   | 4. Gazettes as medium to prove notice.          |

**1. Principle.** These documents are admissible on grounds similar to those on which entries in public records are received. They are documents of public character made by the authorized agents of the public in the course of official duty and published under the authority and supervision of the State and the facts recorded therein are of public interest and notoriety. Moreover, as the facts stated in them are of a public nature, it would often be difficult to prove them by means of sworn witnesses.<sup>9</sup>

**2. Recitals in Acts and Notifications.** The fact as to the existence of which the Court has to form an opinion must be one of a public nature. A similar expression occurs in Section 42 *post* which speaks of "matter of a public nature".<sup>10</sup> The "Gazette of India", the organ of the Government of India, was first published in 1863 only. Previous to that the notifications of the Government of India were published in such of the Gazettes of the Local Government as was necessary. By Act XXXI of 1863, publication in the "Gazette of India" was declared to have the effect of publication in any other Official Gazette in which publication was prescribed by the law in force at the date of the passing of the Act.<sup>11</sup> In the case of *R. v. Amiruddin*,<sup>12</sup> the "Gazette of India" and the "Calcutta Gazette" containing official letters on the subject of hostilities between the British Crown and Mahomedan fanatics on the frontier, were held to have been rightly admitted in evidence under the sixth and eighth sections<sup>13</sup> of the repealed Act II of 1855, as proof of the commencement, continuation and determination of hostilities. It was

8-1. The last paragraph added by Act 5 of 1899, S. 2, omitted by Act 10 of 1914, S. 3 and Sch. II.  
 9. Taylor, Ev., s. 1591; Starkie, Ev. 272, 273, *et seq.*; Phipson, Ev., 11th Ed., 453.  
 10. Notes to Ss. 13, 32 (4) *ante* and

42. *post*  
 11. Act XXXI of 1863, S. 1.  
 12. 7 B.L.R. 63: 15 W.R.Cr. 25.  
 13. S. 6 of Act II of 1855, corresponds generally to S. 57 (judicial notice) and S. 8 of the same Act to the present section.

further held that it was not necessary that these documents should be interpreted to the prisoner. It was sufficient that the purposes for which they were put in were explained. In the subsequent trial of the Wahabi conspirators at Patna, the Gazette was used in evidence for a similar purpose.<sup>14</sup> According to the English rule, a recital in a public general Act is, in general, *prima facie*, but not conclusive, evidence of the facts recited, because in the eye of law every subject is privy to the making of it; but a private statute (though it contains a clause requiring it to be judicially noticed as a public one) is not evidence at all against strangers either of notice or of any of the facts recited.<sup>15</sup> The present section draws no distinction between public and private Acts of Parliament, merely requiring that the fact spoken to in either case should be of a public nature; but, of course, neither in the case of the Act, nor of the Gazette in the section mentioned, is any recital therein contained conclusive of the fact recited, unless expressly declared to be so; and knowledge of a fact although it be of a public nature is not to be conclusively inferred from a notification in the Gazette; it is a question of fact for the determination of the Court.<sup>16</sup>

3. By statute the "Gazette" has been expressly rendered evidence of various matters. Thus, by the Documentary Evidence Act<sup>17</sup> the Gazette is made *prima facie* evidence of any proclamation, order, or regulation issued by Her Majesty, the Privy Council or any of the principal departments of the State. So also, by Section 116 of the Presidency-towns Insolvency Act, 1909, the production of the Gazette containing the notice mentioned in the section is conclusive evidence of the order having been duly made, and of its date.<sup>18</sup>

4. **Gazettes as medium to prove notice.** The Gazettes and newspapers are often evidence, as a medium to prove notice such as the dissolution of a partnership which is a fact usually notified in the manner. But, unless the case is governed by some special Act, such evidence is very weak without proof that the party to be affected by the notice has probably read the particular Gazette in which it is contained, e.g., that he takes it in or attends a reading-room where it is taken, or has shown knowledge of other matters contained in the same number, or that it is a publication with which it is his duty to be familiar, or the like; but the mere fact that the paper circulates in his neighbourhood is not sufficient.<sup>19</sup> Moreover, in the case of those who dissolve partnership, it is incumbent upon them to give to old customers of the firm an express and specific notice, by circular or otherwise.<sup>20</sup> Under Section 350 of the repealed Act, VIII of 1859 (Civil Procedure), the Government Gazette containing the advertisement of sale, and a printed paper purporting to be the conditions of sale alluded to in the Gazette, and issued from the Master's Office in the name of the Master, were admitted in evidence

14. For English cases v. Taylor, Ev., s. 1660, and Starkie, Ev., 278.

15. Taylor, Ev., ss. 1660, 1661, Steptl. Dig., Art. 33; Roscoe, N. P. Ev., 187, 188; see Baban v. Nagu, (1876) 2 B. 38; Ballard v. Way, (1836) 5 L. J. Ex., 207.

16. Harratt v. Wisc, (1829) 9 B. & C. 712; Starkie, Ev., 280.

17. (1868) 31 & 32 Vict. c. 37, S. 2, amended by the Documentary Evi-

dence Act, 1882, S. 2.

18. Act III of 1909.

19. Starkie, Ev., 280; Taylor, Ev., ss. 1665, 1666; Phipson, Ev., 11th Ed., 457; Whart, Ev., cited ib., ss. 671-675; see S. 14 ante, and Notes thereto. In rebuttal evidence may, of course, be given as that the party is unable to read, etc.

20. Chundee v. Eduljee, (1882) 8 C. 678.

to prove the actual conditions of the deed of sale.<sup>21</sup> A statement made in a gazetted notification that an Act has been assented to by the President is under Section 35, proof of that fact.<sup>22</sup> Notice of a resolution winding up a company voluntarily must also be given by advertisement in the Local Official Gazette,<sup>23</sup> in certain cases by the Presidency-towns Insolvency Act<sup>24</sup> and certain orders made thereunder will affect creditors after proof of notice given and the lapse of a certain time.<sup>25</sup>

38. *Relevancy of statements as to any law contained in law-books.* When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

s. 3 ("Relevant").  
s. 54 (Proof of foreign law).  
s. 57 (Judicial notice).

s. 84 (Genuineness of books here mentioned).

Taylor, Ev., Sections 1423—1425; Best Ev., Section 513; Roscoe, N.P. Ev., 119—121; Steph. Dig., Arts, 49-50; Phipson, Ev., 11th Ed., 454; Act XVIII of 1875, Section 3; (Indian Law Reports) 6 and 7 Vict. c. 94; Section 3; 22 and 23 Vict. c. 63; 24 and 25 Vict. c. 11 (Ascertainment of Foreign and Colonial Law); Foreign Jurisdiction Act, 1890; 53 and 54 Vict. c. 37.

### SYNOPSIS

1. Principle.  
2. Law of any country.

3. Precedents.  
4. Foreign Law.

**1. Principle.** Statements in books of law and in Reports are admissible on grounds similar to those of the three preceding sections. Books containing the law of a country,<sup>1</sup> whether in the form of statute or case-law, deal with matters which are of public notoriety and interest, and when published under the authority of Government have the further guarantee of that authority; while reports not published under the authority of Government, or of the Courts may owing to the public and widely known character of their contents, and the frequent and public use to which they are put in the form of reference, comment, citation or otherwise be reasonably presumed to be faithful and accurate. Statements of law contained in text books or law reports can be looked into by courts to form their opinion provided that

21. Jotendro v. Brojosoondery, (1864) W.R. 50.  
22. Narayana Deo v. State of Orissa, 1953 Orissa 185; I.L.R. 1953 Orissa 71.  
23. Act VII of 1913, S. 206. See now section 485 of the Companies Act 1 of 1956.  
24. Act. III of 1909, Ss. 20, 69 (4), Sch.

I, Ss. 3, 6, and the Insolvency Rules (Calcutta), Ss. 108, 129 (1), 138, 132 B. and 142 C.  
25. Ib., S. 73.  
1. Where it is necessary to refer to a statute judicially noticeable, a copy is not given in evidence but merely referred to, to refresh the memory; Starkie, Ev., 274.

they are published or printed under the authority of the Government of the country to which such law appertains.<sup>1\*1</sup>

**2. Law of any country.** These words would, by themselves, include India as well as Great Britain and other foreign countries, but the words "form an opinion" and the fact that Courts of this country must take judicial cognizance of the laws they administer<sup>2</sup> which, therefore, require no proof, indicate that the countries referred to in the section are countries other than India. Though, however, the Court must take judicial notice of laws in force in India, and of the Acts of Parliament, it may refuse, if called upon by any person, to do so, until such person produces any such appropriate book or document of reference as it may consider necessary to enable it to do so.<sup>3</sup>

Statements of law, other than those contained in Reports, must purport to be printed or published under authority. So, a statement contained in an unauthorized translation of the Code Napoleon as to what the French law was upon a particular matter, was held not to be relevant under this section<sup>4</sup> but reports of rulings need not be so published, if only the book containing them purport to be a report of the rulings of such country. As to the presumption of genuineness of the book mentioned in this section, see Section 84 *post*.

The report of a case in a newspaper, strictly speaking, is not relevant under this section for the newspaper cannot be regarded as a 'book' purporting to be a report of the rulings of the Court nor can the presumption under Section 84 arise.<sup>5</sup>

**3. Precedents.** The Law Commission of India in their XIV Report, Volume I, Chapter 28, page 265, discussing judicial decisions as a source of law, points out :

"It has been said with reference to England that it is a common place to lawyers at least that the law of this country consists substantially of legislative enactments and judicial decisions. The former are made known to the public in the most solemn form, printed at the public expense and preserved under conditions which ensure that they shall be permanently and authentically recorded. With the latter it always has been and still is far otherwise. Yet the importance of permanent and accurate reports of judicial decisions is and always has been obvious.... Today whatever the reasons may be, the theory of the binding force of precedent is firmly established, if not unreservedly, at least only with some such reservation as that a *decision need not be followed if it appears to have been given per in curiam*, e.g., by reason of a relevant statute not having been called to the attention of the Court. It is today the accept-

1-1. *Hindustan Chemicals v. Kreby, I. L. R.* (1972) 1 Cal. 506.

2. S. 57, *post*.

3. *Ib.*

4. *Christien v. Delaney*, (1899) 26 C. 931; 3 C. W. N. 614.

5. *Superintendent and Remembrancer of Legal Affairs v. Sardar Bahadur*

Singh, 73 C. W. N. 547; 1969 Cr. L. J. 1120; A. I. R. 1969 Cal. 451, 457. Nevertheless, in this case the report of a case before the Supreme Court in the *Statesman*, Calcutta edition of November 21, 1968, was relied upon.

ed duty of a Judge, whatever his own opinion may be, to follow the decision of any Court recognised as competent to bind him. It is his duty to administer the law which that Court has declared."

The position in India is not very different.

So far as judgments of the Supreme Court are concerned, Article 141 of the Constitution provides that "the law declared by the Supreme Court shall be binding on all courts within the territory of India". Article 141 renounces the principles contained in Section 212 of the Government of India Act, 1935, which laid down that the decisions of the Privy Council and the Federal Court shall be binding upon Indian Courts.

Article 141 of the Constitution and Section 212 of the Government of India Act merely gave legislative sanction to what had long been the recognised practice of the British Indian Courts. The position had been well-established by the decisions of the Judicial Committee of the Privy Council. It decided that "it is not open to the courts in India to question any principle enunciated by this Board, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case. Nor is it open to them, whether on account of 'judicial dignity' or otherwise, to question its decision on any particular issue of fact."<sup>6</sup>

The decisions of the High Courts have not been invested with the authority of law by any enactment. But, it is well settled that the courts subordinate to a High Court are bound by its decisions and it is not open to them to refuse to follow the law as interpreted by the High Court. The High Courts have made this clear in a number of decisions<sup>7</sup> and have gone so far as to characterise refusal on the part of subordinate courts to follow their decisions as being tantamount to insubordination.<sup>8</sup>

It is also well settled that a single judge of a High Court is bound by a decision of a Division Bench of that Court and a Division Bench by a decision of a Full Bench or of former Division Bench except that the latter Division Bench has the right to refer the case to a Full Bench for reconsideration of the earlier decision in the event of its disagreeing with the view of the former Division Bench.<sup>9</sup>

However, the decision of a High Court has only persuasive authority outside the territory subject to its jurisdiction.

Thus, the binding force of precedents has been firmly established in Indian jurisprudence. Judgments delivered by the superior courts are as much the law of the country as legislative enactments.

- 6. Mata Prasad v. Nageshar Sahai, 52 I. A. 398 at 417; 1925 P. C. 272.
- 7. Ramaswami v. Chandra Kotayya, A. I. R., 1925 Mad. 261 at 262; Bankey Lal v. Babu and others, A. I. R. 1953 All. 747.
- 8. Rex v. Ram Dayal, A. I. R. 1950

- 9. All. 134; 1949 A. L. J. 413.
- Chandulal v. Babulal, A. I. R. 1952 Madhya Bharat 171; M. Subbarayudu and others v. The State, A. I. R. 1955 Andhra 87; Dr. K. C. Nambari v. State of Madras, A. I. R. 1953 Mad. 351.

The limitations of case-law and use of judicial precedents are not often adequately realised by legal practitioners and magistrates. It is not every part of a reported case which constitutes binding judicial precedent. In every judicial decision, that of the particular judgment given, lies the legal reason for giving it, or the judicial motive which caused the case to be decided as it was decided. This is called "*ratio decidendi*". The *concrete decision is binding on the parties to it. But it is the abstract ratio decidendi which alone has the force of law as regards all subordinate courts.*" Thus, a precedent is a judicial decision which contains in itself a principle. This *ratio decidendi* must not be confused with *obiter dicta* or the things said by the way in a judgment. In writing a judgment on concrete cases, besides the principle involved and for which reasons are given, there will be accidental observations and observations not germane to the principle involved and which are observations made by the way. These observations, made by the way, are most often pressed in courts in order to support points wholly untenable under different circumstances. Therefore, courts must be careful to distinguish between *ratio decidendi* and *obiter dicta* and consider themselves only bound by the former, except in the case of the Supreme Court whose observations as those of the Privy Council are also binding. Similarly, the citation of precedents obsolete and inapplicable overruled cases, solitary precedents not approved and followed in subsequent cases, turning on peculiar facts and decisions of equally divided Court are wrong uses attempted to be made of judicial precedents.

The correct way of applying judicial precedents has been well set out by Chancellor Kant as follows : "My practice was, first, to make myself perfectly and accurately (mathematically accurate) master of the facts. It was done by abridging the plaint and then the statements and then the depositions, and by the time I had gone through this slow and tedious process, I was master of the cause and ready to decide it. I saw where justice lay and the moral sense decided the case in half the time; and I then sat down to search the authorities until I had examined my books. I might once in a while be embarrassed by a technical rule but I must always find principles suited to my views of the case." In other words, *every decision is only an authority for the facts which it decides and its application depends upon the ratio decidendi and this application should be made after mastering the facts of the case before us and finding out the principle involved and then invoke judicial precedents.* Failure to do so results in the flourishing of the 'case-lawyers' and the grotesque application of case-law and miscarriage of justice. In fact, in the vast majority of cases, as Lord Esher once pointed out, the cases to be decided would be extremely simple, if the trial judges had not started to try the cases before them by studying all about other cases and thereby confused their own minds. In the case of penal statutes where the law has been codified and the provisions are clear, it has been held over and over by our High Courts that when the language of a section is clear there is no point in embroidering it and confusing oneself by citation of case-law. In fact, the Madras High Court in particular has been deprecating the practice of citing case-law in criminal cases.

The force of judicial precedents is of two kinds, viz., (1) authoritative, and (2) persuasive. In so far as subordinate courts are concerned, the decision of High Courts to which they are subject and those of the Supreme Court and formerly of the Privy Council are authoritative precedents binding them absolutely. Judgments of other High Courts and American, Australian

and English decisions will be received with great respect, as representing the opinion of eminent lawyers but are not binding as authoritative precedents. In fact, we must welcome all such external decisions, because very often matters on which the decisions of our High Courts are silent would have been dealt with by them.<sup>10</sup>

It need not be pointed out that the decision of court of co-ordinate jurisdiction and decisions of inferior courts and the decisions of special tribunals, departmental rules, executive circulars, advisory opinions by the Advocate-General, communicated to all authorities, are all aids to be gladly welcomed, but do not constitute authoritative judicial precedents.

In the study of case-law, we have to note briefly the value and importance of text-books, head-notes, digests and official and unofficial law reports. Text-books have always occupied in India a very high place as an aid in the application of judicial principles.<sup>11</sup> There are numerous works of sages in the profession of law which facilitate the researches and abridge the labour of the students. These works acquire in time, by their intrinsic value, weight of authority. The expressions of text writers may be looked to as evidencing the constant practice of the profession. In fact, respect for a law-writer, whose work has got such reputation, may determine the Legislature or judge to adapt his opinion or to turn such speculative opinion of a private man into actually binding rules. In India the head-note, which ought to be a fair epitome of the decision, is not always carefully prepared, and the result is that the head-note most often sets forth the judgment inaccurately. But the thing to be remembered, in respect of a head-note is, that a head-note is not a final authority. It is merely a guide trustworthy according to the ability with which the particular law journal is conducted. In regard to digests, they are plentiful in India. In these digests, cases are arranged under topics and section-wise. But these digests, in order to be useful, have to be kept constantly up to date. Finally, coming to indices, in this country the Madras Law Journal Office and other firms of great repute have published from time to time indices which are extremely useful in the search of judicial precedents. In the search for authority as soon as one pertinent case is found the task becomes comparatively simple. With that one case as a key, the searcher by using the index and tables of cases finds the places where the text-books and digests have placed that case and like ones. The law reports of this country consist of Indian Law Reports published by the State and unofficial reports increasing daily. There can be no doubt that by publishing not only what ought to be published but also what ought not to be reported like ill-considered cases of first impression, cases decided *ex parte*, consent orders and orders in interlocutory proceedings and short orders without giving reasons and short notes in advance without stating the facts, there is a plethora of case-laws and the result might be legitimately described as chaos. It is no doubt true that it is open to court under the Indian Law Reports Act XVIII of 1875 to refuse to look into decisions reported in non-official reports as not authoritative or binding. On account of the fact, however, that the Indian Authorised Law Reports—an honourable exception within the limits imposed

10. In the matter of the C. P. & Berar Sales of Motor Spirit, etc., (1939) 1 M. L. J. (Supp.) 1 : 1989 F. C.

1, 5 : 180 I.C. 161.  
11. Ibid.

by red-tapism being I. L. R. Madras—are the least informative and most belated, this Act has always remained a dead letter.<sup>12</sup>

The doctrine of adhering to judicial precedents is expressed in the maxim *stare decisis et non quieta movere*.

“*Stare decisis*” is the name given to the doctrine that, when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same.<sup>13</sup>

The importance of the maxim and its actual working are best seen in instances where the courts declare themselves bound to abide by the former decisions, although they entertain serious doubt as to whether they are legally defensible, or although (as they often say) they would decide the questions differently if it were a new case.<sup>14</sup>

When a point or principle of law has been once officially decided or settled, by the ruling of a competent court in a case in which it was directly and necessarily involved, and more especially when it has been repeatedly decided in the same way, it will no longer be considered as open to examination or to a new ruling, by the same tribunal or by those which are bound to follow its adjudications.<sup>15</sup>

The courts are always careful not to overrule decisions which, not being manifestly erroneous and mischievous, have stood for some time unchallenged, and from their nature and the effect which they may reasonably be supposed to have produced upon the conduct of a large portion of the community, as well as of the Legislature itself, in matters affecting rights to property, may fairly be treated as having passed into the category of established and recognised law.<sup>16</sup>

To sum up: A precedent is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi*. The concrete decision is binding between the parties to it but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large.<sup>17</sup>

The strict theory of applying the decision in one case as a binding precedent in another is that in an exactly identical case the rights of the parties will be precisely what the rights are decided to be in the previously decided case. But, no two cases are precisely alike. However similar they may be, there is at least a difference as to the persons interested or as to the times of the events upon which the cases are based. But these differences are immaterial or unessential, and consequently would be disregarded in deducing the legal principle involved in the case.

12. “Sec. 3 : No Court shall be bound to hear cited, or shall receive or treat as an authority binding on it, the report of any case decided by any High Court for a State, other than a report published under the authority of any State Government.” The I.L.R. Series published under Indian Law Reports Act (18 of 1875) is only an addendum to S. 78, Indian Evidence Act, 1872.

13. Moore v. City of Albany, 98 N. Y. 396.  
14. Beal 182.  
15. Ibid.  
16. Beal 20. Thesiger, L. J. in Pugh v. Golden Valley Rly. Co., (1880) 49 L. J. Ch. 721 at 723.  
17. Salmon, Jurisprudence, 2nd ed., p. 174; Black’s Law of Judicial Precedents, p. 39.

Hence the rule is, that the decision in every case would furnish a precedent for all other cases in which the circumstances, save as to unessential matters, are identical, i. e. the point of law to be deduced in each case is that one which strips away all the unessential circumstances; and declares the rules having regard to every essential particular and only to essential particulars.

The ascertainment of material points of difference, and the indication of their influence upon the decision to be rendered is known as "distinguishing" cases.<sup>18</sup>

*But when carried to an extreme the process of distinguishing cases becomes a mere splitting of hairs. On the part of counsel, it is resorted to as a means of evading the effect of an unfavourable precedent by finedrawn subtleties and courts have been known to resort to the same process for the purpose of escaping from decisions which they do not want to follow.*

It is a matter of great difficulty to a Judge, who disapproves of a decision, to be quite sure that he is honestly distinguishing the case in which it was given from the case before him.<sup>19</sup> "In my opinion, it is very important", said Justice Fry, "that one Judge should not attempt to draw fine distinctions between cases before him and similar cases decided by another Judge. Practitioners are much embarrassed by minute differences between decisions of different Judges".<sup>20</sup>

But, cases do, however, occur in the multifarious transactions in relations of mankind and rules of law have sometimes of necessity to be extended to suit the local conditions and meet the exigencies of every people. It is one of the maxims of the common law that for *every injury remedy is given and when the justice of a cause stares fully, in the face, it is the duty of court in such a case to open some new channel through which a remedy may be obtained.*<sup>21</sup> This is known as extending the principle of a case.

*It is only in very rare cases that one gets a precedent in support of his position which is on all fours with the question on hand. In the large majority of cases counsel has several cases to consider not one of them by itself deciding the very point to which his attention is directed. When the emergency arises, the advocate having collected the several cases bearing more or less directly upon the point, attempts by combination and comparison to ascertain what doctrine is to be deduced from the cases taken together. The several cases all dealing with the same general topic although with dissimilar aspects of it, may, by their combination, be made to establish a general rule which is broader than the doctrine of any one of the cases taken by itself and broad enough to include the novel case to which it is to be applied.*<sup>22</sup>

Declarations of the High Court about the validity of statutory provisions, after applying the constitutional tests, should be regarded as binding by all authorities and citizens within the State subject to the jurisdiction of the High

18. Black's Law of Judicial Precedents, pp. 60-61.

19. Per Jessel, M. R. Smith's case, (1879) L.R. 11 Ch. D. 579.

20. Fry, J. in *In re Symons Luke v. Tomkin*, (1882) L. R. 21 Ch. D.

757.

21. *Allison v. McCune*, 45 Am. Dec. 605. Extract from the judgment of the Supreme Court of U.S.A.

22. Black on Judicial Precedents, p. 70

Court making the declaration. These declarations must be accepted by the Income-tax Authorities, though the Evidence Act does not apply to them.<sup>23</sup>

**4. Foreign Law.** Though the Courts will take judicial cognizance of the laws they administer, Foreign and Colonial laws must be proved. This section<sup>24</sup> is a departure from the English rule, under which Foreign law must (unless an opinion has been obtained under the statutory procedure mentioned below) be proved as a fact by skilled witnesses, or in the case of foreign customs and usage<sup>25</sup> by any witness, expert or not, who is acquainted with the fact and not by the production of the books in which it is contained.<sup>3</sup> In India also, Foreign law may (in addition to the method provided by this section) be proved by the opinions of persons specially skilled in such law under section 45.<sup>2</sup>

Further, there exists a statutory procedure for the ascertainment of Foreign and Colonial law. By the British Law Ascertainment Act, 1859, 22 and 23 Vict., c. 53, a case may be stated for the opinion of a superior Court in any of Her Majesty's Dominions to ascertain the law of that part<sup>4</sup> and by the amendment of that Act, 24 and 25 Vict., c. 11, a similar case may be stated for the opinion of a Court in any foreign state with which Her Majesty may have entered into a convention for the ascertainment of such law,<sup>4</sup> and as to judicial notice of the territorial extent of the jurisdiction and sovereignty exercised *de facto*, see "The Foreign Jurisdiction Act, 1890".<sup>5</sup>

What the law in a foreign country is, is a question of fact to be proved by evidence. A judgment of the highest tribunal of that foreign country is the best evidence to adjudicate what the law there is. In such a case, there is no question of the binding nature of the foreign judgment, such as arises under Section 13 of the Code of Civil Procedure.<sup>6</sup> The effect of this section and Section 84 is that the Court may take judicial notice of a publication containing a foreign law, if it is issued under the authority of the foreign Government concerned, and may accept the law, as set out in such publication, as a law in force in the particular foreign country at the relevant time. But such a publication cannot be evidence that what is contained in it is the whole law. What the whole law of a foreign country, at a particular point of time, is, cannot, therefore, be proved except by calling in expert evidence as provided for in Section 45, Evidence Act.<sup>7</sup>

- 23. Devi Das v. C. I. T., Lucknow, (1967) 1 I. T. J. 280; 63 I. T. R. 356; 20 S. T. C. 53; A. I. R. 1967 All. 414, 419.
- 24. v. definition of "Foreign Court" Civil Pr. Code, S. 2 (5).
- 25. Lindo v. Belisario, (1795) 1 Hagg. C. R. 216; Sussex Peage Case, (1844) 11 C. & F. 114–117; Vander Danct v. Theilusson, (1849) 8 C. B. 812.
- 1. Sussex Peage Case, supra; Mostyn v. Fabrigas, Cowp. 174; Roscoe, N. P. Ev., 119–121; Bater v. Rater, (1907) P. 323 (expert evidence required to prove the validity of foreign marriage).
- 2. Hindustan Heavy Chemicals v. Kreby, 1 I. R. (1972) 4 Cal. 396.
- 3. Login v. Coorg (Princess), (1862) 30 Beav. 632 in which the Court of Chancery in England forwarded a case on Hindu law to the Supreme Court of Calcutta.
- 4. This Act is stated to be practically a dead letter, as no Convention has ever been made in pursuance of it. Phipson, Ev., 11th Ed., 516; see also 6 & 7 Vict., c. 94, s. 3; and R. v. Dossaji, (1878) 3 B. 834.
- 5. 53 & 54 Vict., c. 57.
- 6. Sugandhachand v. Mangibai, 1942 Bom. 185, 189; I. L. R. 1942 Bom. 407, 408 I. C. 759; 44 Bom. I. R. 558.
- 7. Jagdish Chandra Sinha v. Commissioner of Income Tax, West Bengal, 1955 Cal. 48, 51; see also Kishen Lal v. Sohan Lal, 1954 Raj. 138.

### How much of a statement is to be proved

#### TOPICAL INTRODUCTION TO SECTION 39

While on the one hand, in the case of a statement in a civil or criminal proceeding by way of admission or confession, the whole of it must be taken and read together, since thus alone can the whole of that, which the person making the statement intended to convey, be certainly arrived at, since it would be obviously unfair to take that only which is against the interest of the declarant, while the very next sentence might contain a material qualification; on the other hand, great prolixity, waste of time and not seldom injustice, might occur if evidence of matters (often otherwise inadmissible) were allowed to be given, simply on the ground that the whole of the documents or conversations must be before the Court. The latter is, therefore, constituted the judge of the amount which may be given in evidence of any document or conversation. The discretion is to be guided by the principle of letting in so much, and so much only, as makes clear the nature and effect of the statement and the circumstances under which it was made.<sup>8</sup>

*39. What evidence to be given when statement forms part of a conversation, document, book, or series of letters or papers.* When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book, or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

ss. 21, 23 (proof of admissions).

ss. 137, 138 & Chap. X, *passim* (examination; cross-examination; re-examination).

Taylor, Ev., ss. 732-734; 14, N. P. 14, 4, Roscoe, Ev., 179; Wig S. 2113; Norton Ev., p. 114 at 203-204-206; Phipson 11th Ed., 537-538.

#### SYNOPSIS

|                         |                 |
|-------------------------|-----------------|
| 1. Principle.           | 3. Conversation |
| 2. Documents generally. | 4. Letters.     |

**1. Principle.** The rule laid down by the present section (which is to the same effect as the English law on the same subject) is founded on the general grounds of convenience and justice (v. Introduction, ante).

**2. Documents generally.** "Though the whole of a document may, as a general rule, be read by the one party, when the other has already put in evidence a partial extract,<sup>9</sup> this rule will not warrant the reading of the

8. Notton Ev., 203, 204; Taylor, Ev. ss. 732-734, 127-129, v. ante.

(1882) 10 L. R. Ir. 294, cited in Taylor, Ev., s. 732

9. R. v. Queen's Cy. JJ. Re Feehan,

distinct entries in an account book<sup>10</sup> or distinct paragraphs in a newspaper<sup>11</sup> unconnected with the particular entry or paragraph relied on by the opponent; nor will it render admissible bundles of proceedings in bankruptcy, entries in corporation-books, or a series of copies of letters inserted in a letter book, merely because the adversary has read therefrom one or more papers or entries or letters;<sup>12</sup> but the mere fact that remaining portions of the papers or books may throw light on the parts selected by the opposite-party will not be sufficient to warrant their admission; for such party is not bound to know whether they will or not, and moreover, the light may be a false one."<sup>13</sup> It may be inferred, it has been said, from this section, how much—and how much only—of the special diary may be seen by an accused person or his agent when it is used to refresh memory or to contradict the police officer. In such case, the accused person or his agent is entitled to see only the particular entry and so much of the special diary as is, in the opinion of the Court, necessary in that particular matter to the full understanding of the particular entry, so used and no more. In such cases, the Court must be careful to see that the discretion entrusted to it in deciding what may or may not be seen by the accused or his agent is not abused, remembering that the discretion is to be a judicial discretion, and is not to be influenced by mere arbitrary fancy.<sup>14</sup>

What is rendered admissible under this section is that which the Court finds necessary in order that the statement may be intelligible.<sup>15</sup> Once documents become admissible in evidence, the Court is entitled to look into their contents and make such use of them as it thinks fit.<sup>16</sup> But, it cannot be said that because the document is admissible for a certain purpose, all recitals, statements and references therein can be used as proof of the facts to which they relate.<sup>17</sup> It is well settled, that where a document consists of two separate parts, one of which is admissible and the other inadmissible, the document cannot be rejected as a whole.<sup>18</sup> This section cannot be invoked for the purpose of letting in a confession in respect of which the bar created by Sections 24, 25 and 26, Evidence Act, has not been removed by Section 27. It was never intended that a matter, which has been expressly ruled out should be allowed to come in the garb of an explanatory statement.<sup>19</sup> This section is not drafted for the purpose of Section 27 alone, but is a general section and the words "nature" and "effect" of the statement are meant in that section to apply both to the inherent character of the statement, and the meaning of the statement or the effect produced by the statement, if the word "effect" has the wider meaning. It is possible that, in a particular case, the prosecution, for reasons best known to themselves, may wish to prove the exact words used by the accused, and in that case also this Section would apply. But, so far as the admissibility of the words "deposed to" is concerned, they are still governed by the provisions of Section 27.<sup>20</sup>

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- 10. Catt v. Howard, (1820) 3 Stark, R. 3; Reeve v. Whitmore, (1865) 2 Drew & Sm. 446.
- 11. Darby v. Ousley, (1956) 1 H & N. I.
- 12. Sturge v. Buchanan, (1839) 10 A. & E. 598 at pp. 600, 605. The reference incorporates the two together; Johnson v. Gilson, (1801) 4 Esp. 21; Falconer v. Hanson, (1808) 1 Camp. 171.
- 13. Sturge v. Buchanan, supra, 600–605; Taylor, Ev., s. 732.
- 14. R. v. Mannu, 19 A. 390 at 405 (F.B.) per Edge, C. J.; Dal v. R., 1917 P. C. 25; 44 I.A. 137; I.L.R. 44 Cal. 876; 39 I. C. 311.
- 15. Karam Din v. Emperor, 1929 Lah. 338; 115 I. C. 1.
- 16. Sheikh Katabuddin v. Nafar Chandra, 1927 Cal. 230; 1919 I.C. 907.
- 17. Tika Ram v. Motilal, 1930 All. 299; I. L. R. 52 All. 464; 126 I. C. 29.
- 18. Fazal Din v. Karam Hussain, 1930 Lah. 81, 83; 162 I.C. 404.
- 19. Sukhan v. Emperor, 1929 Lah. 344; I. L. R. 10 Lah. 283; 115 I. C. 6 (F.B.).
- 20. Karam Din v. Emperor, 1929 Lah. 338; 115 I. C. 1.

Thus whether the statement be in a civil or criminal proceeding (admission or confession), the whole of it which contains the statement must be read and taken together, for thus alone can the whole of what the person making the statement intended to convey be certainly arrived at. It would be an unfair practice to extract what is against the interest of the declarant, while the very next sentence might contain a material qualification. On the other hand, great prolixity and waste of time might occur, if the whole of long rambling statements were to be introduced, simply on the ground that the whole of the document or conversation must be before the court. The judge is, therefore, constituted, in every case, the referee, by whose decision is limited the quantity of the document, etc., containing the statements which shall be put in evidence. His discretion is to be guided by the principle of letting in so much, and so much only, as makes clear "the nature of the effect of the statement and the circumstances under which it was made." The Court would exercise a sound discretion in admitting only so much as explains or qualifies the statement.<sup>21</sup>

This section must be taken to refer to statements which are admissible under Sections 17, 18, 19, 34 to 38, as also statements used for purposes of cross-examination. The documents referred to by a witness to refresh his memory do not strictly come within the section, but the same principle has been applied to them.<sup>22</sup>

**3. Conversation.** "The same rule prevails in the case of a conversation in which several distinct matters have been discussed; and although it was, at one time, held, on high authority, that if a witness were questioned as to a statement made by an adverse party, such party might lay before the Court the whole that was said by him in the same conversation, even matter not properly connected with the statement deposed to, provided only that it related to the subject-matter of the suit,<sup>23</sup> yet a sense of the extreme injustice that might result from allowing such course of proceeding has induced the Courts, in later time, to adopt a stricter rule, and if a part of a conversation is now relied on as an admission, the adverse party can give in evidence only so much of the same conversation as may explain or qualify the matter already before the Court.<sup>24</sup> It is settled law, that proof, on cross-examination, of a detached statement, made by or to a witness at a former time, does not authorise proof by the party calling that witness of all that was said at the same time, but only of so much as can be in some way connected with the statement proved.<sup>25</sup> Therefore, where a witness has been cross-examined as to what the plaintiff had said in a particular conversation, cannot be re-examined as to other assertions, made by the plaintiff in the same conversation, that were not connected with the assertions to which the cross-examinations related, although they were connected with subject-matter of the suit.<sup>1</sup>

The opponent, against whom a part of an utterance has been put in, may, in his turn, complement it by putting in the remainder, in order to secure for

21. Prince v. Samo, (1838) 7 A. & E. 627, is the leading case on this point. See also Nort. 203-204.
22. Cunn., p. 109.
23. The Queen's case, (1820) 2 B. & B. 284, per Abbott, C. J.
24. Prince v. Samo, (1838) 7 A. & E. 627, 634, 635; Taylor Ev., s. 733.
25. Prince v. Samo. supra, Sturge v. Buchanan, (1839) 10 A. & E. 598.

1. Taylor Ev., s. 1474; Prince v. Samo, supra, 637. In this case the opinion of Lord Tenterden in The Queen's case, (1820) 2 B. & B. 284, that evidence of the whole conversation, if connected with the suit was admissible, though it related to matters not touched in the cross-examination, was considered and overruled.

the tribunal a complete understanding of the total tenor and effect of the utterance. There is much opportunity for difference of opinion whether the proponent in the first instance must put the whole. But there is and could be no difference of opinion as to the opponent's right, if a part only has been put in, himself to put in the remainder. In the definition of the limits of this right, there may be noted three general corollaries of the principle on which the right rests, namely, (a) No utterance irrelevant to the issue is receivable; (b) No more of the remainder of the utterance that concerns the same subject, and is explanatory of the first part, is receivable; (c) The remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself a testimony.<sup>2</sup>

**4. Letters.** "With regard to letters it has been held that a party may put in such as were written by his opponent, without producing those to which they were answers, or calling for their production; because, in such a case, the letters to which those put in were answers are in the adversary's hands, and he may produce them, if he thinks them necessary to explain the transaction.<sup>3</sup> But, while this is the strict rule, yet, in practice, if a party reads a letter from his opponent and is in possession of a copy of his own letter to which the opponent's is an answer, he is expected to read both. If a plaintiff puts in a letter by the defendant on the back of which is something written by himself, the defendant is entitled to have the whole read,<sup>4</sup> and where a defendant laid before the Court several letters between himself and the plaintiff, he was allowed to read a reply of his own to the last letter of the plaintiff, it being considered as a part of an entire correspondence."<sup>5</sup>

A Court has inherent powers for refusing disclosure of matters, which, in the public interest, should be kept secret, but that a witness should be allowed to put in a portion of a letter and say which portions of it are to go in and which portions are to be concealed from his opponent is quite unheard of.<sup>6</sup>

### Judgments of Courts of Justice when relevant

#### GENERAL

Transactions unconnected with the facts in issue are, according to the general rule of relevancy, inadmissible in evidence. Judgments in Courts of Justice on other occasions, form, however, in certain cases, an exception to the exclusion of evidence of transactions not specifically connected with facts in issue.<sup>7</sup>

In reply to a criticism that the provisions of the Act relating to judgments are meagre, the Hon'ble Mr. Stephen moving the Report of the Select Committee, on the Bill, said: "My answer is, that it may appear meagre to those who take their notions of the Law of Evidence from works like Mr. Taylor's; but that it contains everything which properly belongs to the subject. Many

2. Wigmore, s. 2113.

5. Taylor, Ev., s. 734; Roe v. Dey,

3. Lord Barrymore v. Taylor, (1795)

(1836) 7 C. & P. 705.

1 Esp. 326; De Medina v. Owen, (1850) 3 C. & Kir. 72.

6. E. A. Morley v. Emperor, 1936 Rang. 299: 164 I.C. 369.

4. Dagleish v. Dodd, (1832) 5 C. & P. 238.

7. Steph. Introd., 164.

English writers have treated the subject in such a manner as to make it comprise the whole body of the law. It is obvious that the Law of Evidence thus conceived would include nearly the whole of the substantive law, and it follows, I think, that it is of great importance to draw the line distinctly between what properly belongs to the subject and what does not. It is for this reason that the sections about judgments are drawn in their present form, and that certain topics connected with judgments which are often dealt with by writers on evidence, are omitted from the Bill." Again referring to the Code of Civil Procedure and the Code of Criminal Procedure, he said : "My answer to the criticism is that the authors of the two Codes in question were quite right in considering the matter as an essential matter of procedure. It no more belongs to the Law of Evidence than the thousand other questions which are sometimes connected with it. The only questions connected with judgments, which do appear to me to form part of the Law of Evidence properly so-called, are dealt with in Sections 40–44 of the Bill. These sections provide for the cases in which the fact that a Court has decided as to a given matter of fact relevant to the issue may be proved for the purpose of showing that the fact exists. This, no doubt, is a branch of the Law of Evidence, and the provisions referred to dispose of it fully."

Judgments are either domestic or foreign, and either of these may be *in personam* or *in rem*. Judgments *qua* judgments are adjudications upon questions *in issue*, and proofs of the particular points they decide are only admissible either as (a) *res judicata*,<sup>8</sup> or (b) as being *in rem*,<sup>9</sup> or (c) as relating to matters of public nature.<sup>10</sup> In (a) they are conclusive between the same parties. In (b) they are declared by law to be conclusive proof against all persons of certain<sup>11</sup> matters only. In (c) though not conclusive, they are relevant as adjudications against persons not parties to them, the reason being that in matters of public right the new party to the second proceeding as one of the public has been virtually a party to the former proceeding.<sup>12</sup> But judgments, orders and decrees, other than those admissible by Sections 40, 41 and 42 may be relevant under Section 43, if their existence is a fact in issue or is relevant under some other provision of the Act.<sup>13</sup> In the sections relating to judgments, the judgment is admissible as the opinion of the Court, on the questions which came before it for adjudication. Ordinarily, judgments are not admissible as between persons who were not parties, and do not claim under the parties to the previous litigation. But there are exceptions to this general rule.<sup>14</sup>

The general rules relating to judgments are as follows :

(1) In the first place, all judgments are conclusive of their existence as distinguished from their truth. Thus, if the object be merely to prove the existence of the judgment, its date, or its legal consequences (and not the accuracy of the decisions rendered), the production of the record, or of a certified copy is conclusive evidence of the facts against all the world.<sup>15</sup> But, the fact that judgment is admitted in evidence in order to prove that there

8. Under S. 40, post.

(1880) 6 C. 171.

9. Under S. 41, post.

13. S. 43, post.

10. Under S. 42, post.

14. Hira v. Hills, (1882) 11 C. L. R. 528 per Field, J.

11. See Kanhaiya v. Radha, (1867) 7 W. R. 338.

15. Abinash v. Parsh, (1904) 9 C.W.N. 402, 410.

12. Per Pontifex, J., in Gujja v. Fatteh,

was litigation which terminated in a certain way, does not make all the recitals in that judgment part of the evidence in the subsequent action.<sup>16</sup> As was explained in *Basi Nath Pal v. Jagat Kishore Acharjee*<sup>17</sup> and *Tripurana Seethapati v. Rokham Venkanna*,<sup>18</sup> it is not the correctness of the previous decision, but the fact that there has been a decision, that is established by the production of the judgment.<sup>19</sup> In other words, the law attributes unerring verity to the substantive as opposed to the judicial portion of the record. And the reason is, that a judgment being a public transaction of a solemn nature, must be presumed to be faithfully recorded. In the substantive portion of a record of a Court of Justice, the Court records or attests its own proceedings and acts. *Quod per recordum probatum, non debet esse negatum.* In the judicial portion, on the contrary, the Court expresses its judgment or opinion on the matter in question, and in forming that opinion it is bound to have regard only to the evidence and arguments adduced before it by the respective parties to the proceeding. For example, the question whether a pleader-guardian did or did not appear on behalf of minor defendants at the trial stage, or whether any written statement had or had not been filed on their behalf, as to whether the guardian *ad litem* did or did not appear in the High Court, are questions which relate to the course of the proceedings; in other words, these are matters connected with the substantive portion of the record and not with the judicial portion. Therefore, the aforesaid facts endorsed in the judgment may be used in evidence, if they are found relevant under any of the provisions of the Evidence Act. The judgment may be admissible under Sections 5, 11 and 13. Since the point in issue being whether there is any previous judgment against the minor, the provision of Section 5 is at once attracted and so also Section 13 to prove that, in the former litigation, the guardian *ad litem* had been negligent and Section 11 to prove that the facts stated in the judgment are inconsistent with the fact in issue to the effect that the guardian *ad litem* had not done anything that he should have done on behalf of or in the interests of the minors.<sup>20</sup> Such a judgment, therefore, with respect to any third person, who was neither a party nor privy to the proceeding in which it was pronounced, is only *res inter alios judicata*; and hence the rule, that it does not bind, and is not, in general, evidence against any one who was not such party or privy.<sup>21</sup> So also, judgments are admissible in this connection, where the record is matter of inducement, or merely introductory to other evidence.<sup>22</sup>

(2) All judgments are conclusive of their truth in favour of the Judge, that is for the purpose of protecting him who pronounced them, and the officers who enforced them. The judgment of a Court of competent jurisdiction is conclusive for the purpose of protecting the Judge who pronounced it, and the officers who enforced it, when acting within the scope of their authority. This rule is founded on public policy for the purpose of securing due administration of justice. In the superior Courts, the original proceedings and judgment thereon constitute conclusive proof of the facts stated, if,

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| 16. Abdul Latif v. Abdul Huq, 1924 Cal. 523; 81 I.C. 667.                               | I. R. 1958 Pat. 477, 484-85.   |
| 17. 1916 Cal. 176; 35 I.C. 298.   | 21. Taylor, Ev., s. 1667; Best, Ev., s. 590; Steph. Dig. Art. 40; Phipson, Ev., 9th Ed. 421; v. 543 post. As to parties and privics see cases cited in <i>Secretary of State v. Syed Ahmad</i> , 1921 Mad. 248; I. L. R. 44 Mad. 778; 67 I. C. 971; 14 L. W. 188 (F.B.). |
| 18. 1922 Mad. 71; I.L.R. 45 Mad. 332; 42 M. L. J. 324; 15 L. W. 316 (F.B.).             | 22. See S. 63, post.   |
| 19. Baidya Nath v. Alef Jan, 1923 Cal. 240; 70 I. C. 194; see also cases cited therein. |  |
| 20. Ram Kripal v. Munabati Kumari, A.   |  |

assuming such facts to be true, they show that the Judge had jurisdiction. In the inferior Courts, however, the maxim *omnia rite esse acta* does not apply to give jurisdiction. The rule only protects, where the Judge has acted without jurisdiction under a *bona fide* mistake of fact; and not where he has so acted wilfully, or under a mistake of law.<sup>23</sup>

(3) All judgments are impeachable on certain grounds.<sup>24</sup>

(4) Judgments are never evidence of collateral matters. No judgment is evidence of the truth of any matter not directly decided, or a necessary ground of the decision; thus, it is never evidence of facts which merely came collaterally in question, or were incidentally cognizable, or can only be inferred by arguments from the decisions.<sup>25</sup>

(5) Judgments may have a different effect according as they are for or against a party; thus, a decree of divorce, altering status, affects even strangers: but a judgment dismissing the petition affects only parties and privies.<sup>1</sup>

(6) Judgment in an action will prevent a party in subsequent proceedings arising in the same action from setting up matters which, if proved, would have produced a different result at the trial, e.g., in maintenance proceedings after decree *nisi*, a respondent cannot rely on matters that would have been a defence to the suit or would have resulted in a different decree.<sup>2</sup>

(7) Judgments *in rem* and *in personam*. The admissibility and effect of judgments, when tendered as evidence of their truth, that is, as evidence of the matter decided, or of the grounds of the decision for the purpose of concluding an opponent upon the facts determined, vary according as the judgments are (as they are called) *in rem* or *in personam*. Generally speaking, a judgment *in rem* is one which binds all the world and not only the parties to the suit in which it was passed and their privies. It belongs to positive law to enact what judgments shall have such a character. Accordingly, the Act declares<sup>3</sup> that a judgment, in order to have this effect, must have been pronounced by a competent Court, in the exercise of Probate Matrimonial, Admiralty, or Insolvency jurisdiction. Such a judgment is conclusive of certain matters against all the world, and not against the parties and their privies only. On the other hand, the judgment *in personam* (or the ordinary judgment between parties as in cases of contract, tort or crime) of a Court of competent jurisdiction is conclusive proof, in subsequent proceedings between the same parties or their privies, only of the matter actually decided,<sup>4</sup> but is no evidence of the truth of the decision between strangers, or a party and a stranger, except<sup>5</sup> upon matters of a public nature, in which case, however, they are not conclusive evidence of that which they state.<sup>6</sup> The reasons

23. Taylor Ev., ss. 1669–1672 ; Phipson Ev., 9th Ed., p. 422 ; Stéph. Dig., Art. 45 ; Roscoe, N.P. Ev., 204, 205 1194–1201 : see Judicial Officers' Protection Act. XVIII of 1850.

24. See notes to S. 44, post.

25. Phipson, Ev., 11th Ed., p. 537 citing R. v. Kingston (Duchess), (1776) 2 Smith L.C. (18th Ed.) 644 ; R. v. Hutchins, (1878) 6 Q.B.D. 300; Concha v. Concha, (1866) 11 App. Cas. 541 ; In re Sharman, (1942) Ch. 311.

1. Phipson, 11th Ed., p. 538 citing Need-

han v. Bremmer, (1866) L.R. 1 C.P. 583; and see Dollius Mieg v. Bank of England, (1950) Ch. 333 at 353 ; cf Lazarus Barlow v. Regent Estates Co., (1949) 2 K.B. 465 at p. 475.

2. Phipson, 11th Ed., p. 538 citing Duchesne v. Duchesne, (1951) P. 101.

3. S. 41, post ; see Norton, Ev., 206.

4. See S. 40, post.

5. v. ib. S. 43, post, illust. (1) (b), (c).

6. See S. 42, post where the reasons for this Exception are considered.

of this rule are commonly stated to rest on the ground expressed in the maxim *res inter alios acta* (or *judicata*) *alteri nocere non debet*, it being considered unjust that a man should be affected, and still more that he should be bound, by proceedings, in which he could not make defence, cross-examine or appeal.<sup>7</sup>

Foremost among the judgments, orders and decrees, which are declared to be admissible by the following section, are those which have the effect of barring a second suit or trial.<sup>8</sup> Thus, judgments, orders and decrees may be relevant for the purpose of showing that there is a *lis pendens*,<sup>9</sup> or that the matter is *res judicata*,<sup>10</sup> or that the claim advanced forms part of a former claim, or that the remedy for which the plaintiff sues is one for which the plaintiff might have sued in respect of the same cause of action.<sup>11</sup> Next, the judgments of certain Courts in the exercise of Probate, Matrimonial, Admiralty or Insolvency jurisdiction are declared to be relevant and conclusive proof of certain matters.<sup>12</sup> The general nature of these judgments is not to define a person's rights against the particular individuals who are parties to the proceeding, but to declare his status generally as against all the world. And the broad principle of the rule is that public policy requires that matters of status should not be left in doubt and a decision *in rem* not merely declares status but *ipso facto* renders it such as it is declared.<sup>13</sup>

It was said that with the exception of such judgments, there are no judgments conclusive in Indian Courts against persons other than the parties to the proceedings or their representatives,<sup>14</sup> as to the facts which they declare or the rights which they confer. They are, however, authorities which lay down that a judgment in a suit under Section 92, Civil Procedure Code, is, or has the effect of, a judgment *in rem* and binds the entire world.<sup>15</sup> There are also such judgments, namely, those relating to matters of a public nature, which,<sup>16</sup> though not conclusive proof of what they state and not binding upon anybody but the parties to the proceedings and their representatives, may yet be considered by the Court by way of evidence as to the facts with which they are concerned. Thus, in a suit in which the existence of a public right of way is disputed, a judgment between other parties, in which the existence of the same right of way is affirmed or negatived may be put in as evidence of the existence or non-existence of the right, though the party against whom it is employed will be at liberty to counteract it, if he can as he would in any other piece of hostile evidence. Further, apart from their admissibility under the preceding sections, the existence of a judgment, order or decree may be a fact in issue in the case of a relevant fact, under some of the other provi-

7. See Phipson, Ev., 11th Ed., 569, where the grounds of this rule are considered.
8. S. 40, post.
9. Civ. P. Code, Part I, S. see S. 40 post.
10. Ib., Part I Ss. 11, 14, Cr. P. Code 1973, S. 300; S. 40 post; Furness Withy Co. v. Hall, (1909) 25 T.L.R. 233.
11. Civ. P. Code, Order II, rule 2, sec S. 40, post.
12. S. 41, post.
13. See notes to S. 41, post.
14. Norton, Ev., 204, 114.
15. Ramados v. Hanumantha Rao, I.L.

- R. 36 Mad. 364 : 12 I.C. 449 ; Sakha Ram v. Ganu Raghu, 1921 Bom. 297 : I.L.R. 45 Bom. 683 : 60 I.C. 924 : 23 Bom. L.R. 125 ; Surajgir v. Braham Narain, 1946 All. 148 : I.L.R. 1956 All. 107 : 223 I.C. 593, (Khaja) Hassanullah Khan v. Royal Mosque Trust Board, 1948 Mad. 134 : I.L.R. 1948 Mad. 257 : (1947) 1 M.L.J. 395 : 60 M.L.W. 438 ; Anjuman Islamia v. Latafat Ali, 1950 All. 109 : 1950 A.L.J. 776 ; Sunni Central Board of Waqf U.P. v. Sirajul Huq Khan, 1954 All 88 : 1953 A.L.J. 587.
16. S. 42, post.

sions of this Act as to relevancy.<sup>17</sup> Thus, where A sues B, because through B's fault A has been sued and cast in damages, the judgment and decree by which such damages are given is a fact in issue; or where B is charged with the murder of A, the fact that A has obtained a decree of ejectment against B may be relevant as showing the motive in B for the murder of A.<sup>18</sup> Lastly, as fraud is an act which vitiates the most solemn proceedings of Courts of Justice, and as a judgment delivered by an incompetent Court is a mere nullity, the Act provides that any party to a suit or other proceeding may show that any judgment, order or decree, which is relevant under Sections 40—42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.<sup>19</sup>

*40. Previous judgments relevant to bar a second suit or trial.* The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial.

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| ss. 41—43 (Judgments, orders and decrees.) | s. 3 ("Relevant").                               |
| s. 44 (Fraud; Want of jurisdiction).       | s. 3 ("Fact").                                   |
| s. 3 ("Court").                            | ss. 74, 77 (Public documents, certified copies). |

Steph. Dig. Arts. 39—47; Taylor, Ev. Section 1684, et seq.; Smith's L. C. 13th Ed. Note to Duchess of Kingston's cases; Field, Ev., 6th Ed., 175—179.

#### SYNOPSIS

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|---|--|
| 1. Principle.   | 7. <i>Autrefois acquit and autrefois convict.</i>                          |
| 2. Scope.   | 8. Relevancy of judgment of civil Courts in criminal cases and vice versa. |
| 3. Previous judgments relevant to bar a second suit or a trial. | 9. Stay of criminal case pending civil case.                               |
| 4. Ground for reception of evidence.                            |  |
| 5. Pending suits.   |  |
| 6. <i>Res judicata</i> —Explanation.                            |  |

**1. Principle.** The following extract taken from Hukum Chand's classical treatise on the Law of *Res Judicata*, (1894) of the general view of the doctrine of *res judicata* will be found interesting :

"The doctrine of *res judicata* is of universal application and in fact a fundamental concept in the organisation of every jural society. Justice requires that every cause should be once fairly tried, and public tranquillity demands that, having been tried once, all litigation about that cause should be concluded for ever between those parties. The maintenance of public order, the repose of society and the quiet of families require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. If it were not for the conclusive effect of all such determination, there will be no end of litigation, and no security for any person; the rights of parties should be involved in endless confusion and great injustice often done under cover of law; while the courts stripped of their most efficient powers would become little

17. See notes to S. 43 post.

post, and illust. (b), (e) (f) thereto

18. Cunningham, Ev., 29—32; see S. 43;

19. S. 44, post.

more than advisory bodies; and thus the most important function of Government—that of ascertaining and enforcing their rights—would go unfulfilled.<sup>20</sup> The term '*res judicata*' is derived from the Roman Law and in its most obvious and general meaning signified at Rome, as it signifies in England and America and India, that the matter in dispute has been considered and settled by a competent court of justice. A judgment of a court, among the Romans, always operated as a *novatio* of the original cause of action which was deemed to merge in it and which it was said *transit in rem judicatum*. Every judgment was allowed a conclusive effect on the ground of *res judicata pro veritate accipitur*. It was necessary that the subject-matter of the former litigation should be the same as in the new suit, and the parties the same, and litigating in the same character, except that the judgment was available by or against those also, who might have succeeded as privies to the rights of the parties in the former suit. The conclusiveness of the judgment extended to every point necessarily decided and it was not necessary that the former cause of action should have been the same as the second, except when that cause of action was itself the subject disputed, it being ordinarily considered enough that the matter in dispute in the two suits was the same. *Interest reipublicae ut sit finis litium* was an ordinary principle of Roman jurisprudence. (It concerns the State that there be an end to law suits)."

The doctrine of *res judicata* had long been recognised in England with greater or less distinctness. "The rule of the ancient common law," Bowen, L. J. said in *Brunson v. Humphrey*,<sup>21</sup> "is that when one is barred in any action, real or personal, by judgment, demurrer, confession or verdict, he is barred as to that or the like action of the like nature, for the same thing for ever." This rule has been enunciated in England in a series of cases with which the profession is familiar and the rule as laid down in The Duchess of Kingston's case has acquired an authoritative character in every country that has adopted or followed English jurisprudence.<sup>22</sup>

The following classic passage from the judgment of Sir William deGrey is a statement of the leading principles of *res judicata*:

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that judgment of a Court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another Court; secondly that the judgment of a Court of exclusive jurisdiction, directly on the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose. But neither the judgment of a Court of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

Though the rule of *res judicata* may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded

20. *Jeter v. Hewitt*, 22 How 332, 1  
Campbell.

21. (1884) 14 Q.B.D. 146.  
22. 2 Smith's L.C., 13th Ed., 644.

by the Hindu commentators. Vijnaneswara and Nilkanta include the plea of a former judgment among those allowed by law, each citing for this purpose the list of Katyayana, which describes the plea thus: "If a person, though defeated at law, sues again, he should be answered, 'You were defeated formerly.'" This is called the plea of former judgment. And so the application of the rule by the courts in India should be influenced by no technical consideration of forms but by matter of substance within the limits allowed by law.<sup>23</sup> In Katyayana, *res judicata* is spoken of as Purba Nyaya or former judgment. The doctrine seems to have been recognised much earlier in Hindu jurisprudence judging from the fact that both the Smritichandrika and the Virmitrodaya base the defence of Purba Nyaya (former decision) on the following text of Harita who is said to have flourished in the 9th century B.C.: "The plaintiff should be non-suited if the defendant avers: 'In this very affair, there was litigation between him and myself previously' and it is found that the plaintiff had lost the case." There are texts of Parasara and Mayukha to the same effect.<sup>24</sup>

The distinction between *res judicata* and estoppel has been clearly explained by Mahmood, J., in *Sitaram v. Amir Begam*.<sup>25</sup> That the effect of the plea of *res judicata*, said the learned Judge, may in the result operate like an estoppel by preventing a party to a litigation from denying the accuracy of the former adjudication, cannot be doubted. But there the similarity between the two rules virtually ends and it is equally clear that the ratio upon which the doctrine of estoppel properly so called rests is distinguishable from that upon which the plea of *res judicata* is founded. The essential features of estoppel are those which have found formulation in Section 115 of the Evidence Act, the provisions of which proceed upon the doctrine of equity that he who by declaration, act or omission has induced another to alter his position, shall not be allowed to turn round and take advantage of such alteration of the other's position. All the other rules to be found in Chapter VIII of the Evidence Act relating to estoppel of tenant or of acceptors of bills of exchange, bailees or licensees, proceed upon the same fundamental principles. On the other hand, the rule of *res judicata* does not owe its origin to any such principles but is founded upon the maxim *nemo debet bis vexari pro una et eadem causa* (no person should be twice vexed for the same cause)—a maxim which is itself an outcome of the wider maxim *interest reipublicae ut sit finis litium*. The principle of estoppel, therefore, proceeds upon different grounds and the framers of Indian Codes of Procedure acted upon correct juristic classification in dealing with the subject of *res judicata* as appertaining to province of procedure properly so called, or perhaps the shortest way to describe the difference between the plea of *res judicata* and estoppel is to say that whilst the former prohibits the court from entering into an enquiry at all as to a matter already adjudicated upon, the latter prohibits a party after the enquiry has already been entered upon from proving anything which would contradict his own previous declarations or acts to the prejudice of another party who relying upon those declarations or acts altered his position. In other words, *res judicata* prohibits an enquiry *in limine* while estoppel is only a piece of evidence. Further, the theory of *res judicata* is to presume by a conclusive presumption that the former ad-

23. *Sheoparsan v. Ramnandan*, 43 C. 694; 43 I.A. 91; 33 I.C. 914; A.I.R. 1916 P.C. 78; *Kalipada v. Dwijapada*, A.I.R. 1930 P.C. 22; 121 I.C. 200; 57 I.A. 24.

24. *Lachhmi v. Bulli*, I.L.R. 8 Lah. 384; 104 I.C. 849; A.I.R. 1927 Lah. 289 at pp. 291, 292 (F.B.).

25. I.L.R. 8 All. 324.

judication declared the truth, whilst estoppel, to use the words of Lord Coke, is, where a man is concluded by his own act of acceptance to say that truth, which means, he is not allowed in contradiction of his former self, to prove what he now chooses to call the truth. Thus, the plea of *res judicata* proceeds upon grounds of public policy properly so called, whilst estoppel is simply an application of the equitable principles between man and man, two individual parties to the litigation.

The substance of the rule as enunciated and recognised in England was imported almost *res integra* in this country long before the enactment of a complete Code of Civil Procedure in India.<sup>1</sup>

Finally, the doctrine of *res judicata* is different from the rule laid down in Order II, Rule 2 of the Code of Civil Procedure in that, first, the former refers to the plaintiff's duty to bring forward all the grounds of attack in support of his claim, while the latter only requires the plaintiff to claim all reliefs flowing from the same cause of action, and secondly, the former rule refers to both parties and precludes a suit as well as a defence, while the latter refers only to the plaintiff. The rule of *res judicata* differs from the rule in Section 47, C. P. C. in that the former bars the trial of an issue which was, or which might and ought to have been raised and decided in a previous suit, while Section 47 bars a suit for the determination of certain questions.<sup>2</sup> The rule of *res judicata* differs also from Section 10 in that, first, Section 10 bars the trial of a suit while Section 11 bars the trial of both the suit and of the issue involved in the suit, and secondly, Section 10 relates to the matters *sub judice* while Section 11 relates to matters which have passed into *rem judicatum*.<sup>3</sup>

**2. Scope.** Judgments of Courts of Justice are as such declared to be relevant by Sections 40 to 43, Evidence Act and if they do not fall within the one or the other of these sections, they will have to be held irrelevant unless they can be brought under any other provisions of the Act. Under Section 40 of the Act, previous judgments are admissible in support of a plea of *res judicata* in civil cases or *autrefois acquit* or *autrefois convict* in criminal cases.<sup>4</sup>

The section lays down that when the question is whether a Court ought to take cognizance of a suit or hold a criminal trial, and any judgment, order or decree prevents the Court from taking cognizance of that suit or holding that trial, the existence of such judgment, order or decree is a relevant fact. It is the existence of the judgment that is relevant under this section, the reasons for acquittal or the evidence recorded in the earlier trial is not relevant.

1. See Soorjo Monee Dayee v. Sud-danund, 12 B.L.R. 304; Krishna Behari v. Bunwari, L.R. 2 I.A. 283; Khugowlee Singh v. Hossein, 7 B.L.R. 673.

2. See Sanjiva Row's Civil Procedure Code 4th Ed., Vol. I, Commentary under O, II, R. 1.

3. See the catena of decisions cited. See Sanjiva Row's Civil Procedure Code, 4th (1977) Ed., Vol. I, p. 79.

4. B.N. Kashyap v. Emperor, 1945 Lah. 23, 26; I.L.R. 1944 Lah. 408; 217 I.C. 284 (F.B.); Chhadek Karikar

v. Sayad Ali Kaviraj, 1925 Cal. 1046; 85 I.C. 979; Tulsidas Keshowdas v. Faqir Mohammed, 1926 Sind 161; 93 I.C. 321; (Padmanabhini) Rama-namma v. Golu Appalanarasayya, 1932 Mad. 254; I.L.R. 55 Mad. 346; 186 I.C. 348; Shamsunder Kuer v. Ram Khelawan Shah, 1929 Pat. 739; I.L.R. 8 Pat. 783; 121 I.C. 334; (Smt.) Purnima Debya v. Nand Lal, 1932 Pat. 105; I.L.R. 11 Pat. 50; 136 I.C. 577; Rampak-rekha Pande v. Mst. Ramjhari Kuer, 1933 Pat. 690.

vant.<sup>5</sup> Judgment *inter partes* in previous suit to prove the factum of previous suit is admissible.<sup>6</sup> However, the decision which was not necessary for disposal of the previous suit is not admissible.<sup>7</sup>

This section applies to a case in which the Court has jurisdiction to decide a matter and one party says that it should not do so because that matter has been decided before, and not to a case where the court has no such jurisdiction.<sup>8</sup> So, it has been held that a judgment passed by the British Indian Association but not filed in the Court of the Financial Commissioner within six months after the passing of the Oudh Estates Act XVIII of 1872, could not be treated as a judgment of a competent Court so as to be relevant under this section.<sup>9</sup> It has been said that the English Court will recognize the decision as to the nationality of a foreign person given by the Court of which he was a national. It is a judgment *in rem*, which cannot be questioned in another jurisdiction.<sup>10</sup> But before that principle can be applied and before it can be said that a judgment of a Court of a foreign State is relevant under this section, it must be shown that the decision was as to the nationality of a foreign person given by the Court of which he was a national.<sup>11</sup>

The Act itself does not draw a distinction between a judgment which is not *inter partes*, and a judgment which is *inter partes* except where the judgment is clearly *res judicata*. The logical view, therefore, seems to be that unless a judgment is relevant under Sections 40 to 42, Evidence Act, it is not evidence at all so far as regards the matter which it decides.<sup>12</sup> Where a judgment is not *in rem* nor relating to matters of public nature, nor between the parties to a subsequent suit, the fact that the Court by that judgment decides a point in a particular way is not relevant for the purpose of the decision of the same point in a subsequent suit.<sup>13</sup>

For a judgment to be relevant under this section, it is not necessary that it should prevent the Court from taking cognizance of the entire suit as against all the parties. A judgment passed in a previous suit against some of the defendants is admissible in evidence against them under this section in a subsequent suit filed against them as well as others.<sup>14</sup>

The provisions of Sections 40 to 43 only exclude judgments as pieces of conclusive evidence. They do not bar the admission of judgments as proof of the fact of litigation, or its results and effects upon the parties, which make a certain course of conduct probable or improbable on the part of one of

5. Ali Hasan v. State, 1975 Cr. L. J. 345 (All.).
6. Shyam Singh v. Hira Singh, A. I. R. 1972 Him. Pra. 135; (1973) 3 Sim.L.J. (H.P.) 9.
7. A. Venkateshwarlu v. M. M. Mosque A.I.R. 1972 Andh. Pra. 132.
8. Lakshchandra v. Ram Das, 1929 Cal. 374; 118 I.C. 857; 33 C. W. N. 795 (F.B.).
9. Mohammad Asad Ali Khan v. Sadiq Ali Khan, 1943 Oudh 91, 94; I. L. R. 18 Luck. 346; 205 I. C. 433.
10. Westlake's Private International Law, 7th Ed., p. 395 citing Schlesinger v. The Administrator of Hungarian Property, 1923 I. J. News., p. 254.
11. See In re Antonius Raab, 1950 Bom. 101, 110-111; I. L. R. 1949 Bom. 537.
12. Smt. Purnima Debya v. Nandlal, 1932 Pat. 105; I. L. R. 11 Pat. 50; 136 I.C. 577.
13. Shankar Ganesh v. Kesheo, 1930 Nag. 1; 121 I.C. 644; 12 N.L.J. 164 (F.B.); Kesheo Prasad v. Kirtarath, 1926 Pat. 577; 97 I.C. 282; see also Kesheo Prasad Singh v. Mst. Bhag-jogna Kuer, 1937 P.C. 69; I. L. R. 16 Pat. 258; 167 I.C. 329.
14. Bholanath Chatterji v. Monmota Nath Dutta, 45 C. W. N. 420.

the parties. Thus, in view of the previous litigation and its result that one of the parties was actually in possession, that fact can be used to corroborate the evidence given in the subsequent proceedings.<sup>15</sup>

Where upon a suit for possession being decreed the plaintiff obtains possession otherwise than by execution of decree and has to file suit again on account of subsequent dispossession he can support his title by the judgment in the previous suit.<sup>16</sup>

**3. Previous judgments relevant to bar a second suit or trial.** This section provides for the admission of evidence for the purpose of showing that a suit or trial is barred, as for example on the grounds : (a) that the matter in issue is the subject of a previously instituted pending suit;<sup>17</sup> (b) that the relief sought forms part of a claim for which the plaintiff omitted to sue in a former suit or was one of several remedies in respect of the same cause of action, for which the plaintiff, in a former suit omitted, without the leave of the Court, to sue;<sup>18</sup> (c) that there is an estoppel by judgment, the matter in issue being *res judicata*.<sup>19</sup>

Under the first of the abovementioned grounds, the order admitting the plaint of the former suit, in the second and third, the judgment, and in either, such other portions of the record as are material to show that the matter is beyond the cognizance of the Court, would be relevant and admissible evidence under this section. Each of the abovementioned grounds of objection to a second suit or trial forms a portion of the law of procedure, and as such is dealt with by the Civil or Criminal Procedure Code. Whether a person ought to be allowed to litigate any particular question and, if so, by what limitations the right should be restricted, are questions, which do not belong, in any proper sense, to the Law of Evidence, whose province it is simply to provide the means by which parties to suits may prove any right to which the Legislature entitles them. The present section, accordingly, is so worded as to carry out whatever may be, for the time being the law of procedure on such questions.<sup>20</sup> It is, therefore, not intended in this work to deal with these subjects, but merely to cite the provisions of the Codes relating thereto.

The judgment or order of a Magistrate in a proceeding under Section 145, Cr. P. C., relating to actual possession of the subject of dispute is not relevant as a previous judgment barring a second suit and trial within the meaning of Section 40 of the Evidence Act; in other words, it is not a judgment or order which operates as *res judicata* between the parties.<sup>21</sup>

**4. Ground for reception of evidence.** The reception of this evidence is grounded upon the fact that, unless it were admitted, effect could not be given to the provisions of the law of procedure, which this section is intended to subserve. If that law declares that a Court shall not, in particular circumstances, hold or take cognizance of a judicial proceeding, it is

- 15. *Shiv Charan v. State*, A. I. R. 1965 A. 511.
- 16. *Ram Sarup v. Puran*, A. I. R. 1971 Punj. 106.
- 17. Civ. P. Code, S. 10.
- 18. Civ. P. Code, Order II, rule 20.
- 19. Ib., Ss. 11-14.

- 20. *Cunningham, Ev.*, 175, 176.
- 21. *Niranjan Singh v. Kasturi Lal*, 1969 Cur. L. J. 902; A. I. R. 1971 Punj. 4, 7 overruling *Sewa Dass v. Ram Parkash*, A. I. R. 1947 Lah. 173.

plainly necessary to be able to show that these circumstances exist. The present section accordingly enables such proof to be given.

**5. Pending suits.** Except where a suit has been stayed under the Civil Procedure Code, a Court shall not proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit for the same relief between the same parties, or between parties under whom they or any of them claim litigating under the same title, pending in the same or any other Court, whether superior or inferior, in Ind'a, having jurisdiction to grant such relief, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction or before the Supreme Court.

**Explanation.** The pendency of a suit in a foreign Court<sup>22</sup> does not preclude the Courts in India from trying a suit founded on the same cause of action.<sup>23</sup> The three essential conditions that are necessary for bringing in the operation of Section 10, C. P. C., are : (1) that the matter in issue in the second suit is directly and substantially in issue in the previously instituted suit, (2) that the parties in the two suits are the same, and (3) that the Court, in which the first suit is instituted is a Court of competent jurisdiction to grant the relief claimed in the subsequently instituted suit.<sup>24</sup> This section only provides that no suit shall be tried if the same issues are involved in a previously instituted suit. It does not dispense with the institution of a suit within the proper time when the law requires such institution.<sup>25</sup> The decision of a question under Section 10, where the Court has to consider whether there is a previously instituted suit or not and whether the matters in issue are directly and substantially in issue in that other suit or not, are questions which have to be determined judicially, and if the decision of the two questions is in favour of the defendant, the Court has to stay the suit as the provisions of Section 10 appear to be mandatory. Hence an order under Section 10 is a case decided within the meaning of Section 115, C. P. Code. A plea under Section 10 does not constitute a defence to the suit and it should not, therefore, be a matter in issue between the parties, and the mere fact that the Court has wrongly framed an issue and decided the point, as an issue in the case, should make no difference.<sup>1</sup>

**6. Res judicata.** The rule of estoppel by judgment, or *res judicata*, is that facts actually decided by an issue in one suit cannot be again litigated between the same parties and are conclusive between them for the purpose of terminating litigation.<sup>2</sup> There is nothing technical or peculiar to the law

- 22. See as to meaning of C. P. Code, S. 2.
- 23. C. P. Code, S. 10; Fakuruddeen v. Official Trustee, (1881) 7 C. 82; Balkishan v. Kishan, (1888) 11 A. 148; Bissessur v. Ganpat, (1880) 8 C. L. R. 113; Meckjee v. Devachand, (1879) 4 C. L. R. 282; Rama-linga v. Raghunatha, (1897) 20 M. 413; Naninappa v. Chidambaram, (1897) 21 M. 18; Venkata v. Venkatarama, (1898) 22 M. 256.
- 24. Kalipada Banerji v. Charubala, 1933 Cal. 887; I. L. R. 60 Cal. 1096.
- 25. Nemagauda v. Paresha, (1892) 22 B. 640.

- 1. Ramrichpal Singh v. Dayanand Sarup, 1955 All. 309, 313; 1955 A. L. J. 167; 1955 A. W. R. 229 (F.B.).
- 2. Boileau v. Rutlin, (1848) 2 Ex. 665, 681, per Park, B., and per Lord Hardwicke, in Gregory v. Molesworth, (1747) 3 Atkyns 626 cited in Soorjomonee v. Suddanund, (1873) 12 B. L. R. 304 "Estoppel by judgment results from a matter having been directly and substantially in issue in a former suit and having been therein heard and finally decided". Kali v. Secretary of State, (1888) 16 C. 173; Poulton v. Ad-

of England in this rule which is recognized by the civil law and has been held to be consistent with the Code of Civil Procedure.<sup>3</sup> Independently of the provision in the Code of 1859, the Courts in India recognized the rule and applied it in a great number of cases, and the re-enactment of the provision in the Code of 1877 appears to have been made with the intention of embodying in the 12th and 13th sections of that Code, the law then in force in India, instead of the imperfect provision in the second section of Act VII of 1859.<sup>4</sup> The provisions in the present Code<sup>5</sup> which embody the law of estoppel by judgment in civil suits in India<sup>6</sup> correspond very nearly with those in the Code of 1877. English text-writers deal with this subject under the head of 'Evidence' as it is a branch of the law of estoppel but the authors of the Indian Codes have regarded it as belonging more properly to the head of 'Procedure'.<sup>7</sup> Estoppel is regarded in these Codes as proceeding upon the equitable principle of altered situation and distinguished from *res judicata* which is based on the principle that there must be an end to litigation.<sup>8</sup> The principle of *res judicata*, as remarked by West, J., in *Sridhar Vinayak v. Narayan Valad Babaji*<sup>9</sup> is simple in its statement, but presents considerable difficulty in its application. Very numerous cases have arisen in India upon the construction of the sections of the Code, dealing with this subject, and the reports contain a great number of decisions upon them. Many of them turn upon facts and the difficulty has generally been to apply the principles to the facts. Even if the matter properly belonged to the subject of this work, it would be unprofitable and lead to confusion to enter into an examination of many of these decisions<sup>10</sup> for a case may perhaps be a binding authority as to the conclusion arrived at where the facts are identical but not otherwise; in any other case the tribunal must investigate the facts for itself and determine<sup>11</sup> referring to previous cases only for such propositions of law as are contained in them.

The principle of the rule of *res judicata* is one that is well settled, namely, that a matter which has been put in issue, tried, and determined by a competent civil or criminal Court cannot be re-opened between those who

justable Cover and Boiler Block Co., (1908) 2 Ch. 430. For an apparent exception to this rule in the case of a petition to revoke a patent which exception seems based on the ground that such a petition is on behalf of the public, see *In re Deeley's Patent*, (1895) 1 Ch. 687, and *Taylor*, Ev., s. 1695. For bar in suit by members of the public, see *Muhammad v. Sumitra*, 1914 All. 441; I. L. R. 36 All. 424; 24 I.C. 97 (Members of Mohamedan community).

3. *Khugowlee Singh v. Hossein*, (1871) 7 B. L. R. 673, 678. But while consistent it was not identical with it.

4. *Misir v. Sheo*, 9 C. 439, 445: (1882) 9 I. A. 197, 202, 204; *Kamleshwar v. Rajkumari*, (1892) 19 I. A. 234: 20 C. 79.

5. Act V of 1908, Ss. 11-14.

6. Cf. as to the law on this subject

"Estoppel by Matter of Record in Civil Suits in India", by L. Broughton, (1893); The Law of Estoppel in British India, by A. Casperz (4th Ed., 1915); "The Law of Res Judicata" by Hukum Chand, (1894).

7. See remarks of Mahmood, J., in *Sita Ram v. Amir*, (1886) 8 A. 324 followed in *Ramchandra v. Malkapa*, 1916 Bom. 204; I. L. R. 40 Bom. 679: 36 I. C. 443.

8. *Cassamally v. Currimbhoy*, (1911) 36 B. 214; *Bhaishanker v. Morarji*, (1911) 36 B. 283.

9. (1874) 11 Bom. H. C. R. 225.

10. See Broughton, op. cit., 7.

11. London Joint Stock Bank v. Simmons, (1892) App. Cas. 201 at p. 222, per Lord Herschell; v. ib. at p. 210, per Lord Halsbury, L.C. "I must make a protest that it is not a very profitable inquiry whether one case resembles another in its facts".

were parties to such adjudication. The competency of the Court is essential.<sup>12</sup> The test is not whether the decision was explicit, but whether the issue was one upon which the judgment of the former suit was based,<sup>13</sup> and the grounds for the decision may be *res judicata* as well as the decision itself.<sup>14</sup> *Res judicata* should not be inferred from a judgment; it must be clear from the pleadings and findings.<sup>15</sup> The findings must be on points directly and substantially in issue.<sup>16</sup> And a finding to be *res judicata* between co-plaintiffs must have been essential for the purpose of the relief<sup>17</sup> while the Courts are reluctant to enforce the principle as between co-defendants.<sup>18</sup> The grounds upon which parties and privies are precluded from re-litigating the same matter between them are, first, that of public policy, it being in the interest of the State that there should be an end of litigation (*interest reipublicae ut sit finis litium*); secondly, that of hardship to the individual that he should be twice vexed for the same cause (*nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa*) or twice punished for one and the same offence (*nemo debet bis puniri pro uno delicto*).<sup>19</sup> Inasmuch, however, as an estoppel shuts out enquiry into the truth, it is necessary to see that the principle of *res judicata* is not unduly enlarged.<sup>20</sup> Although the plea of *res judicata* may be taken at any stage of a suit including first or second appeal, an Appellate Court is not bound to entertain the plea if it cannot be decided upon the record before that Court, and if its consideration involves the reference of fresh issues for determination by the lower Court.<sup>21</sup>

If a decision has been given with respect to a part of the matter in controversy by a court of competent jurisdiction, it will be binding in a subsequent stage of the same proceeding and cannot be reopened.<sup>22</sup>

The rule with regard to previous judgment in criminal cases was contained in Section 403 of the Cr. P. C., 1898 and is now contained in Section 300 of the new Cr. P. C., 1973.

**7. Autrefois acquit and autrefois convict.** A plea of *autrefois acquit* which is statutorily recognised under Sec. 403, Cr. P. C., (now Sec. 300 of Cr. P. C., 1973) arises when a person is tried again for the same offence, or on the same facts for any other offence for which a different charge from the one

12. Abdul v. Doolanbibi, (1913) 37 B. 563.
13. Sri Gopal v. Pirthi, 24 A. 429 P.C.; Kali v. Bidhu, (1912) 16 C. L. J. 89; Beni Pershad v. Raj Kumar, (1912) 16 C. L. J. 124.
14. Muthammal v. Secretary of State, 1915 Mad. 106; I. L. R. 39 Mad. 1202; 26 I.C. 817; 27 M. L. J. 529 (F.B.); Krishna v. Bunwari, (1875) 2 I. A. 283; Kamaraju v. Secretary of State, 11 M. 309 (F.B.).
15. Rukhmini v. Dhondo, (1911) 36 B. 207; Bayyan v. Suryanarayana, 1914 Mad. 399 (2); I. L. R. 37 Mad. 70; 17 I. C. 445; 23 M. L. J. 593 (F.B.); see Bayya v. Paradesi, (1911) 35 M. 216; Mahomed v. Ambika, (1912) 39 C. 527 (P.C.) and Mota v. Vithal, 1916 Bom. 277; 40 B. 662; 36 I.C. 74; 18 Bom. L. R. 712; Bai Dewali v. Umedbhai, 1916 B. 318; I. L. R. 40 B. 614; 36 I.C. 564; 18 Bom. L. R. 773; Ramchan-dra v. Malkapa, 1916 B. 204; I.L.R. 40 B. 679; 36 I.C. 443; 18 Bom. L. R. 757; Madhavrao v. Anusuya-bai, 1916 B. 273; I. L. R. 40 B. 606; 36 I.C. 505; 18 Bom. L. R. 768.
16. Secretary of State v. Swaminatha, 1915 M. 294; 37 M. 25; 12 I.C. 167.
17. Ramchandra v. Narayan, (1886) 11 B. 216.
18. Fakirchand v. Naginchand, 40 B. 210; 33 I. C. 423; A. I. R. 1915 B. 222.
19. Lockyer v. Ferryman, (1877) 2 App. Cas. 519; Phipson, Ev. 9th Ed., 430 cited in Ranchod v. Bezanji, (1894) 20 B. 86.
20. Rai Charan v. Kunud, 25 C. 571.
21. Kanhai Lal v. Suraj, (1899) 31 A. 446; (1899) 19 A.W.N. 164.
22. Mohammad Khalid v. Chief Commissioner, Delhi, 69 P. L. R. (D) 279; 1968 Cr. L. J. 50; A. I. R. 1968 Delhi 13, 15 (F.B.).

made against him might have been made under Section 236 of Cr. P. C. of 1898 [now Sec. 221(1) of Cr. P. C. of 1973] or for which he might have been convicted under Section 237, Cr. P. C., of 1898 [now Section 221(2) of Cr. P. C. of 1973].<sup>23</sup> Clause (2) of Article 20 of the Constitution of India provides that no person shall be prosecuted and punished for the same offence more than once. Both the provisions embody the well-known principle of criminal jurisprudence that no one should be put in jeopardy twice for the same offence. But Section 403, Cr. P. C., 1898, [Section 300 of new Cr. P. C. of 1973] is wider than Article 20(2) of the Constitution. Section 403 embodies both the principles known as *autrefois acquit* and *autrefois convict*, while Article 20(2) only embodies the principle of *autrefois convict*. In other words under Section 403, 1898, [Section 300 of new Cr. P. C. of 1973] a person who has once been tried and acquitted cannot again be tried for the same offence, but under Article 20(2) the prohibition is against a person being subject to punishment twice for the same offence. The two provisions *prima facie* appear to be in conflict with each other. But Article 20(2) means that a legislation authorising a fresh trial of a person for an offence of which he has been previously acquitted would not be in violation of the Constitution. It is only when there has been a prosecution and punishment for an offence on a previous occasion that a second trial for the same offence would be unconstitutional. Article 20(2) is only an enabling provision which gives authority to the Legislature and till so long as the Legislature chooses to enact otherwise, a previous acquittal would, under Section 403, Cr. P. C., 1898, [Section 300 of new Cr. P. C. of 1973] be a bar to a subsequent prosecution.<sup>24</sup>

The conditions for the applicability of Article 20(2) are :

(1) There must have been a previous prosecution in the nature of criminal proceedings before a court of law or judicial tribunal and which will preclude enquiries under the Public Servants Enquiries Act of 1850,<sup>25</sup> security proceedings,<sup>1</sup> departmental proceedings,<sup>2</sup> Legal Practitioners Act 1879,<sup>3</sup> and the like.

(2) There must have been a punishment imposed as a result of such prosecution and this will preclude eviction, under the Rent Control Law<sup>4</sup> or restrictions under the Habitual Offenders Act<sup>5</sup> inasmuch as the term 'punishment' is used with reference to the word 'offence', viz. an act or omission made punishable by any law for the time being in force and the punishment must be in accordance with that law. 'To punish' means to impose a penalty upon; to afflict with pain or loss or suffering for crime or fault; to inflict a penalty for an offence upon the offender; to impose a penalty for the commission of a crime.

23. Kharkan v. State of U. P., I. L. R. (1964) 1 All. 519; A. I. R. 1965 S. C. 83.

24. Devanugraham, *In re*, 1952 M. W. N. (Cr.) 74; A. I. R. 1952 Mad. 725.

25. Venkataraman v. Union of India, 1958 S. C. R. 1037; 1958 S. C. J. 594; 1958 A. W. R. (H.C.) 602; (1958) 2 Andh. W. R. (S.C.) 45; 1958 Cr. L. J. 254; (1958) 2 L. L. J. 1; 1958 M. L. J. (Cr.) 473; (1958) 2 M. L. J. (S.C.) 45; I. L.

R. 1958 Punj. 986; A. I. R. 1958 S. C. 107.

1. Mathai v. State, A. I. R. 1952 T.C. 556.

2. Suresh v. Himangshu, A. I. R. 1953 Cal. 316.

3. *In re*, Ram Chbind, A. I. R. 1951 Pat. 369.

4. Fathimabi v. State of Madras, A. I. R. 1953 Mad. 257.

5. Arumugham v. State of Madras, 1953 Mad. 664, 671.

(3) The subsequent proceedings must also have been for prosecution and punishment of the accused.

(4) Proceedings on both these occasions must have been for prosecution of the same offence, which will preclude continuing offences and distinct offences. For types of continuing offences, see *Bhattar v. The State*<sup>6</sup> and *Ram Narain v. State*,<sup>7</sup> and for distinct offences relating to different periods, different obligations and different provisions of law, see *Brojolakshmi v. Sailendra-nath*,<sup>8</sup> *State v. Dhanraj Mills*,<sup>9</sup> *Chintamanrao v. Digrum*<sup>10</sup> and *State of M. P. v. Veereshwar Rao*.<sup>11</sup>

In *State of Bombay v. S. L. Apte*,<sup>12</sup> Rajagopala Ayyangar, J., has held that "though Section 26 of the General Clauses Act, in its opening word refers to 'the act or omission constituting an offence under two or more enactments', the emphasis is not on the facts alleged in the two complaints but rather on the ingredients which constitute two offences with which a person is charged. If the offences are not the same but are distinct, the ban imposed by this provision also cannot be invoked." This construction of Article 20(3) of the Constitution and Section 26 of the General Clauses Act is in line with the terms of Section 403(2) of the Criminal Procedure Code, 1898 [now Section 300(2) of Cr. P. C. of 1973]. So, where the accused were sought to be punished for the offence under Section 105 of the Insurance Act, 1938, after their trial and conviction for the offence under Section 409, Penal Code, it was held, that they were not being sought to be punished for the same offence twice but for two distinct offences constituted or made up of different ingredients and, therefore, the bar of Article 20(3) of the Constitution or Section 26 of the General Clauses Act, 1897, was not applicable.

Even where the plea of *autrefois acquit* is not technically available, the principle of it is available for the accused when the interests of justice require its extension in his favour<sup>13</sup>—*quaere*: Whether Section 403, Cr. P. C. 1898 [now Section 300 of new Cr. P. C. of 1973] constitutes a complete Code upon the subject or whether in a proper case the common law can be called in aid to supplement Section 403,[now Section 300 of new Cr. P. C. of 1973].<sup>14</sup>

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| <p>6. A. I. R. 1957 Cal. 483; 1957 Cr. L. J. 934.</p> <p>7. A. I. R. 1956 All. 141.</p> <p>8. A. I. R. 1959 Cal. 260; 1959 Cr. L. J. 446 (S. 31 of West Bengal Tenancy Act and S. 426, I. P. C.).</p> <p>9. A. I. R. 1960 Bom. 453; 1960 Cr. L. J. 1321 (different periods and different obligations).</p> <p>10. A. I. R. 1960 M. P. 149; 1960 Cr. L. J. 609 (different acts on different occasions and at different places).</p> <p>11. 1958 S. C. A. 249; 1957 S. C. C. 317; 1957 S. C. J. 519; 1957 A. L. J. 567; 1957 A.W.R. (H.C.) 588; 1957 B.L.J.R. 376; 1957 Cr. L. J. 892; 1957 Jab. L. J. 801; 1957 M. P. L. J. 649; (1957) 1 M. L. J. (Cr.) 482; 1957 N. L. J. 503; 1958 Pat. L. R. (S.C.) 17; A. I. R. 1957 S.C. 592, [sec. 5 (2), Prevention of Corruption Act, and s. 409 of Penal Code are not identical].</p> | <p>12. (1961) 3 S. C. R. 107; (1961) 2 S. C. A. 446; (1961) 1 S. C. J. 685; (1961) 1 Andh. W. R. (S.C.) 210; 63 Bom. L. R. 491; (1961) 31 Com. Cas. (Ins.) 39; 1961 (1) Cr. L. J. 725; (1961) 1 Ker. L. R. 452; 1961 M. P. L. J. 1108; 1961 M. L. J. (Cr.) 331; (1961) 1 M. L. J. (S.C.) 210; 1961 N. L. J. 524; A. I. R. 1961 S. C. 578.</p> <p>13. See also <i>Yusofalli v. The King</i>, A. I. R. 1949 P.C. 264; 76 I. A. 158.</p> <p>14. See <i>Din Dayal v. State of V. P.</i>, A. I. R. 1953 Vind. Pra. 35; 1954 Cr. L. J. 1218; <i>Emperor v. Anant Narayan</i>, A. I. R. 1945 Bom. 413; 47 Cr. L. J. 138; 221 I.C. 226; <i>Ajodhya Nath v. Kshitish Chandra</i>, A. I. R. 1932 Cal. 291; 33 Cr. L. J. 439; 35 C. W. N. 1182; 137 I.C. 161; <i>N. Seshachalam v. Bapunayya</i>, 1933 M. W. N. 246; <i>Sidh Nath v. Emperor</i>, A. I. R. 1929 Cal. 457;</p> |
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**8. Relevancy of judgments of civil courts in criminal cases and vice versa.** The relevant sections of the Evidence Act relating to the admissibility of judgments do not empower a criminal Court to treat as *res judicata* the findings of a civil Court on a given point. Only judgments *in rem*, as defined in Section 41, Evidence Act, have a binding effect on criminal Courts.<sup>15</sup> A finding on certain fact by a civil Court in an action *in personam* is not relevant in criminal cases, to give a finding on the same facts. Similarly, a finding on certain facts by the criminal Court is not relevant, when the Civil Court is called upon to give a finding on the same facts.<sup>16</sup>

In criminal case and action in tort arising out of same facts the judgment in one is irrelevant and inadmissible in the other.<sup>17</sup>

A decision of a civil Court on a question of title, though followed by delivery of possession, is not conclusive evidence of the party's possession in any inquiry under Section 145(4), Cr. P. C. The Criminal Court is not bound to decide the matter before it in accordance with the decision of the Civil Court regardless of the evidence before it. If criminal Court is satisfied that the other party is in actual possession, it must declare him to be in possession, despite the decision of the Civil Court and the delivery of possession by it. The admissibility of a previous judgment is governed by the provisions of this Act; there is nothing in law to make a judgment of a civil Court conclusive. The existence of a judgment of a civil Court deciding a question of title or even of possession, does not justify the Criminal Court to refuse the reception of evidence. It may terminate the proceedings on finding that the dispute referred to in sub-section (1) of Section 145, Cr. P. C., has ceased to exist, but if it means to pass an order under sub-section (6) of Section 146 of the Cr. P. C. of 1973 by continuing the proceedings, it cannot refuse to receive evidence if offered by a party.<sup>18</sup> For further decision on the subject, see notes under Section 43 *post*, under this heading.

**9. Stay of criminal case pending civil case.** The vexed question constantly arises in the day-to-day administration of justice, viz., when parallel proceedings are started between the same parties and privies in regard to substantially the same subject-matter as to in which Court—civil or criminal—should evidence be first recorded and adjudicated upon.

Section 344, Criminal Procedure Code, 1898 (now Section 309 of Cr. P. C. of 1973) authorises only the postponement or adjournment of criminal cases from time to time and does not contemplate the stay of proceedings for

49 Cr. L. J. 378; I. L. R. 57 C. 17; Khanimullah v. Emperor, A. I. R. 1947 Pesh. 19; 48 Cr. L. J. 750: 231 I.C. 228; Ramkrishna v. The State, A. I. R. 1956 Madh. Bharat 194: 1956 Cr. L. J. 1073; Narasingha Rout v. Rameswar Mohapatra, A. I. R. 1958 Orissa 141: 1958 Cr. L. J. 794; Godavarthy Bhashyakaracharyulu, In re, 1960 Cr. L. J. 315; A. I. R. 1960 Andh. Pra. 164; State v. Ranganagouda, A. I. R. 1961 Mys. 69; 1961 (1) Cr. L. J. 398; S. M. Basu v. S. R. Sarkar, A. I. R. 1961 Cal. 461: 1961 (2) Cr.

L. J. 204.  
 15. Mansha Ram v. Chetan Ram, 1945 Sind 32, 33; I. L. R. 1944 Kar. 392: 218 I. C. 280: 46 Cr. L. J. 437.  
 16. B. N. Kashyap v. Emperor, 1945 Lah. 23; I. L. R. 1944 L. 408: 217 I. C. 284: 46 Cr. L. J. 296 (F.B.); see also cases cited therein.  
 17. Mahavir Pd. v. Municipal Corporation of Delhi, 1975 A. C. J. 190 (Delhi).  
 18. Hosnaki v. State, 1956 All. 81 (F.B.). See also Niranjan Singh v. Kasturi Lal, A. I. R. 1971 Punj. 4: 1971 Cr. L. J. 79.

an indefinite period. But a civil court has an inherent power to stay a case pending on its file where it is necessary for the ends of justice to do so. The power of the High Court in this respect is expressly recognised by Section 561-A of the Code of Criminal Procedure 1898, (now Section 482 of Cr. P. C. of 1973). The High Court had also, independent of Section 561-A (now Section 482), power under Section 107 of the Government of India Act, 1915, to stay proceedings in subordinate courts in the exercise of its powers of superintendence over inferior Courts. But under Section 224 of the Government of India Act, 1935, which corresponds to Section 107 of the Act of 1915, the High Court was held to have no power to interfere with judicial orders of the lower courts.<sup>19</sup> Under the Constitution of India, in Article 227, which is a reproduction of Section 224 of the Government of India Act, 1935, sub-section (2) of Section 224 has been omitted. This omission of sub-section (2) of Section 224, in Article 227, shows that the Constitution of India has restored the power which the High Court had under the Government of India Act of 1915.<sup>20</sup> Therefore, the High Courts have jurisdiction to stop criminal proceedings.

It is often stated that criminal proceeding should be stayed during the pendency of civil proceeding in respect of the same or substantially the same subject-matter. The arguments on the foot of which this plea is rested invariably have been examined in a decision of the Madras High Court by Jackson, J., in *Gnanasigamani Nadar v. Vedamuthu Nadar*.<sup>21</sup>

There is now a consensus of judicial opinion that there is no invariable rule that a criminal proceeding should be stayed pending the issue of a civil suit, but the matter is entirely one of discretion of the court, to be exercised having regard to the merits and all the circumstances of the case, the only general rule, that can be adumbrated is that every court should be left, as far as possible to dispose of the case on its file with the utmost expedition and the only general assumption that can be made is that in either court justice will be done—per Jackson J., in *Ramiah v. Ramiah*;<sup>22</sup> *Jagannath Acharya v. Rajagopalachari*,<sup>23</sup> *Revalmal Udhomal v. Mehrumal*<sup>24</sup> and *Kanhaiya Lal v. Baij Nath Mahesri*<sup>25</sup> There is no hard and fast rule in this matter. The Court should consider the circumstances of each particular case and decide on grounds of justice and expediency whether it is proper that the criminal proceedings should be stayed or that the civil proceedings should be stayed or that both should be allowed to take their course—per Broomfield, J. in *Dias v. Mahadev*.<sup>1</sup> No hard and fast rule can be laid down as to the circumstances in which stay in a criminal case can be ordered. Each case will have to be judged on its own merits.<sup>2</sup> Section 344 of the Code of Criminal Procedure (Act V of 1898) (now Section 309 of Cr. P. C. of 1973) does not in terms provide for stay of criminal proceedings indefinitely and clearly the multiplicity of proceedings is opposed to public interest. Stay of criminal proceedings is entirely in the

19. See sub-sec. (2) of Sec. 224 and the two undermentioned cases *Sakkal v. Issurdas*, A. I. R. 1942 C. 250; I. L. R. (1941) 2 C. 366; 199 I. C. 740; and *Jahnavi v. Basudeb*, (1950) 54 C. W. N. 626; 1950 Cal. 536.

20. *Abdul Rahim v. Jabbar*, (1950) 54 C. W. N. 445; A. I. R. 1950 C. 379; and *Bimala Prosad v. State of West Bengal*, A. I. R. 1951 Cal. 258.

21. 1927 M. W. N. 54; 99 I. C. 853; A. I. R. 1927 M. 308.

22. (1927) M. W. N. 672; I. L. R. 50 Mad. 839; 104 I.C. 252; A. I. R. 1927 M. 778.

23. A. I. R. 1931 Pat. 411; 135 I. C. 513.

24. A. I. R. 1934 Sind 143.

25. A. I. R. 1933 Nag. 78; 143 I. C. 77.

1. (1933) 35 Bom. L. R. 1054; 1933 Bom. 485.

2. *Chikkanarasaiyan v. Venkatappa*, 1957 Mys. 70; I. L. R. 1957 Mys. 20.

discretion of the court which must be exercised according to merits and all circumstances of the case. Certain points can be culled from the host of decisions on this subject as set out on the elaborate discussion in Sohoni's Code of Criminal Procedure (1961), 17th Edn., Vol. III, p. 2737 et seq. may be summarized as follows :

- (1) It is open to a party to ask for stay of criminal proceedings pending disposal of a civil suit between the same parties and on the same subject-matter.<sup>3</sup>
- (2) It is generally not a valid ground for adjourning a prosecution that issues similar to those arising in the criminal court are concurrently the subject of determination by a civil court with the possible result of conflicting decisions upon practically the same evidence, especially when adjournment of the criminal proceedings would necessarily be very prolonged.<sup>4</sup>
- (3) Criminal proceedings should generally be stayed, if they had been launched with the object of prejudicing the trial of the civil suit and *vice versa*. In such cases, the important question is whether the criminal complaint or the civil suit was first made or instituted.<sup>5</sup>
- (4) If the object of criminal proceedings, while a civil suit in relation to the same matter or a matter intimately connected therewith is pending, be in reality to have a preliminary enquiry before the Magistrate into the matter of the suit and prejudice the trial of that suit or to coerce the accused into a compromise of the civil suit on terms to be dictated practically by the complainant, the Magistrate should, as a general rule, postpone inquiry into, on trial of, the criminal case till the disposal of the civil suit.<sup>6</sup>
- (5) If the same issues are involved in civil and criminal cases and there is risk of conflict of jurisdiction, it is undesirable to institute criminal proceedings until determination of civil proceedings.<sup>7</sup>
- (6) When parties are the same or substantially the same and the subject-matter in issue both in the criminal case and the civil suit is

3. Penumarti Janikamma v. Chunduru Appanna, 1957 Andh. Pra. 771 at p. 772; see also Gurpurb Singh v. S. Autar Singh, 1960 J. & K. 55; Dharmeswar Kalita v. The State, 1952 Assam 78; Chikkathimma Reddy v. The State of Mysore, 1952 Mys. 37; Hariram v. Smt. Radha, 210 I.C. 136; A. I. R. 1943 Nag. 327; Shatrunjaya Singh v. D. S. Saxena, I. L. R. 18 Luck. 419; 204 I. C. 265: 1943 Oudh 184; Motiram Jasamal v. Emperor, I. L. R. 1942 Kar. 193: 204 I. C. 252: 1943 Sind 10; Paras Ram v. Jalal Din, 17 Cr. L. J. 7.

4. Mathura Kuar v. Durga Kuar, 2 A. L. J. 747; Mansharam v. Chetanram, I. L. R. 1944 Kar. 392; 218

I. C. 280; 1945 Sind 32.

5. Dias v. Mahadev, I. L. R. 58 B. 49: 1933 Bom. 485; In re Ramchandra Babaji, 145 I. C. 161: 1933 Bom. 307; Rewatmal v. Sajanmal, 152 I. C. 382: 1934 Sind 143; Bhagwat Prasad v. Ram Kisun, 1930 Pat. 351; Motiram Jasamal v. Emperor, 1943 Sind 10; Kishindas v. State, 1956 Bom. 423: 1956 Cr. L. J. 724.

6. In re, A. R. S. P. Subramanian; 2 Weir 415; Kalima Bibi v. Makbul Ahmad, 15 Cr. L. J. 488 (2); Yelchuri Ranganayakalu Chetty v. K. Gopala Chetty, 1953 Mad. 439.

7. Sri Kisson v. Emperor, 1935 Cal. 182: 159 I.C. 964.

substantially the same, proceedings in the criminal case should be stayed till there is an adjudication on the point in the civil suit.<sup>8</sup>

(7) If parties to the civil and criminal proceedings are not identical, stay will not be granted.<sup>9</sup>

(8) The filing of a suit in relation to possession of property is no ground for staying proceedings under Section 145 of the Code of Criminal Procedure,<sup>10</sup> "but the rule is different if proceedings under Section 145 are started after filing the suit."<sup>11</sup>

(9) The intent to prejudice a civil litigation by a subsequent criminal complaint cannot be inferred in the case of public prosecutions. Thus, prosecution of directors of a company for offences under the Indian Penal Code on a complaint filed by the Official Liquidator with the permission of the Company Judge of the High Court need not be stayed on the ground that already proceedings are pending against those directors under Section 237 of the Companies Act. Nor is it a ground for stay that special leave for an appeal from the order of the company Judge to the Supreme Court has been obtained when the criminal proceedings had already been delayed for more than two years.<sup>12</sup>

But the Supreme Court has laid down the following law in *M. S. Sheriff v. State of Madras*<sup>13</sup>:

"As between the civil and the criminal proceedings, criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule can be laid down but the possibility of conflicting decisions in the civil and criminal Courts is not a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one Court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration is likelihood of embarrassment. Another factor is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust. This, however, is not a hard and fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just."

8. N. B. Chikkathimma Reddi v. The State of Mysore, 1952 Mys. 37: 31 Mys. L. J. 94.  
.hi Singh v. King-Emperor, 1921 t. 484; Mansharam v. Chetanram, 45 Sind 32; Madan Lal v. Empe- ror, 1934 Pat. 113; Moti Ram Jasai- al v. Emperor, 1943 Sind 10; see also Yelchuri Ranganayakulu Chetty v. K. Gopala Chetty, 1953 Mad. 439: (1963) 1 M.L.J. 525. Chikkanarasaiah v. Venkatappa, 1957 Mys. 70; Chitrala Ramiah v. Natu-

kula Ramiah, 1927 Mad. 778; Jagannath v. Rajagopalachari, 1931 Pat. 411: 135 I.C. 513.  
11. Skaria Mathai v. Narayanan, 1952 T. C. 207: I. L. R. 1951 T. C. 269.  
12. Sailendra Nath v. The State, 1955 Cal. 247 at p. 248.  
13. 1954 S. C. R. 1144; 1954 S. C. A. 576; 1954 S. C. J. 458: 1954 Cr. L. J. 1019; (1954) 1 M. L. J. 699: 67 M. L. W. 625: 1954 M. W. N. 473; A. I. R. 1954 S.C. 397, 399.

41. *Relevancy of certain judgments in probate, etc., jurisdiction.*  
A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, <sup>14</sup>[order or decree] declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, <sup>14</sup>[order or decree] declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, <sup>14</sup>[order or decree] declares that it had been or should be his property.

ss. 40, 42, 43 (Judgments, order and decrees). s. 3 ("Relevant").  
s. 44 (Fraud and want of jurisdiction). s. 4 ("Conclusive proof")

Taylor, Ev., Sections 1673—1681 and 1733—1738; Best, Ev., Section 598; Piggot on Foreign Judgments (1879); Roscoe, N. P. Ev., 193, 194; Everest and Stroud on Estoppel; Bigelow on Estoppel; Storey's Conflict of Laws, Westlakes Private International Law (1912); Wheaton's International Law, 216, 225 (1889), 4th Ed., 221, 230, 231; Foote's Private International Law; Broughton's Estoppel by Matter of Record in India 114; Caspersez's Law of Estoppel, 4th Ed., 731; Hukum Chand's *Res Judicata*, 493; Phipson, Ev., 11th Ed., 538-542; Steph. Dig. Articles 39—41, pp. 164-166.

#### SYNOPSIS

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|--------------------------------------|---|
| 1. Principle.                        | (b) Definition of "judgment <i>in rem</i> ."            |
| 2. Scope.                            | (c) Section not exhaustive of judgments <i>in rem</i> . |
| (a) General.                         | (d) Foreign judgments.                                  |
| (b) Positive and negative judgments. |   |
| 3. "Judgment <i>in rem</i> ."        | 4. Valid against all the world.                         |
| (a) General.                         | 5. "Final judgment, order or decree".                   |

14. Ins. by the Indian Evidence (Amendment) Act, 1872 (18 of 1872), S. 3.

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|-------------------------------|-------------------------------------|
| 6. Competent Court.           | 13. Lunacy proceedings.             |
| 7. "Legal character".         | 14. Court-martial.                  |
| 8. Effect of such judgments.  | 15. Indian Companies Act.           |
| 9. Probate jurisdiction.      | 16. Restitution of conjugal rights. |
| 10. Matrimonial jurisdiction. | 17. Rent Controller.                |
| 11. Admiralty jurisdiction.   | 18. Generally.                      |
| 12. Insolvency jurisdiction.  |                                     |

**1. Principle** A decision *in rem* not merely declares the status of the person or thing but *ipso facto* renders it such as it is declared. As regards persons, public policy for the peace of society requires that matters of social status should not be left in continual doubt; and, as regards things, that everyone, generally speaking, who can be affected by the decision may protect his interests by becoming a party to the proceedings.<sup>15</sup>

A judgment *in personam* is no evidence of the truth either of the decision or of its grounds between strangers, or a party and a stranger except—

- (a) upon questions of public and general interest,
- (b) in bankruptcy, administration, divorce, and patent cases, to a limited extent, or
- (c) when so operating by contract, admission, or acquiescence.

But a judgment *in personam* is, in all cases, evidence between strangers of its existence and legal effect, as distinct from its truth, and that a judgment *in rem* is, in addition, evidence between strangers of the truth of its actual decision.<sup>16</sup>

**2. Scope.** (a) *General*. This section consists of two parts. The first part makes certain judgments, etc., relevant. The second part makes the judgments conclusive evidence in certain matters. The conditions necessary for making a judgment relevant may be considered under two heads :

- (1) those having reference to the contents of the judgments, and
- (2) those to the nature of the proceedings in which the judgment is sought to be relied upon.

First, with reference to the judgment alleged to fall under this section

- (1) it must be—
  - (a) of a competent Court,
  - (b) in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction.
- (2) it must—
  - (a) confer upon or take away from any person any legal character, or
  - (b) declare any person to be entitled to any such character, or
  - (c) to be entitled to any specific thing, not as against any specified person, but absolutely.

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15. See Taylor, Ev., S. 1647 Phipson, 16. Phipson, Ev., 11th Ed., p. 568.  
Ev., 11th Ed., 539.

Secondly, with regard to the proceedings in which the said judgment is sought to be relied upon as a piece of evidence, the existence of any such legal character or the title of any such person to anything must be relevant.

(b) *Positive and negative judgments.* The section makes no distinction between a positive or a negative judgment, or between the point adjudicated upon and the grounds on which the decision is based but it arrives at the same result in a simpler manner. It declares the purpose for which the judgment of a competent Court operates as conclusive against the world, and so far as such purposes relate to the status of what is referred to as legal character of a person, it specifies three purposes only. It provides that the judgment is conclusive proof only for showing—

- (a) that the judgment has conferred a legal character on a person, or
- (b) that it has declared that a person had such legal character, or
- (c) that it has declared that any legal character of a person which subsisted had ceased to exist.<sup>17</sup>

The finding of a Court that an attempted proof has failed is not a judgment such as is contemplated in this section. The only kind of negative judgment which is contemplated is that which expressly takes away, from a person the legal character which has up to that time subsisted.<sup>18</sup>

3. "Judgment in rem". (a) *General.* Although the term "judgment in rem" is not used in this Act, yet this section incorporates the law on the subject of such judgments, as explained in the decision of Sir Barnes Peacock in *Kanhiya Loll v. Radha Churn*.<sup>19</sup>

(b) *Definition of "judgment in rem".* Under the English law, a judgment in rem is defined as "an adjudication pronounced (as its name indeed denotes) upon the status of some particular subject-matter, by a tribunal having competent authority for that purpose".<sup>20</sup>

17. *Radhakishin v. Gangabai*, 1928 Sind 121; 110 I. C. 730.

18. *Kalyanchand v. Satabai*, 1914 Bom. 8; I. L. R. 38 Bom. 309; 23 I. C. 325; 16 Bom. L. R. 5 (F.B.).

19. (1867) 7 W. R. 338, see this judgment; see also *Messa v. Messa*, 1938 Bom. 394; I. L. R. 1938 Bom. 529; 17 I.C. 836; 40 Bom. L. R. 571; *Yarakalamma v. Anakala Nayamma*, (1864) 2 Mad. H. C. R. 276; *Jogendur v. Funinder*, (1871) 11 B. L. R. 244; 17 W. R. 104 where the subject of judgment "in rem," and the meaning of the terms *in rem*, *jura in rem* and *status* are fully discussed; see also *Broughton* op. cit. 114; *Caspersz*, op. cit., 4th Ed., 734; *Hukum Chand* op. cit., 493; *Bigelow* on *Estoppel*; *Pigott* on *Foreign Judg-*

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(1870); *Westlake's Private International Law* (1880); *Wheaton's International Law*, ib. 4th Ed., 221, 230 231; *Foote's Private International Law*, *Everest and Stroud on Estoppel*; *Story's Conflict of Laws*. With reference to this section the Select Committee on the Bill remarked in their Report as follows: "For the sake of simplicity, and in order to avoid the difficulty of defining or enumerating judgments *in rem*," we have adopted the statement of the law by Sir Barnes Peacock, C. J. in *Kanhiya Loll v. Radha Churn*, 7 W. R. 338.

20. 2 *Smith's L.C.*, p. 666 (13th Ed.); *Sriram v. Prabhu Dayal*, A. I. R. 1972 Raj. 180; 1972 Raj. L. W. 169; 1972 W. L. N. 49.

This definition has met with criticism. Taylor remarks in his Treatise on Evidence<sup>21</sup> that "it is not an absolutely perfect definition though it is sufficient for all practical purposes". There is an exhaustive criticism of the definition in *Yarakalamma v. Anakala Naramma*.<sup>22</sup> Phipson in his book on Evidence<sup>23</sup> criticises the definition as being seemingly the best but imperfect. Bower defines a judgment *in rem* as one which "declares, defines or otherwise determines the status of a person, or of a thing; that is to say, the jural relation of the person or thing to the world generally".<sup>24</sup> According to one or more of these definitions, the judgment in a suit under Section 92, C. P. C., appointing a particular person as *mutawalli*, would be a judgment *in rem*. It would be so, because it confers a status upon a person as against the world. The whole Muslim public is interested in a public *waqf* and when a certain person is appointed as its *mutawalli*, the status is conferred upon him as against the entire world. It is not possible to conceive of him as *mutawalli* as against the actual parties in the suit, and as anything but a *mutawalli* as against the rest of the world. The principle underlying a judgment *in rem* is, that the entire world may be regarded as party to the suit in which it was pronounced.<sup>25</sup> The principle stated by Phipson<sup>1</sup> "as regards persons is, that public policy for the peace of society requires that matters of social status should not be left in continual doubt; and as regards things, that, generally speaking, everyone who can be affected by the decision may protect his interests by becoming a party to the proceedings". The public should not be left in any doubt as to who is the *mutawalli* of a *waqf* and a District Judge is given the power under Section 92, C. P. C., not only to declare that a person is a *mutawalli* but also *ipso facto* to render him as *mutawalli*.<sup>2</sup>

But a judgment under Section 92, C. P. C., though relevant, is not conclusive.<sup>3</sup> To be conclusive under this section a judgment should fall within the four corners of this section, that is, it must be in the exercise of jurisdiction enumerated. A judgment under Section 92, C. P. C., appointing trustees or settling new schemes of management is not under probate, matrimonial, admiralty or insolvency jurisdiction and as such it is not conclusive though relevant under Section 42.<sup>4</sup>

A compromise decree relating to easements of light and air between owners of adjacent houses cannot be executed against third persons who are not bound by it as the judgment is not a judgment *in rem* nor does the word "assigns" inserted in the compromise decree by the parties thereto enable execution of the decree against third parties by virtue of any provision in the Civil Procedure Code, 1908, even in cases where the decrees provide for covenants running with the land.<sup>5-25</sup>

If persons unsuccessful in an application to be made parties, but an application is permitted to intervene in that application, held that do not make

21. Vol. II, 10th Ed., p. 1205.

22. (1864) 2 M. H. C. R. 276. It also received criticism at the hands of Sir Barnes Peacock, C.J., in *Kanhyal Loll v. Radha Churn*, 7 W.R. 388; (Bengal L.R. Sup., Vol. 662).

23. 11th Ed., p. 540.

24. See Bower on *Res Judicata*, p. 132.

25. See the case of *Yarakalamma v. Anakala Naramma*, (1864) 2 M. H. C. R. 276 at pp. 282 and 287; Bower on *Res Judicata* at p. 133;

and Bigelow on *Estoppel*, 6th Ed. p. 47.

1. At p. 539 of 11th Ed.

2. *Anjuman Islamia v. Latafat Ali* 1950 All. 109; 1950 A. I. J. 776.

3. *Ibid.*

4. *Sri Ram v. Prabhu Dayal*, A. I. R. 1972 Raj. 180; 1972 Rai. I. W. 169; 1972 W. L. N. 49

5-25. *Abdul Kardar v. Judah*, 69 Bom. L. R. 749 at pp. 751, 752; 1967 Mah. L. J. 985.

them parties to the application, and the judgment therein is not a judgment *in rem*<sup>1</sup>. A decision in a proceeding arising out of a suit by the creditor against his debtor does not come under Section 41.<sup>1</sup>

(c) *Section not exhaustive of judgments 'in rem'.* In this view, it would appear that the section is not exhaustive as to judgments *in rem* and that there may be judgments, such as those in suits under Section 92 of the Civil Procedure Code, which are, or have the effect of judgments *in rem* and bind the entire world, although they are not covered by this section as they are not passed in the exercise of the jurisdictions mentioned in it.<sup>2</sup>

Many difficulties on the subject, at any rate so far as domestic judgments *in rem* are concerned, are removed by this section, which greatly simplifies the law relating to these judgments. For the section declares what are the judgments which are alone to have a conclusive character, and one of the main difficulties has always been to ascertain some principle upon which to rest this class of judgments, so as to determine what cases fall within it. It has been held in the Punjab High Court that a previous judgment in a compromise suit was not a judgment *in rem* not being included in the scope of this section and was therefore no bar to a subsequent suit.<sup>3</sup>

The judgments mentioned in this Section are called judgments *in rem*. In *Kanhya Loll v. Radha Churn*,<sup>4</sup> Peacock, C. J., gave a list of judgments *in rem* and that list has been followed in framing this section. But there may be other provisions which may also attach conclusiveness to judgments, etc., of some other kinds. This section does not prohibit the making of other laws. The provisions of Section 11, C. P. C., for example, go much farther than Section 40 or 41 of this Act. Section 40 touches only fringe of the law of *res judicata*. But provision for that has been made more exhaustively in Section 11, C. P. C. The difference between the provisions in the Law of Evidence and the Law of Procedure in C. P. C., or Cr. P. C. is, that one deals with the question of proof, and the other with a bar of suit or other proceedings. A fact, which can be proved from a judgment made conclusive for that purpose, need not be proved afresh. The proof of the judgment is enough. But a second suit or proceeding can only be barred on the principle of *res judicata*, if the law says so; and this bar is regarding the adjudicating of a controversy decided before. It is not possible to add to the list of subjects mentioned in this Section, except by legislation. Conclusiveness under this Section attaches only to the subjects mentioned in it, and a fact established by a judgment of a competent Court on any of these subjects, is taken to be proved, and established in all subsequent proceedings and does not require to be proved again. The Judicial Committee in *Appa Trimbaik v. Waman*

1. Vaishnava Dass v. Faqir Chand, (1967) 2 Com. L. J. 171; A. I. R. 1968 Delhi 6, 9.

1-1. S. Gopal Krishna Iyer v. S. Subbaraya Iyer, A. I. R. 1972 Mad. 269; 2 M. L. J. 112; 85 M. L. W. 263.

2. See Rama Das v. Hanumantha Raw, I. L. R. 36 Mad. 364; 12 I.C. 449; Sakharam v. Ganu, 1921 Bom. 297; I. L. R. 45 Bom. 683; 60 I.C. 924; 23 Bom. L. R. 125; Surajgir v. Bramh Narain, 1946 All. 148; I. L.

R. 1946 All. 107; 223 I.C. 593; Khaja Hassanulla Khan v. Royal Mosque Trust Board, 1948 Mad. 134; I. L. R. 1948 Mad. 257; (1947) 1

M. L. J. 395; 60 M. L. W. 438; Anjuman Islamia v. Latafat Ali, 1950 All. 109; 1950 A. I. J. 776; Sunni Central Board of Waqf, U. P. v. Sirajul Haq Khan, 1954 All. 88.

3. Rahmat v. Zuhra, 14 P.R. 1912; 11 I.C. 486.

4. 7 W. R. 338.

*Govind*<sup>5</sup> did not extend the principle of this Section in a case of adoption. It follows that conclusiveness from the point of view of the Law of Evidence can attach to a judgment, order or decree, only if it falls within the category mentioned in this Section.<sup>6</sup>

(d) *Foreign judgments.* Foreign judgments *in rem* stand on a footing somewhat different from that of domestic judgments *in rem* as well as from that of foreign judgments *in personam*. Their recognition and enforcement is still void of express legislative sanction, as while they are beyond the rule of *res judicata* enunciated in the Civil Procedure Code, there is nothing in this Act to directly indicate that its provisions relating to judgments *in rem* are to be construed so as to include foreign judgments. But it is apprehended that in analogy with the practice of the English Courts, such judgments given in the exercise of probate, matrimonial, admiralty, or insolvency jurisdiction will receive in India the same recognition as is accorded to domestic judgments of the same character.<sup>7</sup>

Although the judgment of a foreign Court declaring that a person is the validity adopted son of another cannot be regarded as a judgment *in rem* within the meaning of this section yet such judgment has been held to be binding on the Indian Courts in matters relating to immovable property situated in India.<sup>8</sup>

In considering the question, whether a judgment of a foreign court is conclusive, the Court will not enquire whether conclusions recorded thereby are supported by the evidence, or are otherwise correct because the binding character of the judgment can be displaced only by establishing that the case falls within one or more of the six clauses of Section 13, C. P. C., and not otherwise.<sup>9</sup> A foreign judgment is by that Section made conclusive between the parties as to any matter directly adjudicated, and it is not necessary that it must be delivered before the suit in which it is set up was instituted. Section 13 incorporates a branch of the principle of *res judicata*, and extends it, within certain limits, to judgments of foreign Courts, if competent to decide a dispute between the parties.<sup>10</sup> A foreign judgment may operate as a judgment *in rem*, provided the subject-matter of the action in the foreign country is property situate within the foreign country.<sup>11</sup> Indeed, Section 13, C. P. C., contemplates both judgments *in rem* and judgments *in personam*. The only difference is, that while the Code makes foreign judgments conclusive *inter partes*, this section makes determination described in it as conclusive proof even against strangers, provided they also comply with the conditions stated in Section 13, C. P. C., to merit conclusiveness.<sup>12</sup> Ordinarily, a judgment upon status is considered to be a judgment *in rem*.<sup>13</sup>

5. I. L. R. 1941 Kar. 134 (P.C.); A. I. R. 1941 P.C. 85.
6. Viswanathan v. Abdul Wajid, (1963) 3 S. C. R. 22; A. I. R. 1963 S. C. 1.
7. See Hukum' Chand, op. cit., 603 et seq.; Pigott, op. cit., Westake, op. cit.; Wheaton, op. supra, note (1); Nallakaruppa Settiar v. Mahomed Iburam Saheb, 20 Mad. 112 at p. 114. See also Blackwood & Sons v. Parasuraman, A. I. R. 1959 Mad. 410, where it has been held that a

- foreign probate would be sufficient proof of the title of the legatee or executor and hence would be admissible under this section.
8. Nataraja v. Subbaroya, 1939 Mad. 693; I. L. R. 1939 Mad. 507: (1939) 1 M. L. J. 499.
9. Viswanathan v. Abdul Wajid, supra.
10. Ibid.
11. Ibid.
12. Ibid.
13. Ibid.

**4. Valid against all the world.** It has been pointed out under heading "General" to Section 39 that a judgment, as a rule, affects only parties and privies. Judgments *in rem* form an exception to this rule, and are valid not only *inter partes* but *inter omnes* or against all the world. Prior to the passing of the Evidence Act, conclusive effect was not infrequently, but erroneously given to decisions which were really binding only *inter partes*, such, for instance, as a judgment declaring the validity of an adoption.<sup>14</sup> This was pointed out by the Madras High Court in *Yarakalamma v. Anakala Naramma*<sup>15</sup> and by the Calcutta High Court in *Kanhya Loll v. Radha Churn*,<sup>16</sup> in both of which cases the law relating to this subject received full consideration. The present section, which is based upon the judgment in the latter case, declares that a judgment, order, or decree in order to operate otherwise than *inter partes* must be a final judgment of a competent Court made in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction. It gives conclusive effect to a judgment of competent Court only in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction. A judgment passed in a suit under Section 92, C. P. C., is not a judgment in the exercise of any such jurisdiction, and is not covered by Section 41. It may be relevant, but it does not have conclusive effect.<sup>17</sup>

**5. "Final judgment, order or decree.** For a judgment, order or decree to be relevant, it must be final. The word "final" does not mean 'not subject to appeal,' but final as distinguished from interlocutory,<sup>18</sup> or reversed. The pendency of an appeal is not sufficient.<sup>19</sup>

In reference to a Probate Court, the words "final judgment, order or decree" mean the judgment, order or decree of such a Court by which the grant is actually issued to the propounder or applicant, for it is only the grant which declares or confers the legal character on the propounder or applicant. The underlying principle is, that it is the seal of the Probate Court, the seal affixed to the grant that prevents any person from challenging, in a Court of law, either the appointment of the executor or administrator, or the validity of the will, or its contents, as appearing in the grant. Hence, an order merely granting letters of administration to the applicant with a copy of the will annexed on condition that he executes the usual bond is not a

- 14. As to the history and position of judgments *in rem* in India prior to this Act, see *Yarakalamma v. Anakala Naramma*, (1864) 2 Mad. H. C.R. 276; *Kanhya Loll v. Radha Churn*, (1867) 7 W. R. 338; *Jogendra v. Fanindra*, (1871) 11 B. L. R. 244; 14 M. I. A. 367; *Ahmedbhoy v. Vollebhoy*, (1882) 6 B. 703.
- 15. (1864) 2 Mad. H.C.R. 276. The conclusion of Holloway, J., "That a decision by a competent Court that a Hindu family was joint and undivided, or upon a question of legitimacy, adoption, partibility of property, rule of descent in a particular family, or upon any other question in a suit *inter partes*, or, more correctly speaking, in an action *in personam*, is not a judgment *in rem*, or binding upon strangers, or,

- in other words, upon persons who were neither parties to the suit nor privies," was approved of and confirmed by Peacock, C. J., delivering the judgment of the Full Bench in the case of *Kanhya Loll v. Radha Churn*, 7 W. R. 338, post.
- 16. (1867) 7 W. R. 338; B. L. R. Sup. Vol. 662 (F.B.).
- 17. *Anjuman Islamia v. Latafat Ali*, 1950 All. 109; 1950 A. L. J. 776; *Sri Ram v. Prabhu Dayal*, A.I.R. 1972 Raj. 180; 1972 Raj. L. W. 169; 1972 W. L. N. 49; as to the effect of such a judgment, see notes under S. 42 post.
- 18. *Huntly v. Gaskell*, (1905) 2 Ch. 656 (C.A.); *Chalmers v. C.*, (1930) P. 154.
- 19. *Phipson, Ev.*, 11th Ed., p. 535 citing *Scott v. Pilkington*, (1862) B. & S. 11.

final judgment, order or decree, in the above sense. That order can be relevant, if at all, under Section 11 or Section 13 of this Act and the Court might consider it not safe to hold on the basis of that order alone that the will has been proved in a subsequent application for letters of administration.<sup>20</sup>

**6. Competent Court.** The expression "competent Court" in this section means the Court of any country which is competent to pass such a judgment as is referred to in this section, that is to say, a judgment *in rem*.<sup>21</sup>

The judgment has to be of a court which had jurisdiction over the parties and the subject-matter. Only the judgment of such court would be conclusive proof of the legal character it confers or takes away.<sup>21-1</sup>

A judgment of a foreign Court, that a person is the validly adopted son of another, cannot be regarded as a judgment *in rem*, within the meaning of this section, but it has been held that a declaration by a Court, affecting the status of a person domiciled within its territory, is treated by the comity of nations as being analogous to a judgment *in rem*.<sup>22</sup> Judgments of foreign Courts are not excluded from the operation of this section, provided they are competent to pronounce a judgment as contemplated by the section. If the Courts are so competent, the judgments are conclusive against the whole world as to the status or title which they establish.<sup>23</sup>

**7. "Legal character".** The judgments referred to in this section are conclusive proof of certain things only,<sup>24</sup> namely, the legal character to which a person may be declared to be entitled, or to which a person may be declared not to be entitled, and the title which a person may be declared to possess in a specific thing. No judgment, except that passed by a Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, upon any matter indicated in this section can have the effect of a judgment *in rem*.<sup>25</sup>

The words used in this section are "declares any person to be entitled to a legal character". *A declaration of a legal right is a different thing from a declaration of a legal character.* The word "character" means status;<sup>25-1</sup> it is something more than a mere right. The declaration of a person's right operates as against a particular person, or group of persons, against whom the right is claimed, whereas a man's status is something which defines his position, not in relation to any particular person or group of persons but in relation to the rest of the world; his status distinguishes him from the rest of the world. To say that a person is not a partner of a firm is not to declare his status or legal character, it is merely to declare his position with respect to the particular firm.<sup>1</sup> An order of an Insolvency Court refusing to adjudicate

20. Harilal Chatterjee v. Sarat Chandra Chatterjee, 43 C. W. N. 824.

I.C. 677.

21. Menahem Messa v. Moses Bunin  
Menahem Messa, 1938 Bom. 394; I. L. R. 1938 Bom. 529.

23. Abdul Wajid v. Gajambal, 1950 Mys. 57.

21-1. Smt. Satya v. Teja Singh, A. I. R. 1975 S.C. 105: (1975) 2 S. C. J. 294: 1974 Cri. App. R. (S.C.) 355: 1975 Cr. L. J. 52: 1974 Cr. L. R. (S.C.) 678: 1974 B.B.C.J. 965: 1975 S.C.C. (Cri.) 50: (1975) 1 S.C.C. 120: 1975 S.C. Cr. R. 89.

24. See Kanhya Lell v. Radna Churn, 7 W. R. 338.  
25. Urjun v. Mathura Nath, 1928 All. 395: 26 A.L.J. 797; Sriram v. Prabhu Dayal, A.I.R. 1972 Raj. 180: 1972 Raj. L.W. 169: 1972 W.L.N. 49 (judgment under Sec. 92, C.P.C.).

22. Nataraja v. Subbaroya, 1939 Mad. 693 : I.L.R. 1939 Mad. 507 : 185

25-1. Lakshmayee v. Ponna Goundan, (1975) 88 Mad. L. W. 445.  
1. Punjab National Bank v. Balikram, 1940 Cal. 225: 190 I.C. 537.

cate a person-insolvent, on the ground that he was not member of a firm which had been declared insolvent, is not a final order which conferred upon or took away from him any legal character within the meaning of this section.<sup>2</sup>

The term "legal character" means something equivalent to status. The legal character assigned to a person announces to all the world what the legal status of the person in question is. The meaning of "legal character" must be narrowly construed, for an action *in rem* is not an action against a thing but an action availng against all the world. One must be cautious lest litigation between A and B be allowed unduly to affect the rights of C. To declare a man to be an insolvent is clearly to place beyond all doubt the status of that individual, and it is conclusive as against the whole world. But it is very different thing to say that to declare a person to be the creditor of an insolvent is to confer a status upon that creditor which is equally conclusive as against the whole world. Apart from an insolvency, the creditor's position arises out of a contractual relationship.

So far as the effect of an order of adjudication is concerned, in view of the provisions of this Section, no one can challenge it except by way of an appeal under the Insolvency law. Once an order of adjudication has come to stay beyond challenge, it is not open to any person in a subsequent proceeding in the insolvency, or otherwise, to challenge it. Even the transferees of property from the insolvent, whose transfers are challenged, either as fraudulent transfers or as voluntary transfers, cannot make such a challenge to the order of adjudication. Thus, one cannot say that the petitioning creditor did not really have any debt genuinely owed by the insolvent debtor and the declaration as to insolvency itself is bad. Once the insolvency Court comes to a finding that the debtor has committed an act of insolvency and is liable to be adjudged an insolvent, since he is unable to pay his debts, the status of the debtor comes to be determined as an insolvent. And the mere fact that that status is determined, as a result of an application by a petitioning creditor, cannot give to any one any right, at a subsequent stage in the insolvency proceedings to challenge the adjudication order. Such a challenge is prohibited by virtue of this section.<sup>3</sup> In *Mahomed Saddique Yousuf v. Official Assignee*,<sup>4</sup> the Judicial Committee observed :

"..... the importance of maintaining the status of the debtor as determined by an order of adjudication, and the necessity of securing the stability of the administration of the debtor's estate, once his status has been fixed, have been justly held to outweigh the consideration of hardship to the private citizen."

Nobody, at subsequent stages of the proceedings, can challenge the very order of adjudication of the debtor as an insolvent in the guise of throwing a challenge to the genuineness of the debt of the petitioning creditor.<sup>5</sup>

But the declaration in insolvency proceedings that a person is the creditor of the insolvent does not confer on him a legal character. Though it may be necessary, as a necessary step, to make a declaration which will operate

2. *Official Assignee of Madras v. Official Assignee of Rangoon*, 1924 Mad. 662; 83 I.C. 174; 46 M. L. J. 580.  
3. *Bajirao v. Bansilal*, I. L. R. 1963 B. 173; A. I. R. 1963 B. 212; 65 Bom. L. R. 39.

4. L. R. 70 I.A. 93; A. I. R. 1943 P.C. 180.  
5. *Bajirao v. Bansilal*, I. L. R. 1963 B. 173; A. I. R. 1963 B. 212; 65 Bom. L. R. 39.

*in rem* to find a fact, that finding does not bind third party in subsequent proceedings. The decision on such a finding is not a judgment *in rem*. If, at any subsequent stage, an occasion arises in insolvency proceeding, either under Section 33 or under Section 50 of the Provincial Insolvency Act, 1920, that an enquiry ought to be made into the genuineness of the claim of the petitioning creditor, the fact that the adjudication order was passed on the application of the petitioning creditor, will not preclude such an enquiry, though the very order of adjudication itself cannot be challenged on the ground that the petitioning creditor did not really have a claim against the debtor.<sup>6</sup>

The adjudication of a person as an insolvent has the effect of taking away from that person his legal character of being not insolvent. An order by which such adjudication is made is covered by this section.<sup>7</sup>

A right to recover a debt or a chose-in-action cannot be deemed to be a "specific thing". In order that a declaration of title to a specific thing should have a conclusive character, as against the whole world, it is not enough to show that under the judgment of the insolvency Court one has become entitled, to a specific thing, but his title to such a thing must have been declared, not as against any specified person but absolutely. A decree declaring that *A* is entitled to a debt is not a declaration of title to a specific thing made, not against a specified person but absolutely.<sup>8</sup> A judgment in insolvency, declaring that the creditor's debt (i.e. a judgment debt) is a provable debt does not declare that an alleged debt which merged in that judgment debt is proved.<sup>9</sup>

A decision by a competent Court that a Hindu family was joint and undivided, or upon a question of legitimacy, adoption, partibility of property, rule of descent in a particular family, or upon any other question of the same nature in a suit *inter partes*, or, more correctly speaking, in an action *in personam*, is not a judgment *in rem*, or binding upon strangers, or, in other words, upon persons who were neither parties to the suit nor privies.<sup>10</sup> If a judgment, in suit between *A* and *B* that a certain property for which the suit was brought belonged to *A*, as the adopted son of *C*, were a judgment *in rem* and conclusive against strangers as to the fact and validity of the adoption, the greatest injustice might be caused.<sup>11</sup>

The legal characters that can be conferred or taken away in the exercise of the jurisdiction mentioned in this section do not include the state of being a partner. A judgment vacating an order of adjudication passed against a

6. Bajirao v. Bansilal, I. L. R. 1963 B. 173; A. I. R. 1963 B. 212: 65 Bom. L. R. 39; see also the cases referred to in this case.
7. Amar Kaur v. Shiv Karan, I. L. R. (1965) 1 Punj. 160; A. I. R. 1965 Punj. 206.
8. In the matter of P. C. Venkata-ramayya Pantulu, 1931 Mad. 441; I. L. R. 54 Mad. 601; 131 I.C. 817; 34 M. L. W. 282 (F.B.).
9. In the matter of P. C. Venkata-ramayya Pantulu, 1931 Mad. 441; Chandreshwar v. Bisheshwar, 1927 Pat. 61; I. L. R. 5 Pat. 777: 101 I.C. 289.
10. Kanhya Loh v. Radha Churn, 7 W.R. 338 at 341 (F.B.), per Peacock, C. J.
11. Kanhya Loh v. Radha Churn, 7 W.R. 338 at p. 344 (F.B.); see also Appa Trimbaik v. Vaman Govind, 1941 P.C. 85; I. L. R. 1941 Bom. 134 (P.C.); 196 I.C. 518: (1941) 2 M.L.J. 733; Radhabai v. Kadar Ali, A. I. R. 1957 Madh. B. 159; 1956 M. B. L. J. 822 where it has been held that a judgment regarding the validity of an ante-adoption agreement between the adopting mother and the natural father of the adopted son, will not be a judgment *in rem*.

person on the ground that he was not proved to be a partner of the insolvent firm is a negative judgment and amounts to nothing more than holding that sufficient grounds have not been made out for adjudicating such person an insolvent. Such a judgment does not come within this section, as the judgment does not declare that the legal character of being a partner existed and has ceased to exist, but it proceeds on the basis that it was not proved to have existed at all.

An order of the Court, rejecting an insolvency petition on the ground that the petitioning creditor had not proved his right to present the petition, would not operate as *res judicata* against the other creditors.<sup>12</sup>

In *Kanhya Loll v. Radha Churn*,<sup>13</sup> it was said of a decree of divorce : "It is conclusive upon all persons that the parties have been divorced, and that the parties are no longer husband and wife ; but it is not conclusive, nor even *prima facie* evidence against strangers that the cause for which the decree was pronounced existed. For instance, if a divorce between A and B were granted upon the ground of the adultery of B with C, it would be conclusive as to the divorce, but it would not be even *prima facie* evidence against C, that he was guilty of adultery with B, unless he were a party to the suit."

An award under the Bombay Agricultural Debtors' Relief Act (28 of 1947) is between the debtor and all his creditors, and it is for that reason that the award is binding upon all the creditors, and not because it is a judgment *in rem* within the meaning of this section.<sup>14</sup> An order passed in guardianship proceedings cannot be treated as a judgment *in rem*, as in the case of a grant made under the Succession Act.

Even though an order is not a judgment *in rem* or *inter partes*, it may be admissible only to prove that such an order had in fact been made but not to prove its contents.<sup>15</sup> The judgment in a partition suit, declaring the right of a person to a share in particular properties, cannot be said to be a judgment *in rem*. It can bind only the parties thereto.<sup>16</sup>

**8. Effect of such judgments.** This section not only enumerates the different kinds of judgments *in rem* but, also enacts what their effect shall be. This effect is of a limited character and less extensive than that which has been allowed at times to judgments *in rem*, in English Court,<sup>17</sup> whose present tendency is, however, to narrow the effect of such judgments making them binding for their proper purposes only, in accordance with the view which has been adopted by the Indian Legislature. For, according to Eng-

12. *Radhakishin v. Mst. Gangabai*, 1928 Sind 121; 110 I.C. 730; 22 S. L. R. 105.

13. 7 W. R. 338 (F.B.).

14. *Keshav Ghanashyam v. Waman Rangaji*, 1953 Bom. 340; I. L. R. 1953 Bom. 831; 55 Bom. L. R. 320.

15. *Muktipada Dawn v. Aklema Khatun*, 1950 Cal. 533, 535; *Manicka Mudaliar v. Ammakannu*, 1942 Mad. 129; 201 I.C. 39; 54 M. L. W. 411.

16. *Abdur Raiman v. Agastheenju Joseph*, 1952 T. C. 176, 177.

17. According to English law a domestic judgment *in rem* is conclusive *inter omnes* of the matters actually

decided, and also in prize cases of the grounds of the decision, if these are plainly stated. A foreign judgment *in rem* is generally conclusive against strangers only upon questions of prize where the ground of condemnation is plainly stated or of marriage and divorce where the marriage was solemnized and the parties domiciled in the foreign country or of bankruptcy as to contracts made in such country; or of probate administration and guardianship to a limited extent; see Phipson, Ev., 11th Ed., 538, 539 and cases cited.

lish decisions,<sup>18</sup> judgments *in rem*, with the exception of the adjudications of Admiralty Courts in Prize causes,<sup>19</sup> operate *in rem* against all persons, only so far as the judgment itself is concerned and beyond the judgment only parties and their privies are within the estoppel.<sup>20</sup> Although it is said, that the Courts will not recognize foreign judgments *in rem*, which have been obtained by fraud or collusion, it would appear that, unlike the case of foreign judgments *in personam*, such fraud or collusion must relate to the jurisdiction of the foreign Court and, if that Court has jurisdiction, fraud or collusion practised in order to obtain a decision will not be inquired into.<sup>21</sup>

Under the provisions of the present section, the judgments therein mentioned will operate *in rem* only in respect of those matters of which these judgments are declared to be conclusive proof. Beyond this only parties and privies will be within the estoppel. There is a broad distinction between the effect of a judgment *in rem* and a judgment *in personam*. The point adjudicated upon in a judgment *in rem* is always as to the status of the *res* and is conclusive against the world as to that status, whereas in a judgment *in personam* the point, whatever it may be, which is adjudicated upon (it not being as to the status of the *res*) is conclusive only between parties or their privies.<sup>22</sup> In English law, a judgment *in rem* is strong *prima facie* evidence in a criminal case on behalf of the person in whose favour such judgment was given; but it is not conclusive,<sup>23</sup> and a criminal conviction is not, in a subsequent proceeding, conclusive of the facts necessary, to be proved to obtain the conviction and is subject to the same rules of evidence as an ordinary judgment *inter partes*; indeed, such a judgment would not seem to be judgment *in rem* at all except in so far as conviction for felony amounts to a judg-

18. De Mora v. Concha, (1885) 29 Ch. D. 268; Concha v. Concha, (1886) 11 App. Cas. 541.
19. See Bernardi v. Motteux, (1781) 2 Doug. K. B. 574, 580. "All the world are parties to a sentence of a Court of Admiralty" *pe Lord Mansfield*; Hughes v. Cornelius, 2 Sm. L. Ca., 9th Ed., 825; ib., 12th Ed., Vol. II, p. 764; The Helen, 4 Rob. Adm. 3. Such adjudications have been held conclusive not only for their own proper purposes but for other purposes as well, but it has been doubted whether, since the case of Concha v. Concha, *supra*, the findings and grounds of the judgment as distinguished from the judgment itself, would be deemed conclusive upon all the world. Bigelow on Estoppel, 5th Ed., pp. 731, 737, 739 and following note.
20. "The Court of Appeal in De Mora v. Concha, (1885) 29 Ch. D. 268, plainly intimate that none of the generally accepted kinds of judgments *in rem* are such with the single exception of adjudication in prize causes in the admiralty, in the sense, that is to say, that the findings and grounds of decision bind *inter omnes*. The judgment itself may operate *in rem* in a variety of cases but nothing else than the judgment except in the case mentioned—the result is that the discussion in regard to the distinction between judgments *in rem* and judgments *in personam* appears to have become for the greater part obsolete learning. If the two cases referred to point a right (De Mora v. Concha, *supra*; Brigha v. Fayerweather, 140 Mass. 411), there is but one pure judgment *in rem*, carrying, that is to say, in its broadly conclusive effect, necessary findings and grounds of the decision, other judgments operate only so far as they have perfectly and completely against all persons—established a right *in rem*. Beyond the judgment, only parties and their privies are within the estoppel. Prize causes themselves are treated by both Courts, English and American, as exceptional—possibly the foundation even of Hughes v. Cornelius (a prize causes *v. supra* are no longer secured)." M. M. Bigelow in the Law Quarterly Review, Vol. II p. 406, 1886.
21. Crowe v. Crowe, (1937) 2 All.E.R. 723.
22. Radhakishin v. Mst. Gangabai, 1928 Sind 121; 110 I.C. 730.
23. Taylor, Ev., s. 1680.

ment that the person convicted is a felon.<sup>24</sup> But under this Act, such a judgment will be conclusive in a criminal, equally and to the same extent, as in a civil proceeding.<sup>25</sup>

In a case in the Calcutta High Court it has been held, that a verdict of acquittal can only be conclusive as regards persons actually tried and not as regards persons named in a charge of conspiracy but not brought to trial; and it was said that the technicalities of English law based on the sacred character of trial by jury in England cannot be imported into India.<sup>1</sup>

An order may be conclusive otherwise than under the provisions of this Act. Thus, an order upon a contributory under the Companies Act is conclusive evidence that the money ordered to be paid are due, and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons and in all proceedings whatsoever.<sup>2</sup>

As in the case of judgments *inter partes* a judgment *in rem* must be final and pronounced by a Court of competent jurisdiction<sup>3</sup> it has been held by the Punjab High Court that a plaintiff was estopped, under this section, from pleading in a suit filed in the Punjab that property in the Punjab had been fraudulently transferred, because he has unsuccessfully opposed the defendant's application to the Bombay High Court to be declared an insolvent on the ground that the defendant had made a fraudulent disposition of his property. This decision was based on the fact that the Bombay High Court was a court of competent jurisdiction under Section 16 of the Civil Procedure Code, in which section the word "property" means property in India.<sup>4</sup>

**9. Probate jurisdiction.** The Court formerly exercised testamentary and intestate jurisdiction<sup>5</sup> under the Indian Succession Act,<sup>6</sup> the

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- 24. Taylor, Ev., s. 1674 and see Anderson v. Collinson, (1901) 2 K. B. 107, an order made in affiliation proceedings is not a judgment *in rem*, neither is an order to wind up a company. In re Bowling & Wei-by's Contract, (1895) 1 Ch. 663.
- 25. See also cases cited in the next footnote.
- 1. Manindra v. R., 1914 Cal. 886; I. L. R. 41 C. 754; 23 I.C. 1002; 15 Cr. L. J. 402 approving Ramesh v. R., I. L. R. 41 C. 350; 23 I. C. 985; A. I. R. 1914 C. 456, per Woodroffe, J.
- 2. Indian Companies Acts, VII of 1913, S. 190 and 1 of 1956, S. 473.
- 3. S. 41, see also S. 44 post, and S. 40 ante, and see Toronto Railway Co. v. Corporation of Toronto, (1904) A. C. 809.
- 4. Ram v. Durga, 55 P.R. 1913 : 13 I. C. 568.
- 5. As to the effect of probate and letters of administration, see De Mora v. Concha, (1885) L. R. 29 Ch. D. 268; Whicker v. Hume, (1859) 7 H. L. C. App. 124; Concha v. Concha, (1886) L.R. 11 App. Cas. 541, and other cases cited in Phipson, Ev., 9th Ed., 450; Taylor, Ev., ss. 1759-1761; Roscoe, N. P. Ev., 201, 202; Foote's Probate, 10th Ed., 352-356; Williams on Executors, 10th Ed., 431-434; see also pp. 341-472 and 492-493; 1637-1638; Hukum Chand, op. cit., 513, Act X of 1865, Ss. 242, 188, 191; Act V of 1881, Ss. 59, 12, 14; Act XXXIX of 1925, S. 227; Act III of 1915, S. 24; Komol v. Nilruttan, (1878) 4 C. 360, ref. to in Rakshab v. Tarangini, 1921 Cal. 332; 62 I. C. 448; 25 C. W. N. 207; Teen v. Hureehur, (1867) 8 W. R 308; Hormusji v. Bai Dhanbaiji, (1887) 12 B. 164; Mayo v. Williams, (1870) 2 N. W. P. Rep. 268 ref. to in Rakshab v. Tarangini, 1921 Cal. 332; 62 I.C. 448; 25 C. W. N. 207; Fatma Kani Ammal v. Shaikh Dawood, 1936 Mad. 197; 160 I. C. 733; 1936 M. W. N. 82; 43 L. W. 75; Kailash Chandra v. Nanda Kumar, 1944 Cal. 385; 48 C. W. N. 751; Raj Kishore Prasad v. Promoda Behari, 1944 Pat. 182 : I.L.R. 22 Pat. 756; 213 I.C. 345; 10 B. R. 598; 24 P. L. T. 390.
- 6. Act X of 1865; see Act XXXIX of 1925 (succession); as to the High

Hindu Wills Act,<sup>7</sup> and the Probate and Administration Act,<sup>8</sup> which are now superseded by the Succession Act.<sup>9</sup> This section is applicable to probates granted prior to the passing of the Hindu Wills Act.<sup>10</sup> In the case cited below, it was contended that, as the testator died before the Hindu Wills Act came into force and as the executor of the will of a Hindu dying before that Act came into force was a mere manager having no title to the estate, the probate of his will neither conferred a legal character nor declared the executor to be entitled to any legal character. But Trevelyan, J. held as above-mentioned and said :

"I have examined the cases which have been cited, but I am of opinion that Section 41 of the Evidence Act applies to this case. It is quite true that a Hindu executor was, at any rate until the passing of the Hindu Wills Act, only a manager, but as such manager he had certain powers over the estate, and for many purposes he represented the testator. It may be that the probate did not confer upon the executor any legal character but I think that the effect of probate is to declare the person to whom probate is granted to be entitled to the powers of an executor, whatever his powers as such may be. The words 'legal character' are not anywhere defined, but I think that it is quite clear that they are intended to include the case of an executor. The fact that this section has been frequently applied to cases of persons dying after the Hindu Wills Act came into force shows this. The only legal character which the Probate Court declares a person to be entitled to is that of executor. It confers the character of administrator. It does not declare it. So, the section would be meaningless unless 'legal character' included the office of an executor. I do not think that the circumstance that in the particular case, the powers of the executor may be limited makes any difference in the construction of the section."<sup>11</sup>

The Indian Succession Act of 1925 draws a distinction between the position of an executor and that of an administrator. Where, therefore, the sole legatee under a will whose application for grant of Letters of Administration is rejected, appeals from the order but dies during the pendency of the appeal, the heir of the sole legatee can be substituted in his place for the purpose of carrying on the litigation and obtaining a final adjudication as to whether the will is genuine or not.<sup>12</sup> An order for grant of probate operates as judgment *in rem*.<sup>13</sup> And the judgment of a Court refusing probate, it has been said, is as much a judgment *in rem* as one which grants it, for such a judgment takes away from the executor named in the will the legal character of executors and from the legatees and beneficiaries their legal character, and this result is final as against all persons interested under the will.<sup>14</sup> But, in a subsequent Full Bench decision of the Bombay High Court, it has been held that this section does not apply to a judgment of an Appellate Court refusing probate,<sup>15</sup> and it was said that the only kind of negative judgment contemplated in

Court, see Letters Patent, 1865, 1 (34); *In re Fackerooddeen*, (1869) 11 W. R. 413.

7. Act XXI of 1870.

8. Act V of 1881.

9. Act XXXIX of 1925 as amended by Acts XXVII of 1926 and XXI of 1929.

10. *Grish v. Broughton*, (1887) 14 C. 861, 874-876.

11. *Grish v. Broughton*, 14 C. 861, 875.

12. (Mst.) *Phekni v. (Mst.) Manki*, 1930 Pat. 618; I. L. R. 9 Pat. 698: 128 I. C. 128.

13. *Malati v. Dhanapati*, A. I. R. 1964 C. 41: 66 C. W. N. 879.

14. *Chinnasami v. Hariharabhadra*, (1893) 16 M. 380, 383.

15. *Kalyanchand v. Sitarai*, 1914 Bom. 8; I. L. R. 38 Bom. 309: 23 I. C. 325: 16 Bom. L. R. 5.

it is one which expressly takes away from a person a legal character which he had held till such judgment and that this cannot cover the case of a finding that an attempted proof of a right to such a character has failed.<sup>16</sup> In this case, a will produced in a contentious proceeding for probate had been held not proved and the grant refused and an appeal to the High Court had been dismissed and the widow of the deceased had then brought a suit for the recovery of the property from the alleged executors of the rejected will. It was held, that while this section did not apply, the judgment in the probate proceedings operated as *res judicata* between the parties under Section 83 of the Probate and Administration Act (V of 1881) and Section 11 of the Civil Procedure Code.<sup>17</sup>

Every refusal to grant probate does not conclusively show that the will propounded is not the genuine will of the testator. From a refusal to grant probate, it by no means necessarily follows that in the opinion of Court, the will propounded is not the genuine will of the testator. It may be based upon entirely different grounds. To operate conclusively, there must have been a prior final decision against the genuineness of the will. Mere finding that sufficient evidence has not been given of the execution of the will, will not preclude a fresh application for probate on the part of the executors, when they are in a position to support it with more complete proof.<sup>18</sup>

Where the genuineness of the will is not disputed and the applicant is not legally incapable, the Court has no discretion to refuse probate.<sup>19</sup> The judgment of a Probate Court granting probate is a judgment *in rem* and, therefore, the judgment of any other Court in a proceeding *inter partes* cannot be pleaded in bar of an investigation in the Probate Court as to the *factum* of the will pronounced in that Court. The only judgment that can be put forward in that Court of Probate in support of the plea of *res judicata* is a judgment of a competent Court of Probate.<sup>20</sup> In the undermentioned case,<sup>21</sup> it was held, that the order of a Judge was *ultra vires* which was passed under Section 476 of the Criminal Procedure Code, so long as the probate of the will in respect of which forgery was charged was unrevoked and that it was for the civil Court to determine the genuineness of a will, and that it was not open to a criminal Court to find the contrary or to convict any person of having forged a will which had been found to be genuine by a competent Court, and that this section provides that in such matters the finding of the civil Court is conclusive. Where the will has been affirmed in a Court exercising appropriate jurisdiction, the propriety of that decision cannot be impugned by a Court exercising any other jurisdiction.<sup>22</sup>

The grant of probate is not a decree. It cannot be revoked except by the Court which granted it.<sup>23</sup> The judgment of a Court of Probate is a judg-

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- 16. (*infra*) A.I.R., 1914 B. 8 per Scott, C. J.
- 17. *Kalyanchand v. Sitabai*, 38 B. 309 (F.B.); 23 I.C. 325; A. I. R. 1914 B. 8; and it was said that the contention that probate proceedings are not a suit had not been addressed in *Kurratulain v. N. Abbas Hossein*, (1905) 33 C. 116 (P.C.); 32 I. A. 244, nor at any time in the Bombay High Court.
- 18. *Ganesh v. Kamchandra*, (1896) 21 B. 563.
- 19. *Hara v. Doorgamoni*, (1893) 21 C. 195; *Pran v. Jado*, (1898) 20 A. 189.
- 20. *Chinnasami v. Hariharabhadra*, 16 M. 380.
- 21. *Manjanadi Debi v. Ram Dass*, (1900) 4 C. W. N. clxxvi.
- 22. *Sheoparsan v. Ram Nandan*, 1916 P. C. 78; I. L. R. 43 Cal. 694; 43 I. A. 91; 33 I. C. 914.
- 23. *Raj Kishore Prasad v. Narain Singh v. Promoda Behari Singh*, 1944 Pat. 182; I. L. R. 22 Pat. 756; 213 I.C. 345; 10 B.R. 598; 24 P. L. T. 890.

ment *in rem* and binds all the world. The judgment in a civil suit is operative only between the parties to the suit. It is difficult to see, therefore, how a judgment *in rem* can be revoked or set aside by a judgment which is only conclusive *inter partes*. Therefore, even when there is an allegation of forgery, the proper remedy of the party who wants revocation of a grant of probate, is to apply to the Probate Court under Section 263, Succession Act, and not to file a civil suit.<sup>24</sup> Similarly, where it is alleged that Letters of Administration have been wrongly granted, the proper course is to apply to the Court which granted the Letters to revoke the same. The grant of Letters of Administration, so long as it subsists, is conclusive evidence as regards the proper execution of the will and the legal character conferred on the administrator.<sup>25</sup> The action of the Probate Court in admitting the will to probate so long as the order remains in force is conclusive as to the due execution and validity of the will. A party to those proceedings cannot be permitted to contest the will unless the grant of probate is revoked.<sup>1</sup> A grant of Letters of Administration with the will annexed does not make any question as to the title to property covered by or as to the construction of the will, *res judicata* in a subsequent suit in which such title or construction comes in issue.<sup>2</sup>

Probate is conclusive proof of the due execution of the will by the testator which is the foundation of the title of the executor.<sup>3</sup> But, as observed by Lord Cranworth in *Whicker v. Hume*,<sup>4</sup> "A probate is conclusive evidence that the instrument proved was testamentary according to the law of this country. But, it proves nothing else." The grant of probate or Letters of Administration is decisive only of the genuineness of the will and the right of the person to whom the grant is made to represent the estate. It is impossible to say, therefore, that the grant of probate or Letters of Administration with a copy of the will annexed would be at all a bar to the determination of any question of title or to suit for construction of the will.<sup>5</sup> A revocation of a probate by the Supreme Court of Singapore proves no more than that the instrument before it, was not testamentary according to the law of the Straits Settlements. It cannot act as a judgment *in rem* so as to be binding on Indian Courts.<sup>6</sup>

- 24. Kailash Chandra v. Nanda Kumar, 1944 Cal. 385, 388: 48 C. W. N. 751.
- 25. Mst. Daropti v. Mst. Santi, 1929 Lah. 483: 116 I.C. 452; see also Annoda Charan Mandal v. Atul Chandra Malik, 1920 Cal. 159: 54 I. C. 197: 31 C. L. J. 3: 23 C. W. N. 1045; Surjinder v. Gian Chand, 1958 S. C. R. 548; A. I. R. 1957 S. C. 875. The judgment of the Probate Court granting probate of a will must be presumed to have been in accordance with the procedure prescribed by law.
- 1. Damodarlal Sunderlal v. Gopinath Sunderlal, 1956 Nag. 209, 211.
- 2. Arunmoji v. Mohendra, (1893) 20 C. 888; "It has been held that in a proceeding upon an application for probate of a will, the only question which the Court is called upon to determine is whether the will is true or not, and that it is not the province of the Court to determine any question of title with reference to the property covered by the will," ib., 894, 895; Behary v. Juggo, 4 C. I. Birj v. Chandar, (1897) 19 A. 458; Jagannath v. Runjit, (1897) 25 C. 354, 369 (shebaitships); Schwaram v. Dolatram, (1904) 6 Bom. L. R. 966: 28 Bom. 644.
- 3. Chandreshwar v. Bisheshwar, 1927 Pat. 61: I. L. R. 5 Pat. 777: 101 I. C. 289: 8 P. L. T. 510; Brendon v. Sunderbai, 1914 Bom. 181: I. L. R. 38 Bom. 272: 23 I.C. 221: 16 Bom. L. R. 164.
- 4. (1859) 7 H. L. C. 124: 28 L. J. Ch. 396: 4 Jur. N. S. 933.
- 5. John Simon Gomez v. George John Gomez, 1955 T.C. 177, 179; Raj Rani v. Dwarka Nath Singh, 1946 Oudh 193: I. L. R. 21 Luck. 314: 223 I.C. 206; 1946 A. W. R. (C.C.) 100; 1946 O. W. N. 136.
- 6. Kani Ammal v. Shaikh Dawood, 1936 Mad. 197, 198: 160 I. C. 733: 1936 M. W. N. 82: 43 M. L. W. 75.

The fraudulent secretion of any document purporting to be a will would constitute an offence within the meaning of Section 477, Indian Penal Code, quite apart from its validity as defined in Section 3 of the Probate and Administration Act, and the grant of Letters of Administration to the accused is no bar to further proceedings under Section 477, Indian Penal Code.<sup>7</sup> A judgment of Court, granting probate in the exercise of probate jurisdiction, is the 'probate' as defined in Section 2(f) of the Indian Succession Act, 1925, for it is the grant which declares or confers the legal character on the propounder or the applicant.<sup>8</sup> Section 218 of the Indian Succession Act, 1925 enacts a rule of evidence and constitutes the procedural requirement of the *lex fori*. The title which the will and the probate confer on the executor, which is rendered relevant evidence under this section is given effect to by the provisions of Section 228 of the Indian Succession Act, 1925, and on the production of the English probate, what may be termed an ancillary probate is directed to be granted with the will annexed to enable the executors to assert their rights to the estate of the deceased in India. The foreign probate would be sufficient proof of the title of the legatee or the executor, and admissible under this section in proof of that right.<sup>9</sup>

**10. Matrimonial jurisdiction.** The Courts exercise matrimonial jurisdiction under the Indian Divorce Act<sup>10</sup> and other Acts,<sup>11</sup> relating to marriage and divorce. The judgment of such courts having matrimonial jurisdiction is a judgment *in rem*.<sup>12</sup> A decree of divorce though conclusive *inter omnes* that the parties have been divorced, is not conclusive, nor even *prima facie* evidence against strangers that the cause for which the decree was pronounced existed.<sup>13</sup> The findings on the issue of adultery in proceedings for maintenance<sup>14</sup> or for restitution of conjugal rights<sup>15</sup> do not operate as *res judicata* in subsequent proceedings for divorce or dissolution of marriage, though they may be relevant. But such a decree in common with others, may be reopened on the ground of fraud or collusion.<sup>16</sup>

The general rule with regard to foreign judgments is that they are conclusive where the marriage was solemnized and the parties domiciled in the foreign country.<sup>17</sup> Section 20 of the Indian Divorce Act (IV of 1969) does

- 7. Mali Muthu Servay v. Emperor, 1926 Rang. 202; I. L. R. 4 Rang. 251: 97 I.C. 1054; 27 Cr. L. J. 1230.
- 8. Satyacharan v. Hrishikesh, 63 C. W. N. 615: A.I.R. 1959 Cal. 795, 796.
- 9. Blackwood & Sons Ltd. v. Parasuraman, A.I.R. 1959 Mad. 410, 421.
- 10. Act IV of 1869; as to the matrimonial jurisdiction of the High Courts, see Letters Patent, 1865, clause (35).
- 11. Acts XV of 1872 (Indian Christian Marriage Act); XXI of 1866 (Converts' Marriage Dissolution Act); XIV of 1903 (Indian Foreign Marriage Act); 40 of 1948 Indian Matrimonial Causes (War Marriages) Act; 43 of 1954 (Special Marriage Act); 25 of 1955 (Hindu Marriage Act); 8 of 1939 (Dissolution of Muslim Marriages Act); 3 of 1936 (Parsi Marriage and Di-
- vorce Act).
- 12. S. M. Pandey v. Manohar Shamrao, A. I. R. 1971 Bom. 183; I. L. R. (1971) Bom. 815: 74 Bom. L. R. 414; 1970 Mah. L. J. 788.
- 13. Kanhya Loll v. Radha Churn, (1867) 7 W. R. 338 (F.B.); As to the use of a decree in a previous suit, see Ruck v. Ruck, (1896) P. 152, 14. (1971) 1 A. P. L. J. 230.
- 15. Shanthammal v. Thangaraj, A. I. R. 1975 Kant. 23; I. L. R. (1974) Kant. 1394: (1974) 2 Kant. L. J. 422.
- 16. S. 44, post; see Perry v. Meddowcroft, (1846) 10 Beav. 122.
- 17. Westlake: Private International Law, ss. 6, 32; see Sinclair v. Sinclair (1708) 1 Hagg. 294; Roach v. Garvan, (1748) 1 Ves. Sr. 157; Show v. Gould, (1868) 3 E. & I. App. 55; Harvey v. Farnie, (1880) L. R. 8 App. Cas. 43; Hukum Chand, op. cit., 527.

not make the proviso in the **seventeenth section** applicable to the confirmation by the High Court of a decree of nullity of marriage made by a District Judge and such a decree may therefore be confirmed before the expiration of six months from the pronouncement thereof. Assuming the proviso in the **seventeenth section** to be applicable to a decree of nullity, a decree by the High Court confirming the same before the six months' period has expired cannot, on that ground, be treated as made by a Court not competent to make it within the meaning of Sections 41 and 44 of the Evidence Act, and is, therefore, under this section conclusive proof that the marriage was null and void.<sup>18</sup> For a judgment to be relevant under this section, it has to be the judgment of a competent Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction. A suit for restitution of conjugal rights is purely a private suit between two persons. No one else has any right to intervene in the matter, and the judgment, in such a suit, cannot possibly be treated as a judgment *in rem*, so as to be admissible under this section.<sup>19</sup> Similarly, a judgment in a suit under Section 42 of the Specific Relief Act, 1877 (now Section 34 of the Specific Relief Act, 1963) passed by a District Court, not exercising matrimonial jurisdiction, is not a judgment *in rem* and is not admissible under this section.<sup>20</sup>

A judgment in a maintenance suit cannot be pleaded as a bar to a petition under Section 10 of the Hindu Marriage Act. But a judgment by a Judge in exercise of the jurisdiction conferred upon him by the Hindu Marriage Act falls within the purview of this section. Any decision given in the exercise of matrimonial jurisdiction is conclusive, not only against the parties to the proceeding but against the whole world. In other words, such judgments operate as judgments *in rem*. And a valid dissolution of marriage causes the relationship between the husband and wife to cease to exist as against the whole world. Such a result cannot be achieved by a decision rendered by a Civil Court in a suit for maintenance.<sup>21</sup> It was, however, held in the undenoted Madras case that the words "not as against any specified person but absolutely" mean that the persons not parties to the suit are not entitled to challenge the findings. Therefore, the section applies not only to status of a wife or husband as such but also to the judgment declaring the right of the wife to live separately and receive maintenance under the Hindu Adoption and Maintenance Act. Such declaration will amount to a declaration of status.<sup>22</sup>

If a Hindu marriage is annulled by the decree of divorce of a foreign court and neither the validity of the decree nor the competency of that court was assailed, the judgment and decree were relevant under this section and amounts to conclusive proof that any legal character it takes away from any person ceased at the time when the judgment, order or decree so declared. Further, the jurisdiction for the grant of maintenance under Section 488, Cr. P. C. of 1898 (now Section 125 of Cr. P. C. of 1973) being summary, the criminal court cannot go behind a valid judgment and decree granted by a

18. *Caston v. Caston*, (1900) 22 A. 270; see S. 44, post. For a case of judgment without jurisdiction, see *Abdul v. Doolanbibi*, (1913) 37 B. 563.

19. *Ma Po Khin v. Ma Shin*, 1933 Rang. 250: I. L. R. 11 Rang. 198.

20. *Muncherji v. Jessie Grant*, 1935 Bom. 5: I. L. R. 59 Bom. 278: 154 I. C. 1075: 36 Bom. L. R. 1021.

See now Section 34 of the Specific Relief Act, 1963.

21. *Siddiah v. Penchalamma*, A. I. R. 1963 A. P. 158: (1962) 2 Andh. W. R. 259; *Suhas Manohar Pande v. Manohar*, 1970 Mah. L. J. 788: A. I. R. 1971 Bom. 183, 186.  
22. *Lakshmayee v. Poona Goundan*, (1975) 88 Mad. L. W. 445.

competent court. Hence; an order granting maintenance to the wife cannot be sustained.<sup>2a</sup>

**11. Admiralty jurisdiction.** See with regard to this jurisdiction, the Letters Patent of the High Courts<sup>24</sup> and the Colonial Courts of Admiralty Act, 1896<sup>25</sup> which abolishes the Vice-Admiralty Court, and enacts that every Court of law in British possessions which is for the time being declared in pursuance of this Act to be a Court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction shall be a Court of Admiralty, with the jurisdiction in this Act mentioned, and may, for the purpose of that jurisdiction, exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such Court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty.<sup>1</sup> It is with reference to vessels condemned as prizes that questions concerned with this jurisdiction usually arise, and to such judgments of condemnation, the last paragraph of this section would be applicable. The finding of the Admiralty Court, restoring the certificate of an officer of a ship which had been suspended, is a judgment *in rem*, so far as the status and certificate of that officer is concerned.<sup>2</sup>

**12. Insolvency jurisdiction.** The Presidency High Courts exercise this jurisdiction under their respective charters,<sup>3-24</sup> and under the Presidency-towns Insolvency Act (Act III of 1909) and also the Mofussil Courts under the latter Act now superseded by the Provincial Insolvency Act (Act V of 1920). A judgment *in rem* is conclusive only as regards status but not as regards the grounds on which it is based. An order adjudicating a person as an insolvent and vesting his property in the Official Receiver no doubt operates as a judgment *in rem*, but the ground on which the order is based has no such effect.<sup>25</sup> On a construction of the provisions of the Presidency Towns Insolvency Act<sup>1</sup> their Lordships of the Privy Council, following the decision in *Ex parte Learoyd*<sup>2</sup> held, that, an order of adjudication is conclusive and cannot be disputed and that accordingly a transfer, found to be an act of insolvency in the order of adjudication, cannot be alleged by the transferee not to be void on that ground, although the order affects his rights and is passed in his absence.<sup>3</sup> It has been held that this decision of the Privy Council applies only to orders of adjudication under the Presidency Towns Insolvency Act and not to orders of adjudication under the Provincial Insolvency Act, as the relevant

23. Teja Singh v. Satya, 1970 Cur. L. J. 70; 72 P. L. R. 235: A. I. R. 1971 Punj. 80, 85.

24. Letters Patent, 1865, clauses (32) and (33).

25. 53 & 54 Vict. C. 27; see The Chusan "Falls of Ettrick", (1895) 22 C. 511.

1. ib. S. 2; see Broughton, op. cit., 149-158.

2. Yoosaf Sagar v. S. S. "Ellora", 1939 Sind 349, 356: I. L. R. 1940 Kar. 53.

3-24 See Letters Patent, 1865 (Calcutta, clause 18); see also Broughton op. cit., 158.

25. Ballantyne & Co. v. Mackinnon, (1896) 65 L. R. Q. B. 616; (1896) 2 Q. B. 455; 75 L. T. 95: 45 W. R. 70; Radhakishin v. Mst. Gangabai, 1928 Sind 121: 110 I.C. 730: 22

S. L. R. 105; In re Venkataramanayya, 1931 M. 441; I. L. R. 54 Mad. 601: 131 I.C. 817 (S.B.); D. G. Sahasrabudhe v. Kilachand Deo Chand & Co., 1947 Nag. 161: I. L. R. 1947 Nag. 85: 230 I. C. 195: 1947 N. L. J. 172 (F.B.); Ripumadhusudan Prasad v. Ram Shankar, 1969 B. L. J. R. 544: 1969 P.L.J.R. 343: A. I. R. 1970 Pat. 138.

1. III of 1909 which correspond to the provisions of the English Bankruptcy Acts (1869, 1883 and 1914).

2. (1879) 10 Ch. D. 3; 48 L. J. Bcy. 17; 39 L. T. 525: 27 W. R. 277.

3. Mahomed Siddique Yousuf v. Official Assignee of Calcutta, 1943 P. C. 130: 70 I. A. 93; 208 I. C. 351: 56 L. W. 423.

vant provisions of the two Acts are different. It has, accordingly been held, that, in the case of an adjudication under the Provincial Insolvency Act (V of 1920), a transferee, who was not a party to the adjudication proceedings, can contend in subsequent proceedings for annulment, that the order has the effect of a judgment *in rem* and cannot be disturbed, but that his transfer was good, notwithstanding that the order of adjudication was based on the alleged transfer being an act of insolvency.<sup>4</sup> In a Patna case, it has been held that where, after a sale in execution of a decree against him, the judgment-debtor has been adjudicated an insolvent, and in proceedings taken by the receiver under Sec. 4 of the Provincial Insolvency Act, the sale is held to be valid, the order has the effect of a judgment *in rem*, and cannot be disturbed by subsequent applications, even if not between the same parties.<sup>5</sup> But a stranger to the insolvency proceeding may, at his option, seek his redress in the ordinary civil Courts when aggrieved by any act of the Official Receiver or he may apply under Sec. 22 of the Provincial Insolvency Act. In the latter case, however, he must comply with the terms of the section.<sup>6</sup>

**13. Lunacy proceedings.** Although an order in lunacy is not a judgment which is conclusive under Sec. 41, it is still binding upon the parties to it and those who claim under them.<sup>7</sup> There is one kind of judgment *in rem* which is not conclusive, though admissible in evidence in any other proceeding. A familiar instance of this class is an inquisition in lunacy, which has always been allowed to be read in a subsequent suit between third parties as evidence of the lunacy though it is not conclusive and may be traversed.<sup>8</sup>

**14. Court-martial.** The section does not expressly mention court-martial, but court-martial, other than court-martial convened under the Army Act, is included in the operation of the Act.<sup>9</sup>

**15. Indian Companies Act.** An order made upon a contributory under the Indian Companies Act VII of 1913<sup>10</sup> is conclusive evidence that the monies ordered to be paid are due and all other pertinent matters stated in such order are to be taken to be duly stated as against all persons and in all proceedings whatsoever.<sup>11</sup>

**16. Restitution of conjugal rights.** A judgment in a suit for restitution of conjugal rights is not one *in rem*. Such a suit is a purely private suit between the parties. No one else has any right to intervene in the matter.<sup>12</sup>

**17. Rent Controller.** A judgment of Rent Controller fixing standard rent for a particular tenancy is not a judgment *in rem*.<sup>13</sup>

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- 4. Official Receiver v. Narra Gopala Krishniah, 1945 Mad. 66; I. L. R. 1945 Mad. 541; 218 I. C. 240 (F.B.); D. G. Sahasrabudhe v. Kilachand Deo Chand & Co., 1947 Nag. 161; I. L. R. 1947 Nag. 85; see also cases discussed therein.
- 5. Bansiram v. Firm Anandi Ram Mohan, 1935 Pat. 273; 155 I. C. 734; see also Irshad Husain v. Gopi Nath, I. L. R. 41 All. 378; 49 I.C. 590; 17 A. L. J. 374.
- 6. Bhairo Prasad v. S. P. C. Dass, 51 I. C. 113; 17 A. L. J. 787; A. I. R. 1919 A. 274.
- 7. Subba Naicker v. Solaiappa, A. I. R. 1933 Mad. 624; I. L. R. 56 M. 904; 147 I. C. 479.
- 8. Hill v. Clifford, (1907) 2 Ch. 236; 76 L. J. Ch. 627.
- 9. See Sec. 1.
- 10. Now Companies Act I of 1956, section 473.
- 11. Cunn., p. 116.
- 12. Ma Po Khin v. Ma Shin, A. I. R. 1933 Rang. 250; I. L. R. 11 Rang. 198.
- 13. Scott v. M's Residence Ltd., A. I. R. 1956 Cal. 606; 60 C. W. N. 746.

## 18. Generally. To conclude :

The whole question of judgments *in rem* in India was exhaustively discussed in *Yarakalamma v. Anakala Naramma*,<sup>14</sup> *Kunhya Loll v. Radha Churn*<sup>15</sup> and *Jogendur v. Funinder*.<sup>16</sup> In these rulings, the Judges specify what were the judgments *in rem* in this country and what were not and the result was embodied in S. 41.

The section gives conclusive effect to a judgment of a competent court only in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction.

Conclusive evidence : "Subject to impeachment on the grounds mentioned (in S. 44), a domestic judgment *in rem* is in civil proceedings (but not in criminal) conclusive evidence for or against all persons, whether parties, privies or strangers, of the matters actually decided; and this, probably, although it has not been pleaded. It is also, as between parties and privies, conclusive of the grounds of the decision where these have been put in issue and actually decided by the Court; but as between strangers, or a party and a stranger, it is no evidence of the truth of such grounds except upon questions of prize, where it is conclusive if the ground of condemnation is plainly stated, and admissible if not. . . . This principle has no reference to the right of a Court to reverse or vary the judgment on appeal, or to rehear when such procedure is available. In such cases, the judgment to which the principle applies is the one affirmed or substituted as a result of the appeal or re-hearing."<sup>17</sup> Thus a conditional order would not be final judgment.

"Just as every judgment *inter partes* upon the same material is *res judicata* between them and their representatives, so in a special class of cases the judgment is *res judicata* not only *inter partes* but *extra partes contra mundum*. Even so the judgments *in rem* are no more than *res judicata*. And we thus arrive at once at a simple general principle which will do away with all need to argue about particular exceptions on any other ground. It is this: In every case, where the judgment is *in rem*, if it would have been *res judicata*, *inter partes*, it is also *res judicata* against all the world."<sup>18</sup>

Where a judgment operates as a judgment *in rem*, as the decision of a probate court does under this section, it is not subject to a collateral attack; while it remains in force it is conclusive not only on the persons who are parties thereto but upon all persons and all courts.<sup>19</sup>

The judgment, however, is not conclusive proof of findings not essential and not covering matters referred to in this section.<sup>19.1</sup>

The section provides that judgments referred to in it are conclusive proof of the matters mentioned in it, and not only in civil proceedings but also these rules will apply as well to the criminal proceedings.<sup>20</sup> The English

14. 2 M. H. C. R. 276.

15. (1867) 7 W. R. 338 (F.B.).

16. 14 M. I. A. 367, 374; 11 B. L. R.

244; 17 W. R. 104.

17. Phipson, Ev., 11th Edn., Ss. 1341,

1342.

18. Kalyanchand v. Satabai, 38 B. 309,

322; A. I. R. 1914 B. 8; 23 I.C.

L. E.-154

325 (F.B.).

19. Rani Hemangini v. Sarat Sundari, 34 C. L. J. 457; 1921 Cal. 292.

19.1. Messa v. Messa, A. I. R. 1938 B. 394. See also Mahabir v. Sonmati, A.I.R. 1964 Pat. 66 at p. 70.

20. Manjanadai v. Ram Das, 4 C. W. N. 176 (note).

law is different.<sup>21</sup> But the judgments are not to be conclusive even under the Indian Law on matters not referred to in this section. Thus, if probate is refused by a competent court on the ground that the will is a forgery, the findings of the Probate Court on the ground that the will is a forgery are not conclusive of forgery in a criminal prosecution for forgery. But, if a Probate Court refuses to give probate of a will, it will be conclusive answer for the prosecution that the will is forged. Similarly, if divorce is granted on the ground of adultery, the finding of adultery will not be conclusive proof in criminal proceedings, because the finding is not on matters stated in this section.<sup>22</sup>

Where there have been conflicting judgments *in rem*, the effect is to set the whole matter at large again.<sup>23</sup>

The view that judgments on question of legitimacy, adoption and the like were judgment *in rem*, has been set at rest in *Yarakalamma v. Anakala Naramma*<sup>24</sup> and *Kanhy Loll v. Radha Churn*<sup>25</sup> relied on in *Appa v. Waman*.<sup>1</sup>

The principle is that a judgment *in rem* is the judgment of a court of competent jurisdiction—foreign or domestic<sup>2</sup>—determining the status of a person or thing, as distinct from the particular interest in it of a party to the litigation.<sup>3</sup>

Any party may show that a judgment which is relevant under Section 40, 41 or 42 was delivered by a Court not competent to deliver it, or obtained by fraud or collusion under Section 44. But, it is not open to attack on any other ground. It is not open to show that the judgment, or order or decree was erroneous. The words 'competent court' in this section is not restricted to a court in India. 'Competent court', means court of any country which is competent to pass such a judgment as is referred to in this section, i.e., a judgment *in rem*.<sup>4</sup>

Sections 41 and 42 draw a distinction between judgments *in rem* and judgment *in personam*. A judgment which does not fall within Section 41 can only be evidence but cannot be used for the purpose of preventing the other side from proving facts he sets up. Where a judgment *in personam* is pleaded, its legal effect and probative force will depend upon the facts of each case.

Sections 41 and 44 recognise that, given the competency of the court, even error or irregularity is a lesser evil than the total absence of finality which will be the only alternative.

21. See *Bater v. Bater*, (1906) 94 L.T. 835.

22. *Mali Muthu Servay v. Emperor*, A. I. R. 1926 Rang. 202; I. L. R. 4 Rang. 251.

23. *Phipson*, Ev., 11th Ed., p. 539.

24. (1865) 2 M. H. C. R. 276 (D.B.).

25. (1867) 7 W. R. 338 (F.B.).

1. A. I. R. 1941 P. C. 85; I. L. R. 1941 Kar. P. C. 134; 196 I. C. 518.

2. *Official Receiver v. Lakshminarayana*,

A. I. R. 1931 Mad. 474; I. L. R. 54 M. 727; 132 I. C. 297.

3. *Castrique v. Imrie*, L. R. 4 H. L. 414.

4. *Official Receiver v. Lakshminarayana*, A. I. R. 1931 Mad. 474; *Messa v. Messa*, A. I. R. 1938 Bom. 394; I. L. R. 1938 B. 529; 177 I. C. 836; *Fatma Kani Ammal v. Shaikh Dawood*, A. I. R. 1936 Mad. 197; 160 I. C. 733; *Abdul Wajid v. Gajam-bal*, A. I. R. 1950 Mys. 57.

As applied to judgments, the terms *in rem* and *in personam*, have never been clearly defined. A judgment *in rem* has been described as "an adjudication upon the status of some particular subject-matter by a tribunal having competent authority for that purpose". It has also been defined as "a judgment by a court having special jurisdiction over the subject-matter"; such judgments, however, only operate *in rem* if they alter status. "Judgments *in personam* are the ordinary judgments between parties in cases of contract, tort, or crime".<sup>5</sup>

The general distinction between action *in rem* and actions *in personam* is that the action *in rem*, is brought for the vindication of a real right and avails against indeterminate persons as against every detainer of the thing to which the actor asserts a right but that the *actio in personam* is brought against persons determinate.

As against persons who are neither parties nor privies, judgments, speaking generally, are not evidence. But certain judgments are excepted from the general principle and are evidence against all persons or at least against the world at large. Accordingly, judgments of this species are marked by a peculiar name, and that peculiar name is 'judgment *in rem*'.<sup>6</sup>

The conferring of the legal character and the taking away of legal character relate to man's status. A man's legal character is the same thing as a man's status. A man's status or "legal character" is constituted by the attributes which the law attaches to him in his individual and personal capacity, the distinctive mark of dress, as it were, with which the law clothes him apart from the attributes which may be said to belong to normal humanity in general. According to Holland, the chief varieties of status among natural persons may be referred to the following cause: (1) sex, (2) minority, (3) 'patria potest' and 'manus', (4) coverture, (5) celibacy, (6) mental defect, (7) bodily defect, (8) rank, caste and official position, (9) slavery, (10) profession, (11) civil death, (12) illegitimacy, (13) heresy, (14) foreign nationality, and (15) hostile nationality.

The status of a person means his "personal legal condition", that is, a man's legal condition only so far as his personal rights and burdens are concerned, to the exclusion of his "proprietary relation". An adjudication on adoption in law amounts to a declaration of status. But the claim to succession is not a matter of status in this sense, and relates to the proprietary relation of the claimant with reference to the deceased estate-holder.<sup>7</sup>

In the case of *Official Assignee, Madras v. Official Assignee, Rangoon*,<sup>8</sup> it was held that an order made by Insolvency Court declaring that a particular person was never a partner of a firm and that he was never adjudged an insolvent by that court is not a judgment *in rem* and does not confer or take away any legal character within the meaning of Section 41. Section 41 does not use the words "legal right" but uses the words "legal character".

5. *Phipson*, Ev., 11th Ed., (1970), pp. 540, 541.

6. *Yarakalamma v. Anakala Naramma*, (1865) 2 M.H.C.R. 276 (283).

7. 284) (D.B.).

7. *Duggamma v. Ganeshayya*, A.I.R.

1965 Mys. 97 at 101.

8. A.I.R. 1924 Mad. 662 : 83 I.C. 174.

A declaration of a legal right is a different thing from a declaration of a legal character. "The word 'character' means status; it is something more than a mere right. The declaration of a person's right operates as against a particular person or group of persons against whom the right is claimed, whereas a man's status is something which defines his position not in relation to any particular person or group of persons but in relation to the rest of the world; his status distinguishes him from the rest of the world. 'To say that a person is not a partner of a firm is not to declare his status or legal character; it is merely to declare his position with respect to the particular firm'.<sup>9</sup> The legal character assigned to a person announces to the world the legal status of the person in question. The meaning of "legal character" must be narrowly construed as judgments *in rem* constitute exceptions to the maxims *res inter alios judicata nullum inter alios pre judicium facit* and *res inter alios acta alteri nocere non debet*.

The principle of the conclusiveness of the judgment *in rem* as regards persons is, that public policy for the peace of society requires that matters of social status should not be left in continual doubt; and as regards things, that, generally speaking, everyone who can be affected by the decisions may protect his interests by becoming a party to the proceedings. A decision *in rem* not merely declares the status of the person or thing, but *ipso facto* renders it such as it is declared; thus, a decree of divorce not only annuls the marriage, but renders the wife *feme sole*; an adjudication in bankruptcy not only declares, but constitutes, the debtor a bankrupt; a sentence in a prize court not merely declares the vessel prize, but vests it in the captor. Therefore, the rule which makes a judgment conclusive only against parties and those who claim under them is subject to certain exceptions which are the offspring of positive law and the reason for the exception may be generally stated to be that the nature of the proceedings by which there is a fictitious, though generally not unjust extension of the parties, renders it proper to use them against those not formally parties.<sup>10</sup>

42. *Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41.* Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

#### *Illustration*

A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies.

The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.<sup>11</sup>

9. Ibrahim v. Mohammad Haji, A.I.R. 1951 Sau. 37, 39-40, quoting from Punjab National Bank v. Balikram, 190 I.C. 537 : A.I.R. 1940 C. 225.  
10. Phipson, Ev., 11th Ed., 539 and

Yarakalamma v. Anakala Naramma 2 M.H.C.R. 276 at 288.  
See Petrie v. Nuttall, (1875) 11 Ex. 569.

ss. 40, 41, 43 (Judgments, orders and decrees).  
 s. 3 ("Relevant").

s. 4 ("Conclusive proof").  
 ss. 13, 32, cl. (4), 48 (Public right and custom)

Steph. Dig., Art. 44; Taylor, Ev., Sections 624–26, 1682; Phipson, Ev., 11th Ed., 539; Starkie, Ev., 386–388; Roscoe, N.P. Ev., 190–192; Wills, Ev., 3rd Ed., 238–240.

### SYNOPSIS

1. Principle.
2. Scope.
3. Judgments, orders or decrees
4. Probative value of judgments.
  - (a) General.
  - (b) Custom, judgments on, question of.
  - (c) Local custom.
  - (d) Manorial customs.
  - (e) Custom of class of people.
  - (f) Public trust, judgment relating to.
5. "Matters of a public nature."
6. Custom of succession.
  - (a) General.
  - (b) Village tenures, customs as to, Interlocutory orders.
7. *Lis mota.*
8. Foreign judgment in criminal case. Accused guilty on his own admission.
10. Judgment of criminal Court, how far relevant in civil Court.

**1. Principle.** This section also forms an exception to the general rule that no one shall be affected or prejudiced by judgments to which he is not a party or privy.<sup>12</sup> In matters of public right, however, the new party to the second proceeding, as one of the public, has been virtually a party to the former proceedings.<sup>13</sup> Judgments of this character (which are regarded as a species of reputation) are said to be receivable on the same grounds as evidence or reputation, which in matters of public or general interests is admissible.<sup>14</sup> On account of the public nature of the earlier proceedings, an exception is made to the rules which exclude *res inter alios acta*.<sup>15</sup> But the earlier judgment is not conclusive; and the technical considerations by which the rule as to *res judicata* is narrowed, lose all their force when it is considered whether the judgment may be used, not as a bar, but merely as evidence in the cause.<sup>16</sup>

**2. Scope.** As observed in *Tepu Khan v. Rajani Mohan Das*<sup>17</sup>: "It is clear from the decisions in the Privy Council that under certain circumstances, and in certain cases, the judgment in a previous suit, to which one of the parties in the subsequent suit was not a party, may be admissible in evi-

12. Judgments are relevant under this section not as *res judicata*, but as evidence whether between the same parties or not; *Gujja v. Fatteh*, (1880) 6 C. 171. For a case of relevancy *res judicata*, see *Mohammad v. Sumitra*, (1914) 36 A. 424; 24 I. C. 97: A.I.R. 1914 A. 441 (suit by members of Mahomedan community).
13. *Gujja v. Fatteh*, (1880) 6 C. 171, 183, *per Pontifex*, J.
14. Taylor, Ev., ss. 1682, 1683 (v. post); Norton, Ev., s. 216; see 32, (4) *ante*; When juries were summoned *d.*

- vicineto* and assumed to be acquainted with the subject in controversy, their verdicts were proper evidence of reputation; but at the present day they are not so; see *Taylor*, Ev., s. 624; *Wills*, Ev., 3rd Ed., 238–240.
15. See *Norton*, Ev., S. 216; *Madhub v. Tomee*, (1867) 7 W. R. 210; *Bai Baiji v. Bai Santok*, (1894) 20 B. 53, 57, 58.
16. *Durga v. Narendro*, (1866) 6 W. R. 232.
17. (1898) 25 Cal. 522; 2 C. W. N. 501 (F. B.).

dence for certain purposes and with certain objects in the subsequent suit".<sup>18</sup> The English rule (which is reproduced by this section)<sup>19</sup> is that on questions of public or general interest wherein reputation is evidence, the verdict, judgment or order, even *inter alios*, of a competent tribunal is admissible, not as tending to prove any specific fact existing at the time, but as evidence of the most solemn kind of an adjudication upon the state of facts and the question of usage at the time.<sup>20</sup>

The relevancy of adjudications upon subjects of a public nature (which means subjects of public or general interest, and will thus include public or general rights and customs), such as customs, rights of ferry and the like, forms an exception to the general rule that judgments *inter partes* are not admissible either for or against strangers in proof of the facts adjudicated. In all cases of this nature, as evidence of reputation will be admissible, adjudications—which for this purpose are regarded as a species of reputation—will also be received whether the parties in the second suit be those who litigated the first or be utter strangers.<sup>21</sup>

This section is in accordance with the English law as stated in Taylor. The law has been stated thus in Taylor<sup>22</sup>:

"The exception (to the rule that judgments *inter partes*, are not admissible either for or against strangers in proof of the facts adjudicated) is allowed in favour of verdicts, judgments and other adjudications upon subjects of a public nature, such as customs, prescriptions, tolls, boundaries between parishes, counties, or manors, rights of ferry, liabilities to repair roads, or sea-walls, moduses, and the like. In all cases of this nature, as evidence of reputation will be admissible, adjudications—which for this purpose are regarded as a species of reputations—will also be received, and this, too whether the parties in the second suit be those who litigated the first or be utter strangers. The effect, however, of the adjudication, when admitted, will so far vary, that, if the parties be the same in both suits, they will be bound by the previous judgment; but if the litigants in the second suit be strangers to the parties in the first, the judgment, though admissible, will not be conclusive."

The term 'public' is strictly applied to that which concerns every member of the State whereas the term 'general' being confined to a lesser though still a considerable portion of community. See notes under Section 32(4). The right of way in the illustration to the section is claimed by the public at large. The right to use the well mentioned in the illustration under Section 48 is claimed for a particular village and is therefore general right. The distinction between public and general interest is not preserved in Section 32(4) or in Section 48. The matters of a public nature, only referred to in this section, apparently relate to a right or custom which concerns a section of the community and not to public at large.<sup>23</sup>

<sup>18</sup> See also Gopi Sundari Dasi v. Kherod Gobinda Chowdhury, 1925 Cal. 194; 82 I. C. 99; 28 C. W. N. 942.

<sup>19</sup> Norton, Ev., s. 216.

<sup>20</sup> Taylor, Ev., s. 624; as to the meaning of "public or general interest"

see S. 32 (4), *ante*.  
21. Taylor, Ev., ss. 1682, 1683; Wills, Ev., 3rd Ed., 238-240.

<sup>22</sup> Taylor, Ev., s. 1686.

<sup>23</sup> Cunningham, pp. 116-17.

Thus the morbid interest of a section of the public in the details of a murder trial cannot constitute such trial as a matter of public nature within this section.<sup>24</sup>

**3. Judgments, orders or decrees.** The section applies only to judgments, orders or decrees other than those mentioned in Section 41 of the Act. It has no application to—

- (a) a final judgment, order or decree of a competent Court falling under Section 41;
- (b) the report embodying the findings as to causes of the accident of an aircraft made by an authority designated in Rule 75 of the Indian Aircraft Rules as a Court, which is not a judgment or a decree.

Such a report is not admissible as a judgment under this Section, though it is admissible under Section 35 of the Act;<sup>25</sup>

- (c) the .inquest report, which is not a judgment, order or decree, and the mere recitals in it cannot be regarded as substantive evidence.<sup>1</sup>
- (d) The coroner's inquisition which is not a judgment relating to a matter of a public .nature, much less a judgment *inter partes*, it is not relevant under any of the provisions of this Act.<sup>2</sup>

But an order passed by a Superintendent during the course of settlement operations in exercise of his powers as a Collector is an order of a competent Court within the meaning of this section read with Section 3 of the Act. If the order recognises the rights of certain inhabitants to graze their cattle in the disputed land, it relates to matters of a public nature and is relevant under this section.<sup>3</sup>

**4. Probative value of judgments.** (a) *General.* The effect, however, of the adjudication, when admitted, so far varies that if the parties be the same in both suits, they are bound by the previous judgment, but if the litigants in the second suit be strangers to the parties in the first, the judgment, however, is not conclusive.<sup>4</sup> In India, Sections 41 and 42 draw a distinction between judgments *in rem* and judgments *in personam*, and it is clear from the sections that a judgment which does not fall within Section 41 can only be evidence but cannot be used for the purpose of preventing the other side from proving facts which he sets up. To hold that a judgment which does not fall under Section 41 is conclusive proof would be to act in direct contravention of the provisions of this section which declares that judgments, orders or decrees, other than those mentioned in Section 41, are

24. *Bishen v. Ram Labhaya*, 32 I. C. 18; 106 P. R. 1915.

25. *Madhuri v. I. A. Corporation*, A. I. R. 1962 C. 544.

1. *Raghava Kurup v. State of Kerala*, A. I. R. 1965 Ker. 44.

2. *Emperor v. Bhagwan Das*, 224 I.

C. 25; A. I. R. 1946 B. 184; 47 Bom. L. R. 997.

3. *Tula v. Sadh*, A. I. R. 1962 H. P. 28.

4. *Taylor, Ev.*, s. 1683; *Phipson, Ev.*, 11th Ed., p. 568 and see generally cases cited ante.

relevant but not conclusive proof.<sup>5</sup> But, where a judgment is admissible it is "conclusive evidence for or against all persons, whether parties, privies or strangers, of its existence, date and legal effect as distinguished from the accuracy of the decision rendered."<sup>6</sup> Where a judgment is not *in rem* nor relating to matters of a public nature, nor between the parties to a subsequent suit, the fact, that the Court by that judgment decides a point in a particular way, is not relevant for the purpose of the decision of the same point in the subsequent suit.<sup>7</sup> In order to be admissible under this section, it ought to appear clearly from the previous judgment that a question of a public nature, e.g., of a custom, was determined.<sup>8</sup>

(b) *Custom, judgments on, question of.* On the question of custom, a decision in a case as regards the existence or non-existence of custom is good evidence in other cases.<sup>9</sup>

The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom.<sup>10</sup> A judgment on a question of custom is relevant, not merely as an instance under Section 13, but also under this section as evidence of the custom. When a custom is repeatedly ascertained and acted upon judicially, the production in evidence of such judicial decisions is sufficient to prove the custom.<sup>11</sup> A judicial decision, though of comparatively recent date, may contain, on its records, evidence of specific instances, which are of sufficient antiquity to be of value in rebutting the presumption created by a *riwaj-i-am*. In such a case, the value of the decision arises from the fact not that it is relevant under Section 13 and this section as forming in itself a "transaction by which the custom in question was recognized, etc., etc., but that it contains, on its records, a number of specific instances relating to the relevant customs". To ignore such judicial decisions merely on the basis of the *rewaj-i-am* would add greatly to the perplexities and difficulties of proving a custom.<sup>12</sup> In order to make a judgment admissible under this section, on the question of custom, it is not obligatory that it should have been pronounced before the commencement of the controversy, although what weight should be attached to such a judgment is a different matter.<sup>13</sup> A judgment based upon a compromise or confession cannot be placed on the same footing

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- 5. Secretary of State v. Syed Ahmad Badsha, 1921 Mad. 218; 1 I. L. R. 41 Mad. 778; 67 I. C. 971; 41 M. L. J. 278; 14 L.W. 128; 1921 M.W. N. 576 (F.B.).
- 6. Gopi Sundari Dasi v. Kherod Gobinda Chowdhury, 1925 Cal. 194; 82 I. C. 99; 28 C. W. N. 942.
- 7. Shankar Ganesh v. Kesheo, 1930 Nag. 1; 121 I.C. 644; 12 N. L. J. 164; 26 N. L. R. 33 (F.B.); Ranji v. Manohar, 62 Bom. L. R. 322.
- 8. Tota v. Mohun, (1867) 2 Agra 120, 121; see also Layburn v. Crip, (1838) 4 M. & W. 320, 325, 326 (as to reading of the decree in connection with the judgment) see Shri Ganesh v. Keshavray, (1890) 15 B. 625.
- 9. Ram Kishore Jaiswal v. Kavindra Narain, 1955 All. 59, 61; 1954 A. L. J. 726; 1955 A. W. R. (H.C.) 50 (F.B.); Rughnath v. Ram Pratap,
- 10. 1935 Sind 38; 160 I.C. 6.
- 11. Gurdyal v. Jhandu, (1888) 10 A. 585; Luchman v. Akbar, (1877) 1 A. 440; Jaikaran v. Abdul Ghafur Khan, 1940 Pesh. 31; 190 I. C. 35.
- 12. Sher Mohammad v. Mt. Jawahar Khatun, 1938 Lah. 309, 311; 177 I. C. 775; 40 P. L. R. 29; Rama Rao v. Raja of Pittapur, 1918 P.C. 81; 45 I. A. 148; I. L. R. 41 Mad. 778; 47 I.C. 354; 16 A. L. J. 833; 20 Bom. L. R. 1056; 28 C. L. J. 428; 23 C. W. N. 173; 35 M. L. J. 392; 1918 M. W. N. 922.
- 13. Mst. Subhani v. Nawab, 1941 P.C. 21, (32); I. L. R. 1941 Lah. 154; 68 I. A. 1; 193 I. C. 436; 1941 A. L. J. 530; 43 Bom. L. R. 432; 33.
- 14. Amarchand v. Mst. Shankari, 1956 Raj. 51, 55; I. L. R. (1955) 5 Raj. 33.

as that in which, after contest, a custom is held to be proved or negatived, but it cannot be said that such a judgment is of no value whatsoever.<sup>14</sup> An *ex parte* judgment of the High Court, whether it is an instance of custom or opinion on a question of law does not become less valuable merely on the ground of the absence of a respondent.<sup>15</sup> Uncontested cases are very good proof of an alleged custom, for the greater the strength of the custom, the less probability is there of anybody attempting to controvert it. The fact that, in several cases, even though there was contest between the parties on other points, the existence of custom was not disputed shows that it was so well recognized that it was not considered worthwhile disputing it.<sup>16</sup> While it is open to a Court to give little weight to a judgment on the ground that, on the face of it, the conclusion was not justified, it is obviously difficult for a Court, which has only the judgment before it, to review the finding arrived at therein and to arrive at a different conclusion in the absence of the record of that case.<sup>17</sup> But the question as to the probative value of a finding in a previous suit depends on the nature of the finding, and of the issues involved in the two different suits.<sup>18</sup>

(c) *Local custom.* The existence of a local custom, such as a right of pre-emption, is a matter of a public nature and previous judgments will be admissible under this section in proof thereof.<sup>19</sup> But a judgment recognising a local custom on consent of parties and not on enquiry has little probative value.<sup>19-1</sup>

(d) *Manorial customs.* Manorial customs may also be of a similar character.<sup>20</sup> They may be proved by previous judgments or by other evi-

14. Abdul Karim v. Shiv Narain, 1952 Punj. 356, 357; 54 Punj. L. R. 255; Imperial Oil Soap and General Mills Co. v. Misbahuddin, 1921 Lah. 69; I. L. R. 2 Lah. 83; 61 I. C. 325; 70 P. L. R. 1921; Lekhraj v. Inder Mal, 1924 Lah. 161; I. L. R. 4 Lah. 176; 73 I. C. 658—all cases of custom of pre-emption.
15. Abdul Karim v. Shiv Narain, 1952 Punj. 356 at p. 357.
16. Maryam Sultan (Mst.) v. Karam Ilahi, 1947 Pesh. 39, 42; Sham Dass v. Mst. Moolo Bai, 1926 Lah. 210; I. L. R. 7 Lah. 124; 95 I. C. 337.
17. Mahadeo v. Baleshwar Prasad, 1939 All. 626, 630; 1939 A. L. J. 708; 1939 A. W. R. 671.
18. Prahlad Chandra Singh v. Bhim Mahto, 1940 Pat. 341, 344; I. L. R. 19 Pat. 172; 185 I.C. 685; 6 B. R. 236; 21 P. L. T. 577.
19. Sardar Khan v. Chaudhari Sadullah Khan, 1933 Lah. 57; 140 I. C. 566; 33 P. L. R. 1054 (decisions admissible under Sec. 13 as well); Madhub v. Tomee, (1867) 7 W. R. 210; Tota v. Mohun, (1867) 2 Agra 120 (in this case, however, it was held that a

previous decree made in pursuance of a compromise could not be cited as any judicial decision of the existence of the custom, or any admission by the defendant in that suit, that such a custom existed); Koodootollah v. Mohini, (1867) 5 Rev. Cir. and Cr. Rep. 290 (decisions of local courts, where not conflicting, may be good proof of local customs). See also as to conflicting decisions, Inder v. Mahomed, (1863) 1 W. R. 234; Gurdayal v. Jhandu, (1888) 10 A. 585 [in this last mentioned case the Court appears to have admitted the previous judgments under Sec. 13 (b)]; Collector, Gorakhpur v. Palakhari Singh, 12 A. 1; but they would have also been admitted under the present section.

- 19-1. 1974 J. & K. L. R. 462.
20. Lachman v. Akbar, (1877) 1 A. 440, 441; as to manorial rights, see Kallan v. Bhagirathi, (1883) 6 A. 47; Lala v. Hira, (1878) 2 A. 49; Akbar v. Sheoratan, (1877) 1 A. 373; Sheobaran v. Bhairo, (1885) 7 A. 880. See Bengal Tenancy Act, (VIII of 1885), Secs. 74, 183.

dence. Where a plaintiff sued for damages for value of timber carried away by Government, after being washed on to his estate, and to have his right declared, as against Government, to all timbers that in the future may be washed on to his estate, it was held that it was not necessary for the plaintiff to produce in support of the right some decree or decision of competent authority establishing the custom.<sup>21</sup>

(e) *Custom of class of people.* Where a custom, alleged to be followed by any particular class of people, is in dispute, a judicial decision in which such custom has been recognized as the custom of the class in question is good evidence of the existence of such custom.<sup>22</sup> Decisions of Courts as regards the caste or a family are relevant. If the judgment is evidence, the recital in the judgment of the evidence of the witnesses is also relevant especially when the original depositions have been destroyed under the rules of Court.<sup>23</sup> Judicial decisions recognizing the existence of disputed custom amongst the Jains of one place are very relevant as evidence of the existence of the same custom amongst the Jains of another place unless it is shown that the customs are different; and oral evidence of the same kind is equally admissible. There is nothing to limit the scope of the enquiry to the particular locality in which the persons setting up the custom reside.<sup>24</sup>

(f) *Public trust, judgment relating to.* In a suit brought by a trustee of a temple to recover from the owners of certain lands in certain villages, money claimed under an alleged right as due to the temple, it was held that judgments in other suits against persons in which claims under the same rights had been decreed in favour of the trustees of the temple were relevant under this section as relating to matters of a public nature.<sup>25</sup>

The matter of a *wakf* is a matter of public nature within the meaning of this section.<sup>1</sup> So also, a right claiming certain land as *takya* is a right of public nature, and a judgment deciding that the land was *takya*, though by no means *res judicata*, is relevant in a subsequent suit involving the same question, though it does not arise between the same parties.<sup>2</sup>

(g) *Judgments in suits under S. 92, C. P. C.* A judgment in a suit under Sec. 92, C. P. C., not being a judgment passed by a competent Court in the

21. Chutter v. The Government, (1868) 9 W. R. 97 (right of Lords of Manors).
22. Shimbhu v. Gayan, (1894) 16 A. 379; Sundrabai Hanmant Kulkarni v. Hanmant Gurunath, 1932 Bom. 398: I. L. R. 56 Bom. 298; 140 I. C. 235; 34 Bom. L. R. 802; Harnabh v. Mandil, (1899) 27 C. 379.
23. Maharaja of Kolhapur v. Sundaram Ayyar, 1925 Mad. 497; I. L. R. 48 Mad. 1.
24. Harnabh v. Mandil, (1899) 27 C. 379; see also Sugandhan Bhikamchand v. Mangibai Gulabchand, 1942 Bom. 185: I. L. R. 1942 Bom. 461: 201 I. C. 759; 41 Bom. L. R. 358 and cases cited therein.
25. Ramasami v. Appavu, (1887) 12 M. 9; the judgments were also held to be relevant under S. 18 ante as being evidence of instances in which the right claimed had been ascertained; see S. 18 ante, also Nallathambi v. Nallakumara, (1873) 7 Mad. H. C. R. 306; Narayanswami Naidu v. Balasundaram Naidu, 1953 Mad. 750; (1952) 1 M. L. J. 487; 1952 M. W. N. 282: 65 M. L. W. 368.
1. Misbahuddin v. Vidyasagar, 1935 Lah. 64: 156 I. C. 268; 36 P. L. R. 106.
2. (Mst.) Imam Bibi v. Abdul Rahman, 1936 Lah. 929; 163 I. C. 924.

exercise of probate, matrimonial, admiralty or insolvency jurisdiction, is not covered by Sec. 41, but it relates to matters of a public nature and is relevant under this section.<sup>2,1</sup> As regards the binding nature of such a judgment, there are authorities which lay down that it is, or has the effect of a judgment *in rem* and binds the entire world.<sup>3</sup> It has, however, been observed in *Surajgir v. Brahm Narain*<sup>4</sup>:

"We can readily understand that even when a scheme has been settled by the Court under Sec. 92, C.P.C., a stranger may come in for the purpose of asserting a title which is paramount to the trust altogether and in that sense he may claim to have the whole scheme displaced upon the ground that there never ought to have been a scheme at all because the property was never the subject of a trust for charitable or religious purposes."

In *Anjuman Islamia v. Latafat Ali*,<sup>5,6</sup> Malik, C. J., observed :

"A suit under Sec. 92, is a suit by members of the public interested in the trust, for safeguarding the interest of the trust, and an appointment of a *mutawalli* by the District Judge made in such a suit must be held to be binding so long as the order cannot be challenged on the ground of fraud or want of jurisdiction or some such similar ground. To hold otherwise would lead to this difficulty that a person appointed a *mutawalli* by the District Judge in a suit under Section 92 can claim to be *mutawalli* only against those who were parties to that suit and his right to act as *mutawalli* would be subject to a challenge by every other third party. I do not mean to suggest that after a decree in a suit under Sec. 92 it is not open to a person interested in the property and not a party to the suit to claim that the property was his private property and there was no public trust which could be made a subject-matter of a suit under Sec. 92, or that it is not open to a person, who is the real trustee, to claim that a decree has been obtained behind his back against persons who were not the real trustees, and were not in charge of the property. But where there is a public trust and the District Judge has appointed a person as trustee in a suit brought against the then trustee, to my mind, it is not open to a third party to claim that the District Judge should not have appointed the person so appointed by him, but should have appointed some other who had a better claim. To that extent a decree under Sec. 92 of the Code, in my opinion, is binding not only on those who are parties to the suit but also on others."

2-1. *Sri Ram v. Prabhu Dayal*, A. I. R. 1972 Raj. 180; 1972 Raj. L. W. 169; 1972 W. L. N. 49.

3. See *Rama Dos v. Hanumantha Rao*, I. L. R. 36 Mad. 364; 12 I. C. 449; *Sakha Ram Daji v. Ganu Raghu*, 1921 Bom. 297; I. L. R. 45 Bom. 683; 60 I. C. 924; 23 Bom. L. R. 125; *Surajgir v. Brahm Narain*, 1946 All. 148; I. L. R. 1946 All. 107; 223 I. C. 593; 1945 A. L. J. 486; 1945 A. W. R. (H.C.) 270; (*Khaja Hassanulla Khan v. Royal Mosque*

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1948 Mad. 134; I. L. R. 1948 Mad. 257; (1947) I M. L. J. 395; 60 M. L. W. 438; 1947 M. W. N. 658; *Anjuman Islamia v. Latafat Ali*, 1950 All. 109; 1950 A. L. J. 776; *Sunni Central Board of Wakf, U. P. v. Sirajul Haq Khan*, 1954 All. 88.

4. A. I. R. 1946 All. 148 at p. 149; I. L. R. (1946) A. 107: 223 I. C. 594.

5-6. 1950 All. 109; 1950 A. L. J. 776.

5. "Matters of a public nature" According to this Section, an order other than the one mentioned in Section 41 is relevant, if it relates to matters of a public nature relevant to the enquiry. The words "matters of a public nature" are wide enough to include matters in which a large section of the public is interested. In order that a matter may be a matter of a public nature, it is not necessary that the whole of the public of a locality may be interested in it.<sup>7</sup>

6. **Customs of succession.** (a) *General.* The existence of custom of succession in particular communities is a matter of public interest, and decrees of competent Courts are good evidence thereof.<sup>8</sup>

(b) *Village tenures, customs as to.* A custom under which lands are held is a matter of public and general interest to all the villagers, and a former decree is most cogent evidence against them of the existence and validity of the custom whose exercise a plaintiff seeks to enforce.<sup>9</sup> In the under-noted case, in a suit by the landlords to avoid the sale of an occupancy holding in their mauza and eject the purchaser thereof, one of the questions was as to the existence of a custom or usage under which the *raiyat* was entitled to sell such a holding. It was held, that a judgment of the High Court as to the transferability of similar tenures in an adjoining village of the same *pergannah* was admissible as evidence of such usage under this section.<sup>10</sup>

7. **Interlocutory orders.** It has been held in England that neither interlocutory orders involving any judgment upon the rights of the parties nor awards, nor claims not prosecuted to judgment, are admissible under the rule contained in this section.<sup>11</sup> Many matters may go to the weight of this class of evidence which will not, however, affect its admissibility. Thus, it matters not with respect to the admissibility, though it may as to the weight of such evidence, that the judgment has been suffered by default, or though of a very recent date, is not supported by any proof of execution or of the payment of damages.<sup>12</sup>

8. **Lis mota.** Since judgments, orders or decrees stand upon a different footing from ordinary declarations by private persons, the conditions as to *lis mota* do not, and indeed cannot, apply to them.<sup>13</sup>

7. *Tula v. Sadh, A. I. R. 1962 H.P. 28.*

8. *Bai Baiji v. Bai Santok, (1894) 20 B. 53, 57, 58.*

9. *Venkataswami v. Subba, (1864) 2 Mad. H. C. R. 1, 6, per Scotland, C. J.; as to judgment in regard to the nature of the interest of certain families and of a shrine in certain village, see Shri Ganesh v. Keshav-rav, (1890) 15 B. 625, 635.*

10. *Dalglieh v. Guzaffer, (1896) 25 C. 427.*

11. Taylor, Ev., s. 626, the last mentioned claims though inadmissible as evidence of reputation may, however, be admissible as evidence of acts of

ownership; thus old Bills and Answers in Chancery have been admitted on the latter ground to show claims made to a public right and abandoned; *Malcolmson v. O'Dea* (1862) 10 H. L. C. 593, on the same grounds it has been held that an indictment whether submitted to or prosecuted to conviction was admissible as evidence of the right in suit being exercised; *R. v. Brightside, (1849) 14 Q. B. 933;* as to awards see *Evans v. Rees, (1839) 16 A. E. 151;* but see also *Tata Ram v. Mohun, 2 Agra 120.*

12. *Taylor, Ev., s. 624.*  
13. *Starkie, Ev., 190 (c).*

**9. Foreign judgment in criminal case.** Accused guilty on his own admission. A foreign judgment in a criminal case, when the accused is found guilty on his own admission, is not binding.<sup>14</sup>

**10. Judgment of criminal court, how far relevant in civil court.** The judgment of a criminal court in a proceeding under section 145, Cr. P. C., relating to actual possession of the subject in dispute may be relevant under section 42 of the Evidence Act only to show that there was between the parties as to possession which was decided by the criminal court in a particular manner and not that the decision of the criminal court has become final. It is only the fact of the judgment that is relevant and the decision contained therein; the decision does not operate as a bar for deciding the same matter in a civil court.<sup>15-16</sup>

**45. Judgments, etc., other than those mentioned in sections 40 to 42, when relevant.** Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act.

#### *Illustrations*

(a) *A* and *B* separately sue *C* for a libel which reflects upon each of them. *C* in each case says, that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

*A* obtains a decree against *C* for damages on the ground that *C* failed to make out his justification. The fact is relevant as between *B* and *C*.

(b) *A* prosecutes *B* for adultery with *C*, *A*'s wife.

*B* denies that *C* is *A*'s wife, but the Court convicts *B* of adultery.

Afterwards, *C* is prosecuted for bigamy in marrying *B* during *A*'s life-time. *C* says that she never was *A*'s wife.

The judgment against *B* is irrelevant as against *C*.

(c) *A* prosecutes *B* for stealing a cow from him. *B* is convicted.

*A*, afterwards, sues *C* for the cow, which *B* had sold to him before his conviction. As between *A* and *C*, the judgment against *B* is irrelevant.

(d) *A* has obtained a decree for the possession of land against *B*. *C*, *B*'s son, murders *A* in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

11. *The State v. Abdul Hamid*, A. I. 15-16. *Niranjan Singh v. Kasturi Lal*, R. 1957 Punj. 86; 59 Punj. L. R. 282. 1969 Cur. L. J. 902; A. I. R. 1971 Punj. 4, 7.

<sup>17</sup>[(e) *A* is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.

(f) *A* is tried for the murder of *B*. The fact that *B* prosecuted *A* for libel and that *A* was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue.]

Steph. Dig. Arts. 40–42, 44; Phipson, Ev., 11th Ed., 549–575; Taylor, Ev., ss. 1667, 1668, 1682, 1694; Best, Ev., s. 590; Roscoe, N. P. Ev., 190–192.

### SYNOPSIS

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|---|--|
| 1. Principle.   | 6. Judgment of criminal court, relevancy in other criminal case                  |
| 2. Scope.   | 7. <i>Autrefois acquit</i> , Applicability.                                      |
| 3. Admissions.  | 8. Judgments other than those mentioned in Sections 40, 41 and 42 when relevant. |
| 4. Agreement.   |  |
| 5. Relevancy of judgments of criminal courts in civil cases and <i>vice versa</i> . |  |

1. **Principle.** Judgments considered as judicial opinions are only relevant under Secs. 40–42 under the circumstances mentioned in those sections. Other judgments, when tendered against strangers, are sometimes said to be excluded as opinion evidence,<sup>18,20</sup> sometimes as hearsay,<sup>21</sup> but more commonly on the ground expressed in the maxims *res inter alios acta* (or *judicata*) *alteri nocere non debet*, and *res inter alios judicata nullum inter alios prejudicium facit*.<sup>22</sup> Such judgments are said not to be evidence for a stranger, even against a party, because their operation would thus not be mutual. This, however, though a legitimate ground for refusing conclusiveness to such judgments, seems no satisfactory reason for denying them admissibility, since the objection of *res inter alios acta* does not suffice to exclude other and less solemn acts of strangers, if relevant to the issue.<sup>23</sup> But, if the existence of the judgment is a fact in issue, or relevant under some other provision of this Act, the judgment is not excluded.<sup>24</sup> Thus, though orders, passed in maintenance proceedings, are not relevant under S. 40, or S. 41, or S. 42, yet they can be relevant under any other provision of this Act. This section enacts that though an order is not relevant under Ss. 40, 41 and 42, it may be relevant under other sections of the Act. Therefore, where documents of maintenance proceedings are relied upon by the wife in proceedings under S. 10 of the Hindu Marriage Act, initiated by her husband to show his conduct towards her, they may be relevant and admissible under S. 8 of this Act.<sup>25</sup>

17. Ins. by the Indian Evidence (Amendment) Act, 1891 (3 of 1891), S. 5.  
 18–20. Lakshman v. Amrit, (1900) 24 B. 591, 593; R. v. Fontaine Moreau, (1948) 11 Q. B. 1028, 1035, per Lord Denman, C.J.; Krishnasami v. Rajagopala, (1893) 18 M. 73; Guju v. Fatteh, 6 C. 171 at p. 188 (F.B.); per Garth, C.J.; Steph. Dig. Art. 14; Wharton, Ev., s. 280 but see Phipson, Ev., 11th Ed., 569.

21. Phipson, Ev., 11th Ed., 569 where the grounds of this rule are considered; Guju v. Fatteh, 6 C. 171 at p. 189 (F.B.); Taylor, Ev., s.

1682.  
 22. Ib.  
 23. Phipson, Ev., 11th Ed., 569, citing Hill v. Clifford, (1907) 2 Ch. 236; see also Taylor, Ev., s. 1682 where the propriety of the last ground has been questioned.  
 24. See Notes to Sec. 13 ante.  
 25. Shvam Chand v. Janki, A. I. R. 1966 H. P. 70, relying upon Dinomoni v. Brojo Mohini, L. R. 29 I. A. 21; I. L. R. 29 C. 187; Bhagwanti v. Sadhu Ram, I. L. R. (1960) 1 Punj. 579; A. I. R. 1961 Punj. 181.

**2. Scope.** It has been seen: (1) that Sec. 40 deals with the effect of judgments as barring suits or trials by reason amongst others of their being *res judicata*, (2) that Sec. 41 deals with the effect of the so-called judgments *in rem*; and (3) Sec. 42 deals with the admissibility of judgments relating to matters of a public nature. This section declares that judgments, orders and decrees other than those mentioned in those sections, are, of themselves, irrelevant, that is, in the sense that they can have any such effect or operations as mentioned in those sections *qua* judgments, orders and decrees, that is, as adjudications upon and proof of the particular points which they decide.<sup>1</sup> For a former judgment, which is not a judgment *in rem*,<sup>2</sup> nor one relating to matters of a public nature,<sup>3</sup> is not admissible in evidence in a subsequent suit, either as a *res judicata*,<sup>4</sup> or as proof of the particular point which it decides,<sup>5</sup> unless it is given between the same parties or those claiming under them.<sup>6</sup> But the present section expressly contemplates cases in which judgments would be admissible either as facts in issue or as relevant facts under the other sections of the Act.<sup>7</sup> As to this Garth, C. J., in *Guju v. Fatteh, supra*, observed :

"This is quite true. But then I take it that the cases so contemplated by Sec. 43 are those where a judgment is used not as *res judicata*, or as evidence more or less binding upon an opponent by reason of the adjudication which it contains (because judgment of that kind had already been dealt with under one or other of the immediately preceding sections). But the cases referred to in Sec. 43 are such, I conceive, as the section itself illustrates, viz., when the fact of any particular judgment having been given is a matter to be proved in the case. As for instance, if *A* sued *B* for slander, in saying that he had been convicted of forgery, and *B* justified upon the ground that the alleged slander was true, the conviction of *A* for forgery would be a fact to be proved by *B* like any other fact in the case, and quite irrespective of whether *A* had been actually guilty of the forgery or not. This, I conceive, would be one of the many cases alluded to in the forty-third section."<sup>8</sup>

Though judgments, other than those mentioned in Secs. 40–42, are relevant *qua* judgments, this section does not make them absolutely inadmissible when they are the best evidence of something that may be proved *aliunde*.<sup>9</sup>

1. Collector of Gorakhpur v. Palakdhari, (1889) 12 A. 1 (F.B.). As to order of Board of Revenue, see *Manno v. Munshi*, 43 I. C. 393; 3 Pat. L. J. 188; A. I. R. 1918 Pat. 320.
2. Under S. 41 ante.
3. Under S. 42 ante.
4. Under S. 40 ante.
5. S. 43, in effect, declares that for such purposes they are irrelevant; see *R. v. Prabhudas*, (1874) 11 Bom. H. C. R. 90, 96. The sole object for which it was sought to use the former judgment in *Guju v. Fatteh*, (*v. post*) was to show that in another suit against another defendant the plaintiff had obtained an adjudication in his favour on the same right; and it was held that the opinion expressed in the former judgment was not a relevant fact within the meaning of the Evidence Act; *Krishnasami v. Rajagopala*, (1894) 18 M. 73.
6. *Guju v. Fatteh*, 6 C. 171 (F.B.); see Secs. 13, 40 ante, and Notes thereto.
7. e.g. under S. 11 or under S. 13; see *Sham Sunder Kuer v. Ram Kheawan*, 1929 Pat. 739; I. L. R. 8 Pat. 783; 121 I.C. 334.
8. *Guju v. Fatteh*, 6 C. 171 at p. 192 (F.B.).
9. Collector of Gorakhpur v. Palakdhari, (1889) 12 A. 1 (F.B.), per Straight, J.

The existence of such judgments may be a fact in issue,<sup>10</sup> or it may be a relevant fact,<sup>11</sup> otherwise than in its character of a judgment.

Where a judgment is admissible, it is "conclusive evidence for or against all persons, whether parties, privies or strangers, of its own existence, date and legal effect as distinguished from the accuracy of the decision rendered."<sup>12</sup> With regard to the existence of the judgment, its date or its legal consequences, the production of the record or of a certified copy is conclusive evidence of the facts against all the world, the reason being that a judgment, as a public transaction of a solemn nature, must be presumed to be faithfully recorded.<sup>13</sup>

It is not the correctness of the previous decision, but the fact that there has been a decision, that is established by the production of the judgment.<sup>14</sup> Generally speaking, a judgment is admissible only to show its date and legal consequences.<sup>15</sup> A judgment, other than a judgment referred to in Secs. 40 to 42, may be admissible to prove that a right was asserted or denied under Sec. 13, Evidence Act, or to explain or introduce facts in issue or to explain the history of the case. In some cases, it has also been held that it may be used to prove an admission made by the ancestor or one of the parties (though the decisions on this point are not unanimous) or to show certain property was dealt with in the past. But the actual decision, or the findings arrived at in a previous judgment, cannot be used as evidence to decide the points which are in issue in a different case, except in cases coming under Secs. 40 to 42. Such a decision may, by virtue of specific provisions, operate as *res judicata*, or be relevant as a pronouncement on matters of a public nature, but otherwise, it is no better than a mere opinion expressed on the issues involved in a particular case, and the Evidence Act is clear that opinion will be relevant in those cases only which are specifically referred to in the Act and in no others. This section, therefore, subject to the exceptions mentioned in the latter part, excludes prior judgments, and so in effect, declares that in deciding a question which has been decided in a suit between other parties, the Court shall not be guided by the judgment in the former suit or finding therein contained.<sup>16</sup> This section lays down that judgments are irrelevant unless their existence is a fact in issue or relevant. Thus, the finding given by the Deputy Registrar of Co-operative Societies, surcharging a Hindu father in respect of an amount misappropriated by him, could not be used in evidence in a suit by his sons

10. See S. 43, illust. (c).
11. See S. 43, illusts. (d) and (f), and S. 54, explanation (2).
12. Gopi Sundari Dasi v. Kherod Gobinda Chowdhury, 1925 Cal. 194; 82 I. C. 99; 28 C. W. N. 942.
13. v. ante, Introduction to Secs. 40, 44; Abinash v. Paresh, 9 C. W. N. 402, 410; Taylor, Ev., s. 1667; Phipson, Ev., 11th Ed., 533. As to certified copies, see S. 76 post.
14. Baidya Nath v. Alef Jan, 1923 Cal. 240; 70 I.C. 194; 36 C. L. J. 9; see also the cases cited therein.
15. Trailokyanath Das v. Emperor, 1932 Cal. 293; I. L. R. 59 Cal. 136; 137 I.C. 163; 33 Cr. L. J. 441.
16. Purnima Debya v. Nand Lal Ojha, 1932 Pat. 105; I. L. R. 11 Pat. 50; 136 I.C. 577; Kesho Prasad Singh v. Mst. Bhagjogna Kuer, 1937 P.C. 69; I. L. R. 16 Pat. 258; 1937 A. L. J. 638; 39 Bom. L. R. 731; 65 C. L. J. 241; 41 C. W. N. 577; (1937) 2 M. L. J. 631; 167 I. C. 329; 1937 M. W. N. 593; Ramadhar Chaudhary v. Janki Chaudhary, 1956 Pat. 49; 1955 B. L. J. R. 705.

to avoid the debt as 'Avyavaharika'. His order would be relevant to prove the existence of the order but not the truth of the facts stated therein<sup>17</sup>. A judgment not falling within Sec. 41 can only be evidence but cannot be used for the purpose of preventing the other side from proving facts which he sets up.<sup>18</sup> Statements of facts in a previous judgment cannot be used as evidence in a subsequent suit to decide the points which are in issue in that case.<sup>19</sup> A judgment not *inter partes* is, if admissible at all in a subsequent suit, admissible only as showing that certain observations were made or certain facts found in a certain judgment, but not admissible as evidence of the truth of the facts found or observations made. Proof of the fact that certain observations were made in certain judgment is of no use whatever.<sup>20</sup> Where a judgment is not *in rem*, nor relates to matters of a public nature nor is between the parties to a subsequent suit, the fact, that the Court by that judgment decides a point in a particular way, is not relevant for the purpose of the decision of the same point in the subsequent suit.<sup>21</sup> The existence of a judgment may be relevant, but the truth of it, by which it is understood the decision of the Judge and the opinion expressed by him, is not relevant. It may be relevant to show that a certain circumstance existed at the time when the judgment was delivered. For instance, it may show that the witnesses in the previous suit made contradictory statements; or it may be relevant to show the nature and the character of the claim in the previous suit. But it cannot be used to prove the conclusion arrived at by the Judge on the particular evidence before him in the previous suit.<sup>22</sup> Where, however, the right of a party has already been concluded by a previous judgment, that fact can be proved by production of the judgment; since, in these circumstances, the existence of the judgment itself is relevant.<sup>23</sup> Therefore, if a party, indicted of any offence, has been acquitted, and sues the prosecutor for malicious prosecution, the record is conclusive evidence for the plaintiff to establish the fact of acquittal, although the parties are necessarily not the same in the action as in the indictment,<sup>24</sup> but it is not evidence whatever that the defendant was the prosecutor, even though his name appears on the back of the bill,<sup>25</sup> or of malice or of want of probable cause,<sup>1</sup> and the defendant,

17. S. M. Jakati v. S. M. Borkar, A. I. R. 1959 S. C. 282: (1959) 2 M. L. J. 21 (S.C.); 61 Bom. L. R. 688: 1959 Cal. L. J. 81.
18. Secretary of State v. Syed Ahmed, 1921 Mad. 248: I.L.R. 44 Mad. 778: 67 I.C. 971: 14 L.W. 128 (F.B.).
19. Khub Narain v. Ramchandra, 1951 Pat. 340: I.L.R. 28 Pat. 890.
20. (Mst.) Muneswari v. Jugal Mohini, 1952 Cal. 368.
21. Shanker Ganesh v. Kesheo, 1930 Nag. 1: 121 I.C. 644: 12 N.L.J. 164: 26 N.L.R. 33 (F.B.).
22. Benode Lal v. Secretary of State, 1931 Cal. 239: 193 I.C. 573: 34 C. W.N. 1113; see also Govinda Narain Singh v. Shamal, 1931 P.C. 89: 58 I.A. 125: I.L.R. 58 Cal. 1187: 131 I.C. 753.
23. Marot Laxman v. Jagannathdas L. E.—156

24. Leggatt v. Tollervey, (1811) 14 East 302; see also Hitendra Singh v. Rameshwar Singh, 1925 Pat. 625 at 636: I.L.R. 4 Pat. 510: 87 I.C. 849: 88 I.C. 141: 6 P.L.T. 634.
25. Trailokyanath v. Emperor, 1932 Cal. 293: I.L.R. 59 Cal. 136: 137 I.C. 163.
1. Parcell v. MacNamara, (1806) 9 East 361; Incledon v. Berry, (1805) 1 Camp. 203n. see Keramatoollah v. v. Golam, (1868) 9 W.R. 77; Aghore v. Radhika, (1870) 14 W.R. 339, the fact that the plaintiff has been convicted, even though acquitted in appeal, is evidence of reasonable and probable cause; Jadubar v. Sheo, (1898) 21 A. 26.

notwithstanding the verdict, is still at liberty to prove the plaintiff's guilt.<sup>2</sup> If *A* has obtained a decree for the possession of land against *B*, and *C*, *B*'s son, murders *A* in consequence, the existence of the judgment is relevant as showing motive for the crime.<sup>3</sup> So, a judgment, against a master or principal for the negligence of his servant or agent, is conclusive evidence against the servant or agent of the fact that the master or principal has been compelled to pay the amount of damages awarded; but it is not evidence of the fact upon which it was founded, namely, the misconduct of the servant or agent.<sup>4</sup> So a judgment recovered against a surety will be evidence for him to prove the amount which he has been compelled to pay for the principal debtor; but it furnishes no proof whatever of his having been legally liable to pay that amount through the principal's default.<sup>5</sup> The same doctrine will apply to other cases, where the party has a remedy over, as for contribution or the like.<sup>6</sup> In an action against a surety, where the defence was that the plaintiff has received certain moneys from the principal in satisfaction of his damages, it was held that the plaintiff in traversing this plea, might put in evidence a judgment recovered from him by the assignees of the principal for the amount so received, as money had to their use, not indeed as conclusive proof that the money had been paid to him by the principal in the way of fraudulent preference, but as showing that he had actually repaid the money to the assignees and as generally explaining the transaction.<sup>7</sup> So, if the object be to discredit a witness, by proving that he has given different testimony in a former trial the judgement in that cause, though the litigating parties be strangers, will be admissible, for the purpose of introducing the evidence of his former statements.<sup>8</sup> Judgments are admissible, when they are tendered for the purpose of contradicting the testimony of a witness. So, where *A* having sworn that her son *B* was born on March 18th, i.e. five days after her marriage, an order of deceased Justices reciting that *A* swore that *B* was born on March 18th, was received to contradict her testimony though not to prove the bastardy or date of birth.<sup>9</sup> The falsity of a statement, made by an accused in a criminal case, does not necessarily show that the prosecution case is true. But, if the Court uses an order, rejecting the accused's claim in a previous claim case in the civil Court, as an independent piece of evidence on the question of the possession of the disputed lands, such a use cannot be said to be unwarranted by law.<sup>10</sup> Upon an indictment for perjury committed in a trial, the record will be evidence to show that such a trial was bad.<sup>11</sup> and if a party be indicted for aiding the escape of a felon from prison, the production of the record of conviction from the proper custody will be conclusive evidence that the prisoner was convicted of the crime stated therein.<sup>12</sup> So, where the judgment constitutes

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- 2. Bull N. P. 15 v.
- 3. Hitendra Singh v. Rameshwari Singh, 1925 Pat. 625 at 635.
- 4. Green v. New River Co., (1792) 4 T.R. 589; Pritchard v. Hitchcock, (1843) 6 M. and G. 151, per Crosswell, J.
- 5. King v. Norman, (1847) 4 C.B. 884, 898.
- 6. Powell v. Layton, (1896) 9 R. R. 660; Kip v. Brigham, (1810) 6 Johns 158; 7 Johns 168; Griffin v. Brown, (1824) 2 Pick. 304.
- 7. Pritchard v. Hitchcock, (1843) 6 M. and G. 151; see Taylor, Ev., s.
- 1667.
- 8. Clarges v. Sherwin, (1698-9) 12 Mood. 343; Foster v. Shaw, (1821) 7 Serg. and R. 163.
- 9. Watson v. Little, (1860) 5 H. and N. 472; see also R. v. M'Cue, (1831) Jebb, C.C. 120.
- 10. Haripanda v. State, I.L.R. 1956 Cut. 241 : 1956 Orissa 212, 213.
- 11. R. v. Iles, Cas. Temp. Hardz. 118; B.N.P. 243; R. v. Page, (1798) 2 Esp. 649n.; see Penal Code, S. 193.
- 12. R. v. Shaw, (1834) R. & R. 526; Taylor, Ev., s. 1668; Penal Code, ss 222, 223.

one of the monuments of the party's title to land or goods—as where a deed was made under a decree in Chancery<sup>13</sup> or goods were purchased at a sale made by a sheriff upon an execution,<sup>14</sup> the record may be given in evidence against a party who is a stranger to it. So, in an action to recover lands, a decree in a suit between the defendant's father, and other persons unconnected with the plaintiff which directed that the father should be let in possession of the estate as his own property has been held admissible on behalf of the defendant, not as proof of any of the facts therein stated, but for the purpose of explaining in what character the father through whom the defendant claimed had afterwards taken actual possession of the estate.<sup>15</sup> In a summary proceeding for pre-emption, which is based upon the assumption that a transfer has taken place a previous judgment setting aside the transfer, is admissible as a fact in issue.<sup>16</sup> Many other instances might be given of the admissibility of judgment *inter alios*, where the record is a matter of inducement or merely introductory to other evidence; but those cited will suffice to illustrate the principle.<sup>17</sup> An order of a Revenue Divisional Officer restoring a person to possession for cultivation, cannot be used to establish his status as a Bargardar on the basis of the recitals therein.<sup>18</sup>

**3. Admissions.** It has been held in a number of cases that the recitals in a judgment are no evidence whatever to prove the exact admission made by a party or a witness unless the whole of the statement is recited therein. This is based on a good principle, because it may be that the Court has taken an incorrect view or has misunderstood the admission made.<sup>19</sup> A previous judgment was held to be admissible under Sec. 35, Evidence Act, to prove a statement made by a predecessor-in-title of the party against whom the document is sought to be used.<sup>20</sup> A judgment may be relevant as between strangers if it is an admission, being received in favour of a stranger against one of the parties as an admission by such party in a judicial proceeding with respect to a certain fact.<sup>21</sup> This is no exception to the rule which requires mutuality since the record is not received as a judgment conclusively establishing the fact but merely as the declaration of the party that the fact was so. Thus, not appealing against an adverse judgment may operate as an admission by the party of its correctness.<sup>22</sup> And a stranger to a judgment may also be

13. Bar v. Gratz, (1819) 4 Wheat 213.

14. Steph. Ev., 355; Witmer v. Schaltter, (1830) 2 Rawle, 359; Jackson v. Wood, (1829) 3 Wend 25, 34; Flower v. Savage, (1819) 3 Conn. 90, 96.

15. Davies v. Lowndes, (1843) 6 M. & G. 471, 520.

16. Basanta Kumar v. Durga Nath, 1939 Cal. 432, 434; I.L.R. (1939) 3 Cal. 558. 183 I.C. 489: 43 C.W.N. 191.

17. Taylor, Ev., s. 1688; S. 13 ante.

18. Nath Das v. Khirode Das, (1958) 1 Cal.L.J. 76.

19. Indra Singh v. Income-tax Commissioner, 1943 Pat. 169, 173 : I.L.R. 22 Pat. 55; 206 I.C. 609; see also cases cited therein; Dundbahadur

Singh v. Durga Prasad Singh, 1953 Pat. 346.

20. Krishnaswami v. Rajagopala, (1895) 18 Mad. 73, 77 cited without disapproval in Collector of Gorakhpur v. Ramsundar, 1934 P.C. 157 : 61 I.A. 286; I.L.R. 56 All. 468 : 150 I.C. 545; see also Ramaswami Goundan v. Subbaraya Goundan, 1948 Mad. 388 : (1948) 1 M.L.J. 215 : 1948 M.W.N. 201 : 61 L.W. 193.

21. Steph. Dig. Art 4; Taylor, Ev., s. 1694; Phipson, Ev., 11th Ed., 571; Krishnaswami v. Rajagopala, (1895) 18 M. 73, 77.

22. Eaton v. Swansea Waterworks (1851) 17 Q.B. 267.

estopped thereby not directly but by his acquiescence therein.<sup>22</sup> Stray sentences in a judgment have no probative value.<sup>23,1</sup>

**4. Agreement.** A stranger to a judgment may also be bound by it, if he has so contracted. Thus, if *A* contracts to indemnify *B* against any damages recoverable against the latter by *C*, and *B*, *bona fide* defends the action and pays the amount, the judgment will be conclusive of *A*'s liability. But this does not apply where *B* has no contract with, but merely a claim against, *A* for such indemnity.<sup>24</sup> In the absence of special agreement, a judgment or an award against principal debtor is not binding on the surety, and is not evidence against him in an action by the creditor but the surety is entitled to have the liability proved as against him in the same way as against the principal debtor.<sup>25</sup> As to decrees considered as evidence of the necessity of alienation, see authorities cited below.<sup>1</sup>

**5. Relevancy of judgments of criminal courts in civil cases and vice versa.** A judgment of a criminal Court is admissible in a civil case to prove only who the parties to the dispute were and what order was passed. Facts therein stated, or statements of the evidence of the witnesses examined in the case, or the finding given by the Court, are not admissible at all. Technically, such judgments are inadmissible as not being between the same parties, the parties in the prosecution being the State, on the one hand and the prisoner on the other, and in the civil suit the prisoner and some third-party, and substantially because the issues in a civil and criminal proceeding are not the same, and the burden of proof rests in each case on different shoulders.

There is abundant authority for the proposition that a judgment of acquittal in criminal Court is irrelevant in a civil suit based on the same cause of action, just as a judgment of conviction cannot, in a subsequent civil suit, be treated as evidence of fact on which the conviction is based. It is admissible only to prove the fact of acquittal, charge or conviction,<sup>1,1</sup> or where the existence of such judgment is the question in issue.<sup>1,2</sup> The civil Court must, independently of the decision of the criminal Court, investigate facts and come to its own finding.<sup>2</sup> So in a suit for damages for malicious prosecution, the judgment of the criminal Court can only be used under this section to establish the fact that an acquittal has taken place as a fact in issue in a civil suit but the civil Court cannot take into consideration the grounds upon which that acquittal was based, and it would be for the civil Court itself to undertake an entirely independent enquiry before satisfying itself of the absence of reasonable and probable cause.<sup>3</sup> A judgment in a criminal case cannot be used in a suit for malicious prosecution to show what

23. *Re Lart*, (1896) 2 Ch. 788.

23-1. *Smt. Karambir Kaur v. Kunwar Vijai Pal*, (1972) 74 Punj.L.R. 158.

24. *Parker v. Lewis*, (1874) 8 Ch. App. 1035, 1058, 1059.

25. *Ex parte Young*, *In re Kitchin*, (1881) 17 Ch. D. 668.

1. Maynes' Hindu Law, Secs. 323, 324 and caess there cited; *Ramadhar Chaudhary v. Janki Chaudhary*, A.I.R. 1956 Pat. 49 : 1955 B:L.J.R. 705.

1-1. *Radha Mohan v. Bare Lal*. 1972

A.L.J. 15; *Perumal v. Devarajan*, A.I.R. 1974 Mad. 14 : 86 Mad.L.W. 395 : 1973. Mad.L.W. (Cr.) 79.

1-2. (1975) 2 Cal.L.J. 340.

2. *Onkarmal v. Banwari Lal*, I.L.R. 1962 Raj. 202 : A.I.R. 1962 Raj. 127 : 1962 Raj.L.W. 77.

3. *Venkatapathi v. Balappa*, I.L.R. 56 M. 641 : A. I. R. 1983 M. 429; *Buddhu Singh v. Chet Ram*, 1971 A.W.R. (H.C.) 445.

was stated against the plaintiff therein.<sup>3,1</sup> A judgment of a criminal Court can be used only to prove who the parties to the dispute were and what order was passed; but the facts stated therein, or statements of the evidence of the witnesses examined in the case, are not admissible, and the civil Court is bound to find the facts for itself.<sup>4</sup> The civil Court cannot assume, on the basis of the judgment of conviction and sentence passed by the High Court in a sessions trial, that the accused was the murderer. The judgment of the criminal Court is relevant only to show that there was a criminal trial, resulting in the conviction and sentence of the accused. It is not evidence of the fact that the accused was the murderer. That question has to be decided on evidence.<sup>5</sup> The finding of a criminal Court that possession was not actually obtained by the decree-holder will be irrelevant in a civil suit.<sup>6</sup> The conviction of a driver for rash driving is not binding in a civil action for damages.<sup>7</sup> However, it was held that where the defendant admitted that some person was convicted for theft of a property, the burden lies on the defendant to prove that the property was not stolen. In other words, a judgment of conviction for theft was admitted as relevant to show the factum of theft.<sup>8</sup> Indeed, any decision of a criminal case cannot be relied on as one binding in a civil action.<sup>9</sup> Equally, the findings in a civil proceeding are not binding on a subsequent prosecution founded upon the same or similar allegations.<sup>10</sup>

The judgment in a criminal trial of an employee is admissible in a civil court for showing that there was a criminal case of identical charge and ended in acquittal of the accused-employee. The other findings or the evidence led in the criminal court are or is irrelevant but the conclusion of the trial is relevant.<sup>11</sup> An acquittal or conviction in a criminal case has no evidentiary value in a subsequent civil litigation except for the limited purpose of showing that there was a trial resulting in acquittal or conviction, as the case may be.<sup>12</sup>

Even an admission cannot be proved by a recital in such a judgment. Therefore, a proceeding of a criminal Court is not admissible as evidence; a civil Court is bound to find the fact for itself. But it is now well settled that orders passed in a proceeding under Sec. 145, Cr. P. C., are admissible in evidence on general principles as well as under Sec. 13, Evidence Act, to show that such orders were made. Such orders are evidence of the following facts, all of which appear from the orders themselves, namely, who the parties to the dispute were; what the land in dispute was; and who was declared en-

- 3-1. Srinivas Dubey v. Dinesh Pal Dubey, 1978 A.W.C. 63.
4. Ramadhar Chaudhury v. Janki Chaudhary, A.I.R. 1956 Pat. 49; 1955 B.L.J.R. 705.
5. Anil Behari v. Latika Bala, (1955) 2 S.C.R. 270; 1955 S.C.A. 1026 : 1955 S.C.J. 578 : (1955) 2 M.L.J. (S.C.) 84 : 1955 M.W.N. 852 : A.I.R. 1955 S.C. 566, 571; Basi Nanda v. Patel Shivabhai Shankarbai, I.L.R. 1966 Guj. 500 : (1966) 7 Guj. L.R. 662.
6. (1975) 2 Cal.L.J. 340.
7. Yogendra v. Durgadass, 1972 A.C.J. 483.
8. P. K. Mitra v. Hindustan Commercial Bank, I.L.R. (1973) 1 Cal. 660.
9. 1975 J. & K. L. R. 446.
10. See Krishnan Asari v. Adaikalam, A.I.R. 1966 M. 425 : 79 L.W. 107 : (1966) 1 M.L.J. 348, and the cases referred to therein.
11. Banta Singh v. National Coal Development Corporation, 34 F.J.R. 249 : 1968 Lab.I.C. 1074 : A.I.R. 1968 Pat. 300, 301.
12. Mundrika v. Bihar State Board of Religious Trust, I.L.R. (1968) 49 Pat. 1305 : 1968 B.L.J.R. 197, 202.

titled to retain possession. The reasonings in the judgment, and the conclusions drawn from them, are not binding or conclusive.<sup>13</sup>

If *A* pleads guilty to a crime and is convicted, the record of judgment upon this plea is admissible against him in a civil action, as a solemn judicial confession of the fact.<sup>14</sup> But if *A* pleads not guilty to a crime, but is convicted, the record of judgment upon this plea is not receivable against *A* in a civil action as an admission to prove his guilt<sup>15</sup>. For the judgment contains no admission, and in conformity with the rule which rejects judgments *inter partes* as evidence either for or against strangers to prove the facts adjudicated, a judgment in a criminal prosecution, unless admissible as evidence in the nature of reputation,<sup>16</sup> or taken in conjunction with the prosecution as an act of ownership,<sup>17</sup> cannot be received in a civil action to establish the truth of the facts on which it was rendered; and a judgment in a civil action, or an award, cannot be given in evidence for such a purpose in a criminal prosecution.<sup>18</sup> Thus, where *A* is convicted of forging *B*'s signature to a bill of exchange, and *B* is afterwards sued by *C* to whom *A* has transferred the

13. Ramadhar Chaudhary v. Janki Chaudhary, 1956 Pat. 49, 52 : 1955 B. L.J.R. 705; see also Gogun Chunder v. R., (1880) 6 Cal. 247, per White, J.; Mahabir v. Ram, A.I.R. 1959 Pat. 406.
14. R. v. Fontaine Moreau, (1848) 11 Q.B. 1028, 1033, per Lord Denman, C.J. "Why does what a man says of himself cease to be evidence by being said in Court?" "As to a plea of guilty being evidence of an admission, see Shumboo Chunder v. Modhoo Kyburt, (1868) 10 W.R. 56. A plea of guilty in the Criminal Court may bar a verdict of conviction, cannot be considered in evidence in a civil case; Taylor, Ev., s. 1694.
15. R. v. Warden of the Fleet, (1700) 12 Mod. 339, and v. post.
16. S. 42, ante; Taylor, Ev., ss. 1693, 624
17. Taylor, Ev., s. 1693.
18. Taylor, Ev., s. 1693, and cases there cited; Castrique v. Imrie, (1869) L.R. 4 E. & I. 234; Keramutoolah v. Gholum, (1868) 9 W.R. 77 (A proceeding of a criminal Court is not admissible as evidence; a civil Court is bound to find the fact itself); Bishonath v. Huro, (1866) 5 W.R. 27 (The conviction in a criminal case is not conclusive in a civil suit for damages in respect of the same act); Nityanund v. Kashinath, (1866) 5 W.R. 26 (A civil Court is not bound to adopt the view of a Magistrate as to the genuineness or otherwise of a document); Doorga v. Doorga, (1866) 6 W.R. Civ. Ref. 26 (A suit for money forcibly taken from the plaintiff by the defendant

is maintainable in a civil Court, notwithstanding the defendants' acquittal in the criminal Court on the charge of robbery); Ali Buksh v. Samir-uddin, (1869) 4 B.L.R. 11 : 12 W.R. 477. In a suit for damages for an assault, the previous conviction of the defendant in a criminal Court is no evidence of the assault. The factum of the assault must be tried in a civil Court; R. v. Hedger, (1852) 131 at p. 135; Aghoremath v. Radhika, (1870) 14 W.R. 339, Radhika, (1870) 14 W.R. 339, Gagan Chunder v. R. (1880) 6 C. 247; Ram v. Tula, (1881) 4 A. 97; see also Raj Kumar v. Bama, (1896) 23 C. 610, in which, however, Ghose, J., observed that he was not prepared to say that the decision in a civil suit would not be admissible in evidence in a criminal case, if the parties were substantially the same and the issues in the two cases identical. Rampini, J., contra; Manjanadi v. Ramdas, (1900) 4 C.W.N. 176. For a case in which a civil judgment was rejected in a criminal proceeding, see R. v. Fontaine Moreau, 11 Q.B. 1028 at p. 1033. And for a case in which a civil judgment was admitted, in a criminal proceeding, see Markur (In re), (1917) 41 B. 1 : 33 I.C. 633 : A.I.R. 1916 B. 163. Here the former plaintiff was the complainant with the former defendant the accused and the issue substantially the same, and the civil judgment in certain points now included in the criminal charge was admitted in evidence.

bill, *A*'s conviction is not admissible to prove the forgery.<sup>19</sup> So, again, a certificate of acquittal on a charge of rape is not admissible to disprove the rape in a divorce suit founded thereon.<sup>20</sup> A mother murdering her son is not beneficially entitled to take his estate by inheritance; but the fact of her having been acquitted or convicted is not relevant in a civil Court upon the question whether she has committed the wrongful act imputed to her, and, if so, whether by such act she has forfeited her rights of inheritance.<sup>21</sup>

In a case of a suit for malicious prosecution it was observed by a learned Judge of the Allahabad High Court:

"When the plaintiff has been acquitted, there would be a presumption of want of reasonable and probable cause in an occurrence when there was no scope for surmise and the evidence was given by the defendant of what he actually saw.<sup>22</sup> But under this section the judgment of the criminal Court can be used only to establish the fact that an acquittal has taken place as a fact in issue in the civil suit. There is no provision in the Evidence Act which will justify the civil Court in taking into consideration the grounds upon which that acquittal was based."<sup>23</sup>

Where the prosecution for an offence of failure to furnish the return due under R. 11(1) of the Madras General Sales Tax Rules, punishable under section 15(a) of the Act, ended in an acquittal, because the prosecution failed to prove the guilt of the accused beyond reasonable doubt, on subsequent assessment based on the same questions, it was held: (i) that, sections 40 to 43 of the Act embody primary and fundamental principles governing admissibility of judgments, and unless the assessees are able to bring their case within the permissible ambit of the said provisions they cannot rely on their success in the criminal Court; (ii) that either the Sales Tax Act or the Rules provide for an election between the two courses, a criminal prosecution and the making of an assessment; (iii) that both courses are open concurrently to the department; (iv) that action in respect of one is no bar to proceedings in the other; (v) that the assessees cannot seek shelter under the doctrine of *autrefois acquit*; that principle can apply only to a second prosecution for the same offence; and (vi) that the principle of *res judicata* embodied in section 11, C. P. Code, can have no application as its operation is limited to civil actions; nor can the department be precluded from proceeding with the assessment on the ground of acquiescence in the Magistrate's finding and decision.<sup>24</sup>

The judgment of a criminal Court in a prosecution arising out of a motor accident determining the guilt or innocence of the driver of the motor

19. Castrique v. Imrie, (1869) L.R. 4 E. & I. 234; Parsons v. London County Council, 9 T.L.R. 619.
20. Virgo v. Virgo, (1894) 69 I.T. 460. So also in the trial of *A* as accessory to a felony committed by *B*, the conviction of *B*, though admissible to prove that fact, is no evidence of *B*'s guilt; see Philson, Ev., 11th Ed., 560.
21. Vedanavyangar v. Vedammal, 14 M. L.J. 297 : 27 Mad. 591.
22. Mohammed Daud Khan v. Jailal, 1929 All. 255: 116 I.C. 852.
23. Shubrati v. Shamsuddin, 1928 All. 337 : I.L.R. 50 All. 713 : 110 I.C. 418; Gulabchand Gokuldas v. Chun-

- nil Jagjivandas, 9 Bom. L.R. 1134; Pedda Venkatapathi v. Ganagunta Balappa, 1933 Mad. 429 : I.L.R. 56 Mad. 641 : 143 I.C. 825 : 65 M.L.J. 146 : 1933 M.W.N. 1804 : 37 M.L.W. 623; T. Y. Singh v. T. K. Singh, A.I.R. 1959 Manipur 32; Jogendra Garabudu v. Lingaraj Patra, I.L.R. 1969 Cut. 821 : 35 Cut.L.T. 835 : 1970 Cr.L.J. 819 : A.I.R. 1970 Orissa 91, 97. See however Gobind v. Upendra, A.I.R. 1960 Orissa 29.
24. M/s. Macherlapa & Sons v. Government of Andhra, A.I.R. 1958 A.P. 371 : I.L.R. 1958 A.P. 421.

vehicle concerned is neither conclusive nor binding on the Motor Accidents Claims Tribunal dealing with a claim petition under section 110-C of the Motor Vehicles Act, 1939.<sup>25</sup> Such judgment can, however, be relevant only for the purpose and to the extent specified in section 43 of the Evidence Act.<sup>1</sup>

In England the question of the admissibility of criminal convictions in subsequent civil proceedings has been considered by the House of Lords in *Hollington v. F. Hewthorn & Co.*<sup>2</sup> In that case, damages were claimed in respect of a collision between motor cars. The first defendants, Hewthorn & Co., were the owners of a car involved in the collision and driven by the second defendant, Poll. Owing to the death of the driver of the plaintiff's car, the plaintiff was unable to adduce any direct evidence of the accident and he tendered as evidence of negligence a conviction of the defendant, Poll for careless driving under Section 12 of the Road Traffic Act, 1930, at the time and place of the collision. The Court of Appeal, upholding Hilbery, J., on this point, held that the conviction was inadmissible. Goddard, L. J., delivered the judgment of the Court. The judgment contains most of the traditional arguments against the admissibility of the criminal convictions, which may be stated in summary as follows :

"(1) The modern law of evidence, unlike the earlier law, is concerned with relevance and not primarily with the competence of witnesses. Generally, relevant evidence is admissible. This evidence is not relevant but is only the view of another Court that it considered the defendant guilty of careless driving on evidence and considerations not known to the civil Court. (2) It is *res inter alios acta*—the issues in criminal and civil proceedings are not identical. (3) It is open to the objection of irrelevance as opinion evidence, as the conviction is only the opinion of the criminal Court. (4) It is hearsay. (5) If a conviction is admissible, an acquittal should equally be admitted, and no one has ever suggested that an acquittal was evidence. (6) The authorities are against admissibility."

The rule laid down in this case has not commended itself to Wigmore who observes that in numerous situations, it is 'unreasonable and impractical' to ignore the evidential use of a judgment in another proceeding involving the same fact as in the present case.<sup>3</sup> Wigmore's view has distinguished support in America, as appears from the fact that in the Model Code of Evidence published by the American Law Institute in 1942, Rule 521 provides that 'evidence of a subsisting judgment adjudging a person guilty of a crime or misdemeanour is admissible as tending to prove the facts recited therein and every fact essential to sustain the judgment.' It will be noted that Goddard, L. J., was careful to distinguish relevance and competence, and stated as a principle the general admissibility of relevant evidence. He then held in terms that the criminal conviction was not relevant. It would appear that Goddard, L. J.'s use of relevance here is identical with Stephen's use of the term in his Digest of Evidence. There 'relevant' is used interchangeably with admissible.<sup>4</sup> But the almost invariable meaning of 'relevant' in the modern

25. Yogendra Paul Chawdhry v. Durgadas, Punj. 1972 A.C.J. 483.  
 1. Municipal Committee, Jullundhur City v. Romesh Saggi, I.L.R. (1970) 1 Punj. 617 : 1969 A.C.J. 185 : 71 P.L.R. 452 ; A.I.R. 1970 Punj. 137, 151 overruling Sadhu Singh v. Punjab Roadways, Ambala City, A.I.R.

1968 Puaj. 466.  
 2. (1943) K.B. 587 : (1943) 2 All.E. R. 35.  
 3. Wigmore, Vol. V, s. 1671 at p. 688; see also Vol. V, s. 1846a.  
 4. C. A. Wright, (1934) 21 Canadian Bar Review 653, 656.

law of evidence is 'logically probative'. It is submitted that the evidence of the conviction is logically probative evidence for the purposes under consideration. However, the case is authority for the proposition that the plaintiff in a civil action, arising out of the same facts as those involved in a prosecution, cannot adduce evidence of the conviction of the defendant or his privy to establish those facts. But the rule has not been applied in divorce suits where desertion or cruelty is in issue.<sup>5</sup>

It has been held in some cases that where the civil liability is determined by a civil Court, the judgment of that Court would be best evidence of the civil rights of the parties, that save for very exceptional reasons the decision of the civil Court should be accepted as conclusive between the parties,<sup>6</sup> and that a Magistrate has no jurisdiction to reagitate a dispute that has been settled by a competent Court, and give a declaration in favour of a party whose claim to title and possession has been negatived in a contested litigation; for to allow this would amount to permitting a criminal Court to fly in the face of the decision of a competent civil Court, being the only Court competent to adjudicate with finality the disputes as to title and possession as between the parties having conflicting claims thereto,<sup>7</sup> and that a criminal Court is not entitled to disregard the decree of a civil Court, declaring rights to the identical property in dispute in the criminal case.<sup>8</sup> But there appears to be no sound reason for that view. To hold that when a party has been able to satisfy a civil Court as to the justice of his claim and has in the result succeeded in obtaining a decree which is final and binding upon the parties, it would not be open to a criminal Court to go behind the findings of the civil Court, is to place the latter, without any valid reason, in a much higher position than what it actually occupies in the system of administration in this country and to make it master not only of cases which it is called upon to adjudicate but also of cases which it is not called upon to determine, and over which it has really no control. Accordingly, it has been held that even where there are concurrent proceedings covering the same ground before a criminal and a civil Court, the parties being substantially the same, the judgment of the civil Court, if obtained first, would not be admissible in evidence before the criminal Court in proof or disproof of the fact on which the prosecution is based.<sup>9</sup> A decision of a competent Court on a question of title, even if followed by delivery of possession to the successful party, is not conclusive evidence of the party's possession in an inquiry under Sec. 145, Cr. P. C.; and a Magistrate is not bound by any law to give his finding in accordance with the decision regardless of the actual evidence before him. If the evidence satisfies him that the other party is in actual possession, he is bound by law to declare him to be in possession despite the decision of the civil Court or the delivery of possession by it. The admissibility of a previous

5. *Ingram v. Ingram*, (1956) 1 All. E., R. 785.

6. *In re N. F. Markur*, 1916 Bom. 163; I.L.R. 41 Bom. 1; 33 I.C. 633; 18 Bom.L.R. 185.

7. *Emperor v. Bishen Das*, 8 I.C. 1161; 33 P.R. 1910 (Cr.).

8. *Jang Bahadur v. Nazimul Haque*, 1947 Pat. 245, 247; 226 I.C. 516. L. E.—157

9. 47 Cr.L.J. 976: 12 B.R. 770. *Varadaraja Chettiar v. Swami Mastry*, 1948 Mad. 49, 50: 48 Cr.L.J. 1002: (1947) 2 M.L.J. 179: 60 M.L.W. 499: 1948 M.W.N. 62.

10. B. N. Kashyap v. Emperor, 1945 Lah. 23, 27; I.L.R. 44 Lah. 408; 217 I.C. 284: 46 Cr.L.J. 296 (F.B.); see also cases cited therein.

judgment is governed by the provisions of this Act; there is no provision which makes a judgment of a civil Court conclusive. The only section under which it might be said to be admissible is Sec. 13 on the ground that it provides an instance in which the right to be in possession was claimed or recognized. An inquiry under Sec. 145, Cr. P. C., is about the question as to which party was in actual possession on a certain date; it is not about the existence of any right to be in possession. An inquiry into the right to be in possession is barred. Moreover, the judgment would not provide an instance in which the right to be in possession on a certain date was claimed or recognized. A view more consistent with the provisions of the Code of Criminal Procedure is that a civil Court decree for possession affords only a presumptive proof of possession, to be taken along with such other evidence of possession as might be forthcoming. The existence of a judgment of a Court deciding a question of title or even of possession does not justify a Magistrate's refusing to receive evidence. He may terminate the proceedings on finding that the dispute referred to in sub-section (1) of Sec. 145, Cr. P. C., has ceased to exist, but if he means to pass an order under sub-section (b) or under Sec. 146 by continuing the proceeding, there is no circumstance in which he can refuse to receive evidence, if offered by a party.<sup>11</sup> The relevant sections of the Evidence Act relating to the admissibility of judgments do not empower a criminal Court to treat as *res judicata* the findings of a civil Court on a given point. Only judgments *in rem* as defined in Sec. 41, Evidence Act, have a binding effect on criminal Court.<sup>12</sup>

A magistrate in coming to a decision as to possession of a disputed land in proceedings under Sec. 145, Cr. P. C., while mainly relying upon the affidavits of the parties can use the judgment of the High Court in a previous criminal case touching the disputed land as evidence of possession *quantum ratiocinalis* (so much as it was worth);<sup>13</sup> even if the judgment is not relevant under section 43, it may be relevant under section 13 in order to establish the existence of the right of a party over the disputed land.<sup>14</sup>

No doubt, this section makes the existence of the judgment relevant, if covered by any other provision of this Act. This means that the judgments, which do not operate as *res judicata*, can be admitted in evidence to show the existence of a judgment in favour of a party. The existence of a judgment is in itself of some probative value in determining the question. It creates a paramount duty on the party, against whom the judgment is to displace the finding. But the judgment is not conclusive evidence.<sup>15</sup>

In *In re Markur*,<sup>16</sup> the following observations were made:

"If we are to administer justice in a civilised country, if we are to avoid those conflicts between civil and criminal courts which ordinarily

- 11. Mst. Hosnaki v. State, 1956 All. 81, 85; 1955 A.W.R. (H.C.) 654; see also the case-law discussed in it; see also Mahabir v. Ram Narain, A.I.R. 1959 Pat. 406.
- 12. Mansharam Madhvadas v. Chettaram Rupchand, 1945 Sind 32, 33 : I.L.R. 1944 Kar. 392 : 218 I.C. 280 : 46 Cr.L.J. 437.
- 13. Ram Kawal Upadhyा v. Dudhanath Pandey, 1969 Cr.L.J. 1197; A.I.R. 1969 Pat. 317, 320; Abdul Sha-
- 14. Ram Kawal Upadhyā v. Dudhanath Pandey, supra.
- 15. Midnapur Zamindari Co., Ltd. v. Naresh Narain, L.R. 48 I.A. 49 : A.I.R. 1922 P.C. 241 relied on in Shiv Charan v. State, A.I.R. 1965 A. 511.
- 16. I.L.R. 41 Bom. 1 : 33 I.C. 633 : A.I.R. 1916 B. 163.

must be fraught with evil and can produce no good, if, in short, we are to make the actual administration of justice in this country with a proper relation to that which we prefer it to be, then we cannot have criminal courts trying over again matters which have been thoroughly dealt with and finally decided by a civil Court of competent jurisdiction. It may be that to this principle there would be rare exceptions founded on possibly the discovery of new cogent and important evidence. But ultimately that principle must prevail, and if that principle must prevail, then it is a matter of the first importance of the very highest relevancy to show to a criminal Court that the matter which the criminal Court is asked to adjudicate on has already been fully dealt with by a civil Court. The judgment of the civil Court is undoubtedly relevant and of the very highest importance."

In *Rajkumari v. Bama Sundari*,<sup>17</sup> Ghose, J., said : "I am not prepared to say that the decision in the civil suit would not be admissible in criminal cases, if, as I understand it to be, the main issue in both the cases is identically the same."

**6. Judgment of Crime Court, relevancy in other criminal case.** In respect of the same occurrence where some of the accused were tried and convicted, the judgment is not relevant in the trial of the remaining accused held separately.<sup>18</sup>

**7. Autrefois acquisit.—Applicability.** A plea of autrefois acquit which is statutorily recognised under Section 403, Cr.P.C., 1898 (now section 300 of Cr.P.C., 1973) arises when a person is tried again for the same offence or on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236 [Sec. 221 (1) of Cr. P. C., 1973], or for which he might have been convicted under Sec. 237 [Sec. 221 (2) of Cr.P.C., 1973]. Where, however neither of these provisions is applicable, because the two offences are distinct and spaced slightly by time and place, and require different charges, the Court should order separate trials and the prior acquittal cannot create a bar in reaching a conviction. The earlier judgment is no doubt admissible to show the parties and the decision but it is not admissible for the purpose of relying upon the appreciation of evidence. If the bar under Section 403 (Sec. 300 of Cr. P. C., 1973) does not operate, the earlier judgment is not relevant for the interpretation of evidence in the subsequent trial.<sup>19</sup>

**8. Judgments other than those mentioned in Secs. 40, 41 and 42 when relevant.** Judgments in previous suit not between the same parties are not relevant to prove title or possession in a subsequent suit between different parties as they are not covered by Secs. 40–42.<sup>20</sup> The section lays down

17. 23 Cal. 610 at p. 618.

18. *Bojagani*. *In re*. (1971) 1 Andh. W.R. 316.

19. *Kharkan v. State of U.P.*, (1964) 4 S.C.R. 673; 1964 S.C.D. 270; (1965) 2 S.C.L.J. 546; (1964) 1 S.C. W.R. 1; 1964 A.I.L.J. 162; 1964 A.W.R. (H.C.) 201; I.L.R. (1964)

I All. 519; 1964 (1) Cr.L.J. 116; (1964) 1 Ker.L.R. 14; 1965 M.L.T. (Cr.) 781; A.I.R., 1965 S.C. 83, 86.

20. *Gopal Krishna v. Ammalu Ammal*. A.I.R., 1972 Ker. 196; 1971 Ker. L.T. 578

that judgments, orders or decrees, other than those mentioned in Secs. 40, 41 and 42, are relevant if—

- (1) their existence is a fact in issue, or
- (2) they are relevant under some other provision of this Act.

Thus, they may be relevant and admissible to prove that a right was asserted or denied under Section 13, or to explain or introduce facts in issue, or to explain the history of the case.<sup>21</sup> But where the question relates to the value of a property then the value assessed by the Court a long time ago is absolutely irrelevant. The order of the Court in respect of the value of the property cannot be used to show the assertion or denial of a right, or introduce facts in issue, or to explain the history of the case.<sup>22</sup> Judgments, which are *in rem* but are judgments *inter partes* are confined to the facts of disputes in the individual case, and cannot be used against third parties. Hence, on the question whether a firm's trade mark is identical with, or deceptively similar to another's registered trade mark, other judgments where the parties, the subject-matter and the alleged infringing marks are all different, cannot be used in fact or in law against that person (the applicant for registration).<sup>23</sup> A judgment not *inter partes* in a previous suit is admissible in evidence in a subsequent suit for possession by way of redemption in which the same right is asserted, by virtue of section 13.<sup>24</sup> In a case from Allahabad, it was held that though proceedings under the U. P. Consolidation of Holdings Act, 1954, are not governed by the Evidence Act, the judgment of a civil Court in a previous litigation between the parties is certainly good material which can be taken into consideration by the consolidation authorities.<sup>25</sup>

41. *Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.* Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

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| ss. 40–42 ("Judgments, orders and decrees"). | s. 3 ("Court").    |
|  | s. 3 ("Relevant"). |

Steph. Dig. Art. 46; Taylor, Ev., ss. 1713–1717; Phipson, Ev., 11th Ed., 536; Best, Ev., s. 595; Norton, Ev., 218, 219; Wharton Law Lexicon; Hukum Chand's Res Judicata, 484.

#### SYNOPSIS

|                             |                                |
|-----------------------------|--------------------------------|
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| 3. Incompetency.            | (c) Erroneous decision.        |

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| 21. Mahabir v. Somnati, A.I.R. 1964 Pat. 66.  | Marks Act, 1958, section 12 (2).   |
| 22. Rajo Kuer v. Brij Bihari, A.I.R. 1962 Pat. 236.   | 21. Hiralal v. Shivlal, (1969) 71 P.L.R. 735.  |
| 23. Prem N. Mayor v. Registrar of Trade Marks, A.I.R. 1969 Cal. 80. See Trade and Merchandise | 95 Khyali Ram v. Joint Director of Consolidation, U.P., 1963 A.W.R. (H.C.) 206, 207. |

4. Fraud.
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9. Collusion.
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10. Who can show collusion?
11. Generally.
12. Setting aside decrees on ground of mistake.

**1. Principle.** A judgment delivered by a court not competent<sup>1</sup> to deliver it, as by a Court which had no jurisdiction over the parties or the subject-matter of the suit, is a mere nullity.<sup>2</sup> And though the maxim is stringent that no man shall be permitted to aver against a record, yet when fraud can be shown, this maxim does not apply,<sup>3</sup> nor in the case of collusion, when a decree is passed between parties who were really not in conflict with each other.<sup>4</sup> Fraud avoids all judicial acts, ecclesiastical or temporal. It is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice, which, upon being satisfied of such fraud, have a power to vacate and should vacate their own judgments.<sup>5</sup> In the application of this rule, it makes no difference whether the judgment impugned has been pronounced by an inferior or by the highest tribunal; but in all cases alike, it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud.<sup>6</sup>

**2. Scope and applicability.** When one of the parties to a suit tenders or has put in evidence,<sup>7</sup> a judgment, order or decree under the fortieth, forty-first or forty-second section<sup>8</sup> it is open to the other party, under this section, to avoid its effect on any of the three grounds: (a) want of jurisdiction in the Court which delivered the judgment, (b) that the judgment was obtained through fraud, or (c) through collusion.<sup>9</sup> To the extent of the three grounds aforesaid, the principle of *res judicata* embodied in section

1. See Ketilamma v. Kelappan, (1889) 12 M. 228; Sardarmal v. Aranyayal, (1896) 21 B. 205, 212.
2. See cases cited post.
3. Rogers v. Dadley, (1863) 2 H. & C. 247; see Huffer v. Allen, (1866) L. R. 2 Ex. 18.
4. Bandon v. Becher, (1835) 3 C. & F. 479.
5. Duchess of Kingston's case, (1776) 2 Sm. L. C., 13th Edn., 644, per Lord DeGrey, C. J.; Philipson v. The Earl of Egremont, (1884) 6 A. & E. 587, 605; Paranjpe v. Kanade, (1882) 6 B. 148.
6. Shedden v. Patrick, (1851) 1 Macq. H. L. 535; as to the procedure to be taken to set aside a decree obtained by fraud and collusion, see Mewa v. Bhujhunaria, (1874) 13 B. L. R. App. 11; Aushootash v.

- Tara, (1884) 10 C. 612; Eshan v. Nundamoni, (1884) 10 C. 357; Kamali v. Rahimbhoy, (1888) 13 B. 137; Bansi v. Ramji, (1898) 20 A. 370, 374; Nistarini v. Nundo, (1902) 30 Cal. 369, 383; see also Act IX of 1908, Sch. I, Art. 95
7. See Nistarini v. Nundo, (1902) 30 C. 369, 382, where it was objected that the decree had not been proved by the adverse party.
8. In Norton, Ev., 218, it is suggested that the same rule ought to apply in the case of a judgment, order or decree tendered under Sec. 43.
9. ib.; see Ahmedbhoy v. Vulleebhoy, (1882) 6 B. 703, it was suggested that the words may be read as equivalent to "Fraud and collusion"; see post.

11 of the C. P. C., is modified.<sup>10</sup> The provision of this section is not idle. If the judgment is shown to be obtained by collusion etc. it will not operate as *res judicata*.<sup>11</sup> Even a judgment *in rem* in a matrimonial matter can be attacked under this section on the ground of fraud or incompetency of the court.<sup>12</sup> The section is applicable both to civil and criminal proceedings. In cognizable cases, the Magistrate no doubt controls the proceedings, but, even in such cases, it is possible for a private complainant to collude with the accused and obtain an acquittal by perpetrating fraud upon the Court. It can therefore, be shown that the acquittal was brought about by fraud or collusion, and is therefore a nullity.<sup>13</sup> But the section applies only, when a judgment or decree has been proved. In the case of an application under Sec. 476, Cr. P. C., 1898 (now Sec. 340 of Cr. P. C., 1973), in connection with a probate decree, where the applicant admits the decree, and there is no question of the decree being proved against him by the adverse party, this section does not apply to the application.<sup>14</sup> The section does not apply to judgments admissible under Sec. 43, *ante*.<sup>15</sup> The section has no application to proceedings for rateable distribution of assets under Sec. 73, C. P. C., which are of non-judicial character.

The executing Court is not entitled to question the validity of the decree under execution.<sup>16</sup> But the executing Court can refuse to execute a decree passed without jurisdiction.<sup>17</sup> However, it has been held in the undernoted cases that Section 44 applies to execution matters also and enables a party to show that the decree sought to be executed was obtained by practising fraud and as such was not binding.<sup>18</sup> A decree can be challenged any time on the ground of fraud in a collateral proceeding without getting it set aside by a regular suit within the period of limitation for such suit because the right given under this section was quite independent of the right to sue for setting aside a fraudulent decree.<sup>19</sup> But the Patna High Court has held that section 44 cannot be used to circumvent the Law of Limitation for setting aside a

- 10. Kunheema Umma v. Balakrishnan Nair, I. L. R. (1966) 2 Ker. 440; 1966 Ker. L. J. 807; 1966 Ker. L. R. 477; 1967 Ker. L. T. 629; A. I. R. 1967 Ker. 97, 99.
- 11. Khirod Ch. Mohanty v. Banshidhar, A. I. R. 1978 Orissa 111; 45 C. L. T. 174; 1977 (2) C. W. R. 828.
- 12. Smt. Satya v. Teja Singh, A. I. R. 1975 S.C. 105; (1975) 2 S.C. L. 294; 1975 Cr. L. J. 52; 1975 S. C. C. (Cr.) 50; (1975) 1 S. C. C. 120; 1975 M. L. J. (Cr.) 599.
- 13. Narmada Prasad Singh v. State of Vindhya Pradesh, 1956 V. P. 30.
- 14. Bhagwandas v. D. D. Patel & Co., 1940 Bom. 131; I. L. R. 1940 Bom. 403; 187 I. C. 867; 41 Cr. L. J. 526; Nistarini v. Nundo, (1902) 30 Cal. 369 at 382.
- 15. Venkata Rangacharyulu v. Akkappa Rao, 1941 Mad. 569; (1941) 1 M. L. J. 492; 1941 M. W. N. 237; 53 L. W. 352; Biswanath Prasad Mishra v. Bhagwandas Pandey, 10 I. C. 536; 14 C. L. J. 648; Bishunath Tewari v. Mst. Maibhi, 1955 Pat. 66. In Norton, *Ev.*, 218, it is sug-
- 16. gested that the same rule ought to apply in the case of judgment, order or decree tendered under Sec. 43. Biswambar v. Aparna Charan, 1935 Cal. 290; I. L. R. 62 Cal. 715; 155 I.C. 480; 61 C. L. J. 165; 39 C. W. N. 490 (F.B.); Shankar Sarup v. Mejo Mal, 23 All. 313; 28 I. A. 203; Saravana Pillai v. Arunachalam Chettiar, 1918 Mad. 825; I. L. R. 40 Mad. 341; 38 I. C. 117; Dattatraya Govind Seth v. Purshottam Narayanseth, 1922 Bom. 31; I. L. R. 46 Bom. 635; 65 I. C. 600 (F.B.); Bibi Uma Habiba v. Mst. Rasoolan, 1926 Pat. 497; I. L. R. 5 Pat. 445; 98 I. C. 759; Mst. Annapurna v. Ashutosh, 1934 Pat. 545; 152 I. C. 482.
- 17. Gorachand v. Prafulla, 1925 Cal. 907; 89 I. C. 685; 29 C. W. N. 948; 42 C. L. J. 1 (F.B.).
- 18. Shiva v. Bhawani Lal, A. I. R. 1973 Bom. 129; I. L. R. (1974) Bom. 494.
- 19. Jitendra Nath v. Ladaram, (1972) 2 Cal. L. J. 205; 70 Cal. W. N. 936.

decree obtained by fraud.<sup>20</sup> The section refers only to setting aside a decree and not to a transfer of property either as a part of the decree or in carrying out the decree.<sup>21</sup>

It has been held that the section is merely permissive and not prohibitive. It does not enumerate or exhaust the grounds upon which a decree or order may be attacked, that apart from this section, a minor would have a right to avoid a decree obtained against him on the ground of gross negligence of his guardian, and that this substantive right cannot be defeated simply because gross negligence is not mentioned in this section as one of the grounds of avoiding a judgment.<sup>22</sup> In *Talluri Venkata Seshayya v. Thadikonda Kotiswara Rao*,<sup>22-11</sup> however, their Lordships of the Privy Council pointed out that the protection of minors against the negligent actings of their guardians is a special one, and the principle, involved in cases relating to minors, cannot be extended to cases of gross negligence by parties litigating on behalf of the public interest. With regard to this latter class of cases Lord Thankerton who delivered the judgment of the Board, remarked<sup>12</sup>:

"The provisions of Sec. 11, C. P. C., are mandatory, and the ordinary litigant, who claims under one of the parties to the former suit, can only avoid its provisions by taking advantage of Sec. 44, Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion. It is not for the Court to treat negligence, or gross negligence, as fraud or collusion unless fraud or collusion is the proper inference from the facts."<sup>13</sup>

Again, where a decree is passed on the basis of a compromise, it suffers from the infirmities which attach to all contracts, because a compromise decree is nothing but an order of the Court superadded to the contract between

- 20. *Ekawari v. Jadunandan*, A. I. R. 1974 Pat. 191.
- 21. *Arvi Co-operative Credit Society, Ltd. v. Dhondiram Naval Chand*, 1940 B. 289; I. L. R. 1940 Bom. 526; 190 I. C. 606; 42 Bom. L. R. 486;
- 22. *Siraj Fatima v. Mahmood Ali*, 1932 All. 293; I. L. R. 54 All. 646; 138 I. C. 465; *Ganganand Singh v. Rameshwar Singh*, 1927 Pat. 271; I. L. R. 6 Pat. 388; 102 I. C. 449; *Mathura Singh v. Rama Rudra Prasad Sinha*, 1936 Pat. 231; I. L. R. 14 Pat. 824; 162 I. C. 235; *Kamakshya Navain Singh Bahadur v. Baldeo Sabai*, 1950 Pat. 97; I. L. R. 27 Pat. 441 (F.B.); *Sureshchandia Jamiet Ram v. Bai Ishwari*, 1938 Bom. 206; 174 I.C. 820; 40 Bom. L. R. 127; *Sheo Churn Lal v. Ram Nandan Dobey*, 22 Cal. 8; *Mahesh Chandra Bayan v. Manindra Nath Das*, 1941 Cal. 401; I. L. R. (1941) 1 Cal. 477; 196 I. C. 779; 45 C.W.N. 508; *Iftekhar Hussain Khan v. Beahit Singh*, 1946 Lah. 233; I. L. R. 46 Lah. 515;
- 225 I.C. 456; 48 P. L. R. 280 (F.B.); *Egappa Chettiar v. Ramanathan Chettiar*, 1942 Mad. 384; I. L. R. 1942 Mad. 526; 203 I. C. 526; (1942) 1 M. L. J. 155; 1942 M. W. N. 104; 55 L. W. 43; *Mohammad Baksh v. Allah Din*, 1942 Oudh 33; I. L. R. 17 Luck. 1; 196 I. C. 457; but see *Krishnadas Padmanabha v. Vitooba Annappa Shetti*, 1939 Bom. 66; I. L. R. 1939 Bom. 340; 180 I. C. 51; 41 Bom. L. R. 59, where a contrary view has been taken.
- 22-11. 1937 P. C. 1; 64 I. A. 17; I. L. R. 1937 Mad. 263; 1937 A. L. J. 240; 39 Bom. L. R. 317; 41 C. W. N. 257; (1937) 1 M. L. J. 113; 1937 M. W. N. 66; 45 L. W. 43; 166 I. C. 1.
- 12. *Kayastha Pathshala v. Mst. Bhagwati*, A.I.R. 1937 P.C. 4; 64 I.A. 5; I.L.R. 1937 A. 3; 166 I.C. 4.
- 13. See also *Laxmi Narain Gododia v. Mohd. Shafi Bari*, 1949 E. P. 141, where the Privy Council case has been followed.

the parties and can be set aside on any ground on which a contract can be set aside, namely, for misrepresentation, undue influence, etc. This then would be another ground on which a decree can be set aside.<sup>14</sup> But it has been held that though the party was entitled to show that the judgment was obtained by fraud, it was not open to him to plead that the compromise on which the judgment was based was vitiated by mutual mistake as to a material fact.<sup>15</sup> In a Patna case, it has been held that a minor is entitled to obtain the avoidance of proceedings undertaken on his behalf, if he satisfies the Court that his guardian consented to a decree against him without applying his mind to the question, whether the terms of settlement were for his benefit or not, but that is a rule of prudence and not of law.<sup>16</sup> Though under this section, a party may show that a compromise decree was obtained by fraud, it is not open to him to plead that the compromise on which the decree was based was vitiated by mutual mistake as to a material fact.<sup>17</sup>

When there have been two adjudications binding on the same parties in respect of the same right, the later adjudication has to prevail over the earlier one. In order to render the earlier decree inoperative, it is not necessary that it should be reversed or superseded by proceedings arising out of the same case. On the other hand, it may be collaterally superseded and rendered ineffective even by some ulterior and independent proceedings. What is material is that the parties to the first decree must also be parties to the subsequent proceedings, so that the decision in such subsequent proceedings may be binding on them. The rights and liabilities covered by the decree must also have been considered and adjudicated upon in the subsequent proceedings. It cannot be said that so long as the earlier decree has not been reversed or superseded in express terms, the executing Court is bound to enforce that decree. When the existence of the later decree having the effect of superseding the earlier decree is brought to the notice of the execution Court, it is bound to realise that the earlier decree has become inoperative and unenforceable and thus to refuse to execute it.<sup>18</sup>

A party to a collusive decree cannot avoid it on the ground of its being collusive. Such a decree binds not only the party but also his legal representatives under section 11, C. P. C.<sup>19</sup>

**3. Incompetency.** (a) *General.* A judgment delivered by a Court not competent to deliver it, is a mere nullity, and cannot have any probative force whatever between the parties,<sup>20</sup> and may be declared void by every Court in

14. Moti Lal v. Murli, 1951 A. W. R. (H.C.) 407; see also Shaminath v. Ramjas, I. L. R. 34 All. 143; Mohiuddin v. Mst. Kashmira Bibi, 1933 All. 252; I. L. R. 55 All. 334; 142 I. C. 419; 1933 A. L. J. 132 (F.B.).
15. Smt. Krishna Subala Bose v. Dhapanati Dutta, A. I. R. 1957 Cal. 59, 64.
16. Ganganand Singh v. Rameshwar Singh, 1927 Pat. 271; I. L. R. 6 Pat. 388; 102 I. C. 449; 8 P. L. 71, 730.
17. Smt. Krishna Subala Bose v. Dha-

- napati Dutta, A. I. R. 1957 Cal. 59.
18. Padmanabhan Krishnan v. Mathevan Pillai, 1952 T.C. 294, 295.
19. Chauhana v. Gaya Prasad, 1971 A. L. J. 819; A. I. R. 1971 All. 439, 440; for distinction between a fraudulent decree and a collusive decree, see Sahib Raj v. Babari Rai, A. I. R. 1927 All. 494.
20. See Kalka v. Kanhaya, (1875) 7 N.W.P. 99; Sookram v. Crowley, (1873) 19 W. R. 284; Gunnesh v. Ram, (1874) 22 W. R. 361; Kesavalal Sakhidas v. Amarchand Som-

which it is presented.<sup>21</sup> It need not be set aside,<sup>22</sup> but may simply be ignored.<sup>23</sup> The words 'not competent' in this section refer to a Court acting without jurisdiction.<sup>24</sup> In the order of reference to a Full Bench in the case of *Sukhlal v. Tara Chand*,<sup>25</sup> it was stated that jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it; in other words, by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. This jurisdiction of the Court may be qualified or restricted by a variety of circumstances. Thus, the jurisdiction may have to be considered with reference to place, value and nature of the subject-matter. The power of a tribunal may be exercised within defined territorial limits. Its cognizance may be restricted to subject-matters of prescribed value. It may be competent to deal with controversies of a specified character, for instance, testamentary or matrimonial causes, acquisition of lands for public purposes, record-of-rights as between landlords and tenants. This classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject-matter is obviously of a fundamental character.<sup>1</sup> The general rule is, that, if the Court rendering a judgment suffers from want of jurisdiction in respect of any one out of the above matters, its judgment is a nullity, and may be ignored. Venkatarama Ayyar, J., in delivering the judgment of the Supreme Court in *Kiran Singh, v. Chaman Paswan*,<sup>2</sup> observed :

"It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."

chand, 1933 Bom. 398; I. L. R. 57 Bom. 456; 35 Bom. L. R. 680; R. v. Husein, (1884) 8-B. 307. Where an offence is tried by a Court without jurisdiction the proceedings are void, and the offender if acquitted is liable to be tried.

21. Kunja Mohan Chakravarty v. Manindra Chandra Roy Choudhuri, 1923 Cal. 619; 77 I. C. 253; 27 C. W. N. 542.

22. Pearceylal v. Secretary of State, 1924 Cal. 913; 83 I. C. 446; 39 C. L. J. 454.

23. Hiralal v. Sri Kali Nath, 1955 All. 569.

24. Kettilamma v. Kelappan, (1887) 12 M. 228. Competency is here synonymous with jurisdiction; Sardarmal v. Aranvayal, (1896) 21 B. 205, 212; see the same matter reported in (1897) 21 B. 297; see Abdul v.

Doolanbibi, (1913) 37 B. 563 (Incompetence and *res judicata*).

25. (1905) 33 Cal. 68; 9 C. W. N. 1046; 2 C. L. J. 241; as to nature of jurisdiction, see Ashutosh v. Behar Lal, (1907) 35 Cal. 61; 11 C. W. N. 1011; 6 C. L. J. 320 (F.B.).

1. Hriday Nath Roy v. Ramchandra Barna Sarma, 1921 Cal. 34; I. L. R. 48 Cal. 138; 58 I.C. 806 (F. B.); see also Hirralal Patni v. Kali Nath, A. I. R. 1955 All. 569.

2. 1955 S. C. R. 117; 1954 S. C. A. 725; 1954 S. C. J. 514; 1954 A. L. J. 551; 1954 B. L. J. R. 426; 1954 M. L. J. 60; A. I. R. 1954 S. C. 340; Kunheema Umma v. Balakrishna Nair, I. L. R. (1966) 2 Ker. 440; 1966 Ker. L. R. 477; 1967 Ker. L. T. 629; A. I. R. 1967 Ker. 97, 99.

But, this general rule is subject to well-defined exceptions, two of them being Sec. 11 of the Suits Valuation Act and Sec. 21 of the C. P. C., both of which were dealt with in the above cited case by the Supreme Court. The words "by a Court not competent to deliver it" in this section refer to the inherent incompetency of the Court and not a lack of jurisdiction which can be waived, such as want of territorial jurisdiction. Although this section is not referred to in the Supreme Court judgment above mentioned, it must be taken that the decision of the Supreme Court implies that this section refers to the lack of inherent jurisdiction in the Court and not to its territorial jurisdiction which can be waived.<sup>3</sup> If a Court was not competent to deliver any judgment, order or decree, it may be shown that it was not so competent.<sup>4</sup>

The section has nothing to do with the competency of the former Court to try the subsequent suit. It is concerned only with the competency of the former Court to try the former suit, and with such competency of that Court as a fact. It follows that, if the former suit, as framed, was within the jurisdiction of the Court which tried it, the decree passed therein is a decree of a Court competent to pass it such as it is. If a suit is subsequently brought for a declaration that the decree is void, having been passed by a Court not competent to try the suit in which the decree was passed, all that the plaintiff is entitled to show under this section is that the former suit, as framed and laid on the pleadings therein, was beyond the jurisdiction of the Court. If he cannot establish such want of jurisdiction with respect to the particular suit, such as it was, nor prove collusion or fraud, the decree will stand, concluding the matter determined by it.<sup>5</sup>

(b) *Who can show incompetency?* Although one Court cannot set aside the proceedings of another Court, for want of jurisdiction, yet when a matter arises before a Court in the ordinary course of its jurisdiction, and one of the parties relies on, or seeks to protect himself by the proceedings of another Court, then in that way the jurisdiction of the Court whose proceedings are pleaded may be inquired into.<sup>6</sup> By the law both of this country and of England, anybody, whether a party or a stranger, against whom a previous judgment is used in a subsequent suit may impeach it in the suit in which it is so used on the ground of want of jurisdiction in the Court which passed it.<sup>7</sup> It is not necessary for him to bring an independent suit for setting it aside. Even the executing Court may refuse to execute a void decree without any formal proceedings to set it aside.<sup>8</sup> To this extent the executing Court is authorized to question the validity of the decree.

3. Hiralal Patni v. Kali Nath, A. I. R. 1955 All. 569 Beerappa v. Yeshwantrao, A. I. R. 1972 Mys. 338; (1972) 2 Mys. L. J. 123.

4. Kunheema Umma v. Balakrishna Nair, A.I.R. 1967 Ker. 97; I.L.R. (1966) 2 Ker. 440.

5. Newton Hickie v. Official Trustee of West Bengal, 1954 Cal. 506, 512; 58 C. W. N. 819.

6. Gunnesh v. Ram, (1874) 22 W. R. 36.

7. Rajib v. Lakhan, (1899) 27 C. 11, 21; Steph. Dig Art. 46; Taylor, Ev., s. 1714. According to English law, while in the case of fraud or collusion strangers alone may show

their existence, want of jurisdiction may be shown by anybody. As to fraud and collusion in this country v. post.

8. Pearey Lal v. Secretary of State, 1924 Cal. 913; 83 I.C. 446; 39 C. L. J. 454; Prayag Kumari v. Siva Prasad, 1926 Cal. 1; 93 I. C. 385; 42 C. L. J. 280; Keshava Lal Sakhdas v. Amarchand Somchand, 1933 Bom. 398; I. L. R. 57 Bom. 456; 35 Bom. L. R. 630; Padmanabhan Krishnan v. Mathevan Pillai, 1952 T. C. 294.

9. Gorachand v. Prafulla Kumar, 1925 Cal. 907; 89 I. C. 685; 42 C. L. J. 1; 29 C. W. N. 948, (F.B.).

(c) *Erroneous decision.* The competency of a Court cannot depend on, whether a point which it decides has been raised or argued by a party or counsel. It cannot be said that, whenever a decision is wrong in law or violates a rule of procedure, the Court must be held incompetent to deliver it. It has never been and could not be held, that a Court which erroneously decrees a suit which it should have dismissed as time-barred or barred by the rule of *res judicata*, acts without jurisdiction and is not competent to deliver its decree. This section and Sec. 41 recognize that the competency of the Court, even error or irregularity in the decision is a lesser evil than the total absence of finality which would be the only alternative.<sup>10</sup> There is a distinction between an order which a Court is not competent to pass and an order which, even if erroneous in law or in fact, is within the Court's competency.<sup>11</sup> As pointed out by the Full Bench in the case of *Hriday Nath v. Ramchandra*,<sup>12</sup> there is a fundamental distinction between existence of jurisdiction and exercise of jurisdiction. The circumstance that jurisdiction has been exercised in an irregular manner does not destroy the jurisdiction, for as Lord Hobhouse said in *Malkarjun v. Narhari*,<sup>13</sup> a Court has jurisdiction to decide wrong as well as right; if it decides wrong, the wronged party can only take the course prescribed by law for setting matters right, and, if that course is not taken, the decision, however wrong, cannot be disturbed.<sup>14</sup> It is very trite and very familiar that a challenge of the method of the exercise of the jurisdiction of a Court can never in law justify a denial of the existence of such jurisdiction.<sup>15</sup> Though, under this Section, the party is entitled to show that the judgment was obtained by fraud, it is not open to him to plead that the compromise on which the judgment was based was vitiated by a mutual mistake as to a material fact.<sup>16</sup> A decision afterwards found to be erroneous in law cannot have effect as *res judicata* in a later execution proceeding for a different relief.<sup>17</sup>

**4. Fraud.** (a) *General.* "Fraud" is an extrinsic, collateral act, which vitiates the most solemn proceedings of Courts of Justice. A judgment obtained by fraud or collusion may be treated as a nullity. An exception to the generality of these propositions should probably be made, where a purchaser has acquired title to property *bona fide* and for value upon the faith of a judgment *in rem*. Apart from this, they may be accepted without qualification in favour of persons who were not parties to the judgment, whether it was *in rem* or *in personam*.<sup>18</sup> It is always competent to any Court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud.<sup>19</sup> A decree obtained by fraud is a nullity, and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collate-

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- 10. This passage was cited with approval in *Nathu v. Kalian*, 26 A. 522; *Caston v. Caston*, (1900) 22 A. 270; see S. 41 ante.
- 11. *Sardarmal v. Aranvayal*, (1896) 21 B. 205, 211.
- 12. (1921) 48 Cal. 138; 58 I. C. 806 A. I. R. 1921 C. 34 (F.B.).
- 13. (1900) 25 Bom. 337; 27 I. A. 216; 7 Sar. 739 (P.C.).
- 14. *Pramatha Nath Bose v. Bhupan Mohan Bose*, 1922 Cal. 321; I.L.R. 49 Cal. 45; 64 I.C. 980; 33 C. L. J. 421; 25 C. W. N. 585; *Ishan Chandra v. Moomraj Khan*, 1926 Cal. 1101; 97 I. C. 770; 45 C. L. J. 24; 30 C. W. N. 940.
- 15. *Rajwant v. Ram Ratan*, 1915 P. C. 99; I. L. R. 37 All. 485; 13 A. L. J. 937; 17 Bom. L. R. 754; 20 C. W. N. 35; 29 M. L. J. 165; 30 I. C. 849.
- 16. *Smt. Krishna Subala Bose v. Dhannapati Dutta*, A. I. R. 1957 Cal. 59, 64.
- 17. *Baij Nath Goenka v. Padmanand Singh*, (1912) 39 C. 848.
- 18. Halsbury's Laws of England, 3rd Ed., Vol. 15, pp. 203-204.
- 19. *Paranjpe v. Kanade*, 6 Bom. 148, 150.

ral proceeding.<sup>20</sup> But fraud does not make a judicial act or transaction void but only voidable at the instance of the party defrauded. The judicial act may be impeached on the ground of fraud or collusion in an active proceeding for rescission by way of suit. The defrauded party may also apply for review of the judgment to the Court which pronounced it. But the judgment may also be impeached in a collateral proceeding in which fraud may be set up as a defence to an action on the judgment or as an answer to a plea of estoppel or *res judicata* founded upon the judgment.<sup>21</sup>

(b) *Negligence and fraud.* Fraud or collusion must be distinguished from negligence. Negligence is a negative act and consists of the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do. Fraud and collusion, on the other hand, are positive acts committed with the object of deceiving or injuring someone. When a person commits a fraud, or is guilty of collusion, he does so deliberately and with the intention of bringing about results, but in the case of negligence intention is absolutely wanting.<sup>22</sup> Mere negligence or gross negligence may not amount to any *mala fide* conduct. Negligence may be due to an error of judgment on the facts at the disposal of the litigant. He might, in all honesty, have decided not to present a particular aspect of the case having regard to the evidence available to him. It is not proper to treat negligence or gross negligence as fraud or collusion, unless fraud or collusion is proper inference from facts. The principle of the section cannot be extended to cases of gross negligence.<sup>23</sup>

(c) *Kind of fraud which vitiates decree.* Fraud, it was said in the under-noted case,<sup>24</sup> must not consist in the fact of a fraudulent defence having been set up; it must be fraud in procuring the judgment, such as collusion or the like between the parties, or fraud on the Court itself. In a subsequent case, it was said that the fraud must be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him. The fraud

- 20. Reg. v. Sadler's Co., (1868) 11 E.R. 1088; 32 L.J.Q.B. 337; 11 W. R. 1004 followed in Hare Krishna Sen v. Umesh Chandra Dutt, 1921 Pat. 193; 62 I.C. 962 (F.B.); Pulin Behari v. Satya Charan, 1923 Cal. 79; 70 I.C. 548; 36 C. L. J. 367; Bhola Nath Bose v. Nagendra Bala, 1928 Cal. 810; 110 I.C. 571; Bansi v. Dhapo, 24 All. 242; Bhagwandas Naraindas v. D. D. Patel & Co., 1940 Bom. 131; I. L. R. 1940 Bom. 403; 187 I. C. 867; 42 Bom. L. R. 231.
- 21. Bishunath Tewari v. Mst. Mirchi, 1955 Pat. 66; see also cases cited therein; Tribeni Mishra v. Ram-pujan Mishra, A. I. R. 1970 Pat. 13, 19.
- 22. Laxmi Narain v. Mohammad Shafi, 1949 E. P. 141.
- 23. Talluri Venkataseshaya v. Thadi-konda Koteswara Rao, I. L. R. 1937

- M. 263; 64 I.A. 17; 166 I. C. 1; A. I. R. 1937 P.C. 1; see also State of Rajasthan v. Rao Dhir Singh, A. I. R. 1972 Raj. 241. Cammell v. Sewell, (1860) 6 Jur. N. S. 918 (S.C.); 5 H. & N. 728; see Story Eq., Jur., 258 s. 252a; as to enquiries in the Bankruptcy Court guarding against fraud with regard to the consideration for a judgment debt, see *Ex parte Revell in re Tollemaeche*, (1884) 14 Q. B. D. 415; *Ex parte Lennox*, (1886) 16 Q. B. D. 315; *Ex parte Flatau*, (1889) 22 Q. B. D. 83; *Ex parte Bonham*, (1885) 14 Q. B. D. 604; *Ex parte Official Receiver, Re Miller*, (1893) 67 L. T. 601; *Re Fraser*, (1892) 2 Q. B. 633; *Re Hawkins, Ex parte Troup*, (1895) 1 Q.B. 404. As to the effect of fraud in judgments, see Hukum Chand, *op. cit.*, 484.

must be such as can be explained and defined on the face of a decree, and mere irregularity or the insisting upon rights which, upon a due investigation of these rights, might be found to be overstated or overestimated, is not the kind of fraud which will authorize the Court to set aside a decree.<sup>25</sup>

The mere fact that notice was not served is not necessarily fraud. If, on the other hand, it is shown that there was any deliberate suppression of notice particularly in order to give effect to a scheme then such suppression of notice would be clearly fraud. Further, it is not necessarily fraud on the part of any person to put forward a claim which is in fact unfounded in law. A person may make a claim to which he is not entitled and his conduct is not fraudulent merely on that ground. It must be found that there were circumstances which establish that the overclaim, if there be one, was made with knowledge and for a fraudulent purpose.<sup>1</sup> It is not possible to enumerate all the circumstances which would lead a Court to come to the conclusion that there was such a contrivance. In the case of *ex parte* decrees when the defendant had never appeared, the contrivance may consist in suppressing the summons. The fact of suppression would itself be the contrivance, and indeed a most effective contrivance for keeping the defendant in ignorance of his rights and from placing his case before the Court. Mere non-service would not do. But when the fact of non-service of summons is proved by the plaintiff in the later action, and the claim on which the decree was passed is proved to be a false one, the Court may and should ordinarily infer deliberate and hence fraudulent suppression, for the last mentioned circumstance supplies the motive for the suppression and indicates that the suppression is itself fraudulent.<sup>2</sup> Where the signature on the back of the summons was forged and the fact was within the knowledge of the plaintiff, it could be presumed that it was through his complicity that the return of the summons had been made and that the decree had, in consequence been one that had been fraudulently obtained.<sup>3</sup> For the purposes of Section 44, "fraud" means a deliberate act to conceal the knowledge of suit or to disable the party from defending it and thereby obtaining the decree.<sup>3-1</sup> The falsity of the claim by itself is not enough to set aside a domestic judgment on the ground of fraud. *To set aside a decree on the ground of fraud, the fraud alleged must be actual, positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the facts of the case, and the decree sought to be set aside must be obtained by that contrivance.*<sup>4</sup> The question as to the falsity can be gone into only to make the case of fraud probable, and to show why the fraud was committed.<sup>5</sup> The mere fact that the plaintiffs were unsuccessful in the proceedings under Order IX, Rule 13, C. P. C., which they had instituted to set aside an *ex parte* decree will not prevent them from successfully attacking the decree in a subsequent suit by establishing that

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| <p>25. Patch v. Ward, (1867-1868) L. R. 3 Ch. A 203 cited in Mahomed Golab v. Mahomed Sulliman, (1894) 21 C. 612 and followed in Nanda v. Ram Jiban, 1914 Cal. 232; I. L. R. 41 Cal. 900; 23 I. C. 887 which has been followed in Janki v. Lachmi, 1915 All. 400; I. L. R. 37 A. 585; 30 I.C. 789; Bishen Singh v. Wasawa Singh, A. I. R., 1926 L. 177: 92 I. C. 317.</p> <p>1. Jogesh Chandra Ghose v. Prosanna Kumar Talukdar, 1924 Cal. 395: 71</p> | <p>I.C. 962.</p> <p>2. Kunjabehari v. Krishnadhone, 1940 Cal. 489; I. L. R. (1940) 2 Cal. 477; 44 C. W. N. 912.</p> <p>3. Devraj v. Hazari, I. L. R. (1959) 9 Raj. 167: 1959 R. L. W. 114.</p> <p>3-1. I. L. R. (1972) 2 Delhi 964.</p> <p>4. Mohomed Hashim Ali Khan v. Iffat Ara Hamidi Begum, 1942 Cal. 180 at 203; 200 I.C. 392; 46 C. W. N. 561.</p> <p>5. Laganmani Kuar v. Ram Govinda Singh, 1942 Pat. 357: 199 I. C. 736.</p> |
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the decree had been obtained by means of fraud.<sup>6</sup> But then the matters of fraud involved must be independent of and outside the scope of the proceedings for setting aside the *ex parte* decree. If the main charge of fraud consists in the allegation that the summons had been fraudulently suppressed, and that allegation was fully investigated and negatived in the proceedings under Order IX, Rule 13, C. P. C., the latter is *res judicata* and the question of alleged fraudulent suppression of service cannot be reopened between the same parties in a subsequent suit.<sup>7</sup>

According to the headnote in *Logodapatti Chinnayya v. Ramanna*,<sup>8</sup> the following rule was enunciated in the Duchess of Kingston's case<sup>9</sup>:

"In order that fraud may be a ground for vacating a judgment, it must be a fraud that is extrinsic or collateral to everything that has been adjudicated upon, but not one that has been or must be deemed to have been dealt with by the Court."<sup>10</sup>

Where the decree of a foreign court is not assailed as having been obtained by fraud or collusion as required by this section, the decree will stand.<sup>11</sup>

**5. Perjured evidence, judgment obtained by.** In order to set aside decree upon the ground of fraud, it must be shown that the fraud was practised in relation to the proceedings in Court, and the decree must be shown to have been procured by practising fraud of some sort upon the Court. Where a case has been decided, even if it was decided *ex parte*, the decree cannot be set aside merely upon the ground that the claim of the plaintiff in that case was false, or that it was obtained by the aid of perjured evidence.<sup>12</sup> As observed by Wallis, C. J., in *Kadirvelu Nainar v. Kuppuswami Naicker*<sup>13</sup>:

"There has been considerable difference of opinion in England as to whether an action would lie to set aside the judgment of an English Court on the ground that it had been obtained by perjured evidence. In India, the weight of authority appears to be in favour of holding that such a suit will not lie."

In a case<sup>14</sup> an action was brought for infringement of a patent, and a judgment was recovered by the plaintiff, which was reversed by the Court of Appeal on the ground that the fact showed no infringement. Subsequently, the plaintiff brought an action to impeach the judgment on the ground that when an expert sent down by the Court, and whose evidence was the only material

6. *Khagendra Nath v. Pran Nath Roy*, I. L. R. 29 Cal. 395; 29 I. A. 99; 6 C. W. N. 473 (P.C.).

7. *Laganmani Kuwar v. Ram Govinda*, 1942 Pat. 357; 199 I.C. 736; see also the case-law discussed therein.

8. 38 M. 203; 19 I.C. 579; 25 M. L. J. 288; A. I. R. 1916 M. 364.

9. (1776) 2 Sm. L. C. 731; 34 J. H. L. J. 655; 20 Howell S. T. 537.

10. See *Musthan, K. E. v. Mahendra Nath Singh*, 1924 Rang. 119; I. L. R. 1 Rang. 500; 76 I.C. 794, and the cases cited therein; see also *Subrahmoniam v. Nagaramma*, A. I.

R. 1963 Ker. 26; 1962 Ker. L. J. 307.

11. *Teja Singh v. Satya*, 1970 Cur. L. J. 70; 72 P. L. R. 80, 85.

12. *Muktamala Dasi v. Ram Chandra*, 1927 Cal. 84; 87 I. C. 879; *Punjab Commercial Syndicate v. Punjab Co-operative Bank, Ltd.*, 1926 Lah. 96; I. L. R. 6 Lah. 512; 92 I. C. 322.

13. 1919 M. 1044; I. L. R. 41 Mad. 743 at 749; 45 I.C. 774; 35 M. L. J. 590 (F.B.) overruling *Venkatappa Naik v. Subba*, 29 Mad. 179.

14. *Flower v. Lloyd*, (1877-1878) 19 Ch. D. 327 cited in *Nistarini v. Nundo*, (1899) 26 C. 891.

evidence before the Court, as to the nature of the process, examined the defendant's works, the defendant fraudulently concealed from him certain parts of the process, so that he had no opportunity of discovering the points in which it resembled that of the plaintiff. On the original trial, the fraud was found to be proved, and the judgment was set aside. On appeal<sup>15</sup> by the defendant in the Court of Appeal (James, Baggallay and Thesiger, L.J.J.) the judgment of the lower Court was reversed on the ground that the fraud was not proved. But James, L.J., added the following observations, in which Thesiger, L.J. concurred and Baggallay, L.J., dissenting :

"Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end, if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action; or that false answers had been given to interrogatories, or a misleading production of documents or of a machine, or a process, had been given? There are hundreds of actions tried every year, in which the evidence is irreconcilably conflicting and must be on one side or the other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal judgment in their favour, the present defendants in their turn might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury, and so the parties might go on alternatively *ad infinitum*."

These observations, which were *obiter dicta*, were cited by Petheram, C.J., in the case undernoted<sup>16</sup> where the plaintiff alleged that he was induced by the fraud of the defendant not to defend the action, and in which the following observations (which were also *obiter*, as fraud was negatived) were made :

"The principle upon which these decisions rest is that where a decree has been obtained by a fraud practised upon the other side, by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him and may be set aside in a separate suit, and not only by an application made in the suit in which the decree was passed to the Court by which it was passed; but I am not aware that it has ever been suggested in any decided case, and in my opinion it is not the law, that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by, or at the instance of, the other party, which is of course fraud of the worst kind, that he can obtain a re-hearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given. To so hold would be to allow defeated litigants to avoid the operation, not only of the law which regulates appeals, but that, which relates to *res judicata* as well. The reasons why this cannot be the case are very clearly stated by James, L.J., in the passage I have quoted...."

15. Flower v. Lloyd, (1877-1878) 19 Ch. D. 327; see Abouloff v. Oppenheimer, (1882) 10 Q. B. D. 295, 307, 308, in which this decision was criticised, and Janki v. Lachmi, 1915 All. 400: I.

L. R. 57 All. 535: 30 I.C. 789, in which it was stated to be no longer law.  
16. Mahomed Golab v. Mahomed Sullivan, (1894) 21 C. 612, 619.

Since the English decision cited, there have been several cases, where the Court has, under similar circumstances, exercised jurisdiction. In the undermentioned case,<sup>17</sup> B in an action brought in the Probate Division had propounded a will, and A had propounded the substance of a later will alleging that the earlier will had been obtained by undue influence. A compromise was effected under which the alleged earlier will was admitted to probate. Afterwards A discovered that the last-mentioned alleged will was a forgery, and that B was a party or privy to the forgery and brought an action to set the compromise as having been procured by fraud, and obtained judgment in that action. In another case,<sup>18</sup> the plaintiff alleged that a judgment was procured by the fraud of the defendant, in that the latter fraudulently exhibited to the Court and jury certain false and counterfeit documents and certain memorandum books containing false and fraudulent entries touching the matters in issue in the action, and the judgment so fraudulently obtained was set aside. But yet in another, where the plaintiff, having obtained letters of administration to the estate of a deceased landlord, sued a tenant for rent, and the latter in his written statement objected that the letters of administration could be regarded as an order within the meaning of this section, the allegations of the defendant were not such as would entitle him to go into evidence for the purpose of proving that the letters of administration were invalid in law, and also that such a defence could not be successfully raised so long as the letters of administration were not revoked by a competent Court.<sup>19</sup> And in the case cited, it has been held, that a suit to set aside a decree on the ground that it had been procured by perjured evidence is not maintainable for the fraud must be actual and positive, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the facts of the case and obtaining of the decree by such contrivance.<sup>20</sup>

It has been held that there is fraud, on which the Court can set aside a decree, where there has been suppression of evidence which was of such a character that, if it had been produced, the Court would probably have arrived at a different conclusion.<sup>21</sup>

**6. Proof of fraud.** Pleadings in India are not to be strictly and literally construed. In *Gopi Narain Khauna v. Bansidhar*,<sup>22</sup> their Lordships of the Judicial Committee pointed out that if the plaint contains a statement of all the material circumstances, but the prayer is inaccurately framed, the Court can give appropriate relief, if the plaintiff is otherwise entitled to it.<sup>23</sup>

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- 17. *Priestman v. Thomas*, (1884) 9 P. D. 210 ref. to in *Rakshab v. Tarangini*, 1921 Cal. 332: 62 I. C. 448; (1921) 25 C. W. N. 207.
- 18. *Srirangammal v. Sandammal*, 23 M. 216, 219.
- 19. *Ambica v. Kala*, 10 C. W. N. 422 ref. to in *Rakshab v. Tarangini*, (1921) 25 C. W. N. 207.
- 20. *Jankl Kuar v. Lachmi Narain*, 37 A. 595; 1915 All. 400 following *Nanda v. Ram Jiban*, (1914) 41 C. 990; 23 I. C. 337; A. I. R. 1914 C. 232, per Jenkins, C. J. which dissented from *Venkatappa v. Subba*, (1905) 29 M. 179; and see *Munshi Mosul v. Surendra*, (1912) 16 C. W. N. 1002 and *Logadapatti Chin-nayya v. Ramanua*, 1916 Mad. 364; I. L. R. 38 M. 203; M. A. Maistry v. Abdul Aziz Rahman, 1927 Rang. 281; I. L. R. 5 Rang. 471; 104 I.C. 513; but see *Abdul Bari v. Amirjan*, 1927 Cal. 940: 100 I.C. 603.
- 21. *Bhikaji v. Balvant*, 1927 Bom. 510: 105 I. C. 296; 29 Bom. L. R. 1046; *Nanda v. Ram Jiban*, (1914) 41 C. 990, but see *Shriniwas Sarjerao v. Narayanrao Navlojirao*, 1923 Bom. 379: 76 I.C. 551.
- 22. (1905) 32 I.A. 123: 27 All. 325 (P.C.).
- 23. See *Bishunath Tewari v. Mst. Mirchi*, 1955 Pat. 66.

Fraud, like any other fact, can be proved by circumstantial evidence and if the circumstances are such as from which no other inference except that of fraud can be deduced, it would not be right to throw out the plea merely because no direct proof of it was furnished.<sup>24</sup> It was held in *Shedden v. Patrick*<sup>25</sup> that a prior judgment cannot be upset on a mere general allegation of fraud or collusion ; it must be shown how, when, where and in what way the fraud was committed. In *Patch v. Ward*,<sup>1</sup> Sir John Rolt, L.J., observed, that the fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance. To the same effect were the observations made by a Division Bench of the Calcutta High Court in *Mohamed Hashim Ali v. Iffat Ara Hamidi Begum*.<sup>2</sup> It was held in *Bishen Singh v. Wasawa Singh*,<sup>3</sup> that in order to obtain a reversal of the judgment given in the former case, it is not sufficient for the plaintiffs to prove constructive fraud, but they must prove actual positive fraud. In *Hans Raj Gupta and others v. Dehra Dun-Mussoorie Electric Tramway Company, Ltd.*,<sup>4</sup> it was held by their Lordships of the Privy Council, that the party alleging fraud is bound to establish it by cogent evidence and suspicion cannot be accepted as proof. As observed by Lord Atkin in *Narayanan Chettyar v. Official Assignee, Rangoon*,<sup>5</sup> fraud like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt. Mere want of good faith cannot establish fraud.<sup>6</sup>

**7. Who may show fraud ?** (a) *Strangers*. With regard to the parties who may show fraud, it is clear that a stranger to a judgment, against whom such judgment is used as evidence, may impeach it on the ground of fraud in the suit in which it is so used. This is also the rule in English law,<sup>7</sup> according to which, however, by the greater weight of authority,<sup>8</sup> the rule that fraud can only be proved by an innocent party does not apply to probate<sup>9</sup> or divorce cases.<sup>10</sup> Proof of fraud can only be given by a stranger to the judgment who is in no way privy to the fraud, and not by a party, since if the latter were innocent, he might have applied to vacate the judgment, and if guilty he cannot escape the consequence of his own wrong. But the language of this section is wide enough to allow a party to the suit in which the judgment was obtained to aver and prove that it was obtained by the fraud of his antagonist though the judgment stands unreversed.<sup>11</sup>

- 24. *Laxmi Narain v. Mohd. Shafi*, 1949 E. P. 141.
- 25. (1854). 1 Macq. 535; 149 R. R. 55.
- 1. (1867) 3 Ch. App. 203; 18 L. T. 134.
- 2 A. I. R. 1942 Cal. 180; 200 I.C. 292.
- 3 1926 Lah. 177; 92 I.C. 317.
- 4 1940 P.C. 98; I.L.R. 1940 Kar. 216 (P.C.); 187 I.C. 787.
- 5. 1941 P.C. 98 at 95; 196 I.C. 404 : 1941 A. L. J. 683; 54 L. W. 606.
- 6. *Laxmi Narain v. Mohd. Shafi*, 1949 E. P. 141.
- 7. *Taylor, Ev.*, s. 1713; *Phipson, Ev.*, 11th Ed., p. 586; *Steph. Dig. Art.* 46; *Bigelow's Estoppel*, 208; *Huffer* L. E.—159

v. *Allen, L. R. 2 Exch. 15*; see also *Aswini Kumar Samaddar v. Banamali Chakrabarty*, 40 I.C. 607; 21 C. W. N. 594; A. I. R. 1917 C. 612 (1).

8. This view is by no means a clearly settled and accepted one; the rule with regard to innocent parties being allowed to set up fraud is open to some doubt; *Rajib v. Lakan*, (1899) 27 C. 11 at p. 23.

9. *Birch v. Birch*, (1902) P. 130.

10. *Bonaparte v. Bonaparte*, (1892) P. 402.

11. *Ahmedbhoy v. Vullebhoy*, (1882) 6 B. 703.

(b) *Parties.* It has been accordingly held that a party to a previous suit in which a judgment was obtained may in a subsequent suit aver and prove that it was obtained by fraud though the judgment remains unreversed.<sup>12</sup> The section lays down not merely a rule of law relating to evidence, but it also lays down a rule of procedure as to how the judgment should be impeached. The section not merely declares that the judgment which is conclusive against a party may be impeached by such party on the ground of fraud or collusion, it also lays down that the party seeking to impeach it may impeach it in the very suit or proceeding in which the judgment is proved against him by his opponent.<sup>13</sup> In order to render the earlier decree inoperative, it is not necessary that it should be reversed or superseded by proceedings arising out of the same case. On the other hand, it may be collaterally superseded and rendered ineffective even by some ulterior and independent proceeding.<sup>14</sup> So, in a suit brought by A against B for khas possession of a tank the plaintiff put in a decree based on a compromise in a previous suit between him and the defendant to prove his right to khas possession, the defence *inter alia* was that the decree was a fraudulent one. It was objected by the plaintiff that as the defendant was a party to the former decree, which was unreversed, he should not be allowed to prove that it was procured by fraud, but it was held that the defendant was entitled to do so.<sup>15</sup>

A party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud,<sup>16</sup> and if it can be proved that the decree in the former suit was obtained by fraud, then there can be no question of *res judicata*.<sup>17</sup> If parties in a particular suit were really parties to a former suit, although only through a person competent to represent them, they would have, under the terms of this section, to show that the former decision was obtained by fraud or collusion to escape the bar of *res judicata*.<sup>18</sup> It is not necessary to bring an independent suit to set aside a decree obtained by fraud.<sup>19</sup> In the undermentioned case, it appeared that A

12. Rajib v. Lakhan, (1899) 27 C. 11; Nistarini v. Nundo, (1899) 26 C. 891. In appeal, 30 C. 369, it was held that the High Court had original jurisdiction to entertain a suit to set aside a decree of a mufussil Court on the ground of fraud and that even if this were not so, inasmuch as admittedly the Court had jurisdiction to entertain the suit so far as it was one for administration, the decree was relied upon by the defendant the plaintiff might show that it was obtained by fraud approved in Srirangammal v. Sandammal, (1899) 23 M. 216, 216; Bansi v. Dhapo, (1902) 24 A. 242 in which cases this matter and prior decisions thereon will be found fully discussed. These three cases are supported by *dicta* in Ahmedbhoy v. Vullebhoy, (1882) 6 B. 703; Manchharam v. Kalidas, (1894) 19 B. 821, 826; Nilmony v. Aimunissa, (1885) 12 C. 156; see also Bishunath Tewari v. v. Mst. Mirchi, 1955 Pat. 66; Hare Krishna Sen v. Umesh Chandra Dutta, 1921 Pat. 193, 196, 197; 62

I. C. 982; 2 P. L. T. 528; 6 P. L. J. 373 (F.B.); (Mst.) Parvati v. Gajraj Singh, 1937 All. 28; 166 I.C. 624; 1936 A. L. J. 1162. The case of Bansi v. Ramji, (1898) 20 A. 370, cannot be regarded as an authority, as the present section was not considered nor even mentioned in that decision.

13. Bishunath Tewari v. Mst. Mirchi, 1955 Pat. 66 at 74.

14. Padmanabhan Krishnan v. Mathevan Pillai, I. L. R. 1952 T. C. 252; 1952 T. C. 294 at 295; see also the cases cited therein.

15. Rajib v. Lakhan, (1899) 27 C. 11.

16. Manchharam v. Kalidas, (1894) 19 B. 821.

17. Krishnabupati v. Ramamurti, (1892) 16 M. 198.

18. Krishna Pillai v. Karthiayani, A. I. R. 1969 Ker. 26, 28.

19. Prayag Kumari Debi v. Siva Prasad Singh, 1926 Cal. 1; 93 I.C. 385; 42 C. L. J. 280; Bhagwan Das v. D. D. Patel, 1940 Bom. 131; I. L. R. 1940 Bom. 40; 187 I. C. 867; 41 Cr. L. J. 526; 42 Bom. L. R. 231.

mortgaged certain property to B, who instituted a suit on his mortgage and obtained a decree therein. Subsequent to such decree, A sold the property to a third party, C. B, having attempted to execute his decree against the property in the hands of C, the latter instituted a suit against A and B, for the purpose of having declared that the property was not liable to satisfy the decree, because the mortgage transaction was a fraudulent one and the decree had been obtained by fraud and collusion. In such suit, B contended that C having purchased subsequent to the decree was absolutely bound by it. But, it was held that, having regard to the terms of this section, it was open to C to prove that the decree had been obtained by fraud and collusion.<sup>20</sup> The words of the section "any party to a suit, etc." are wide enough to include parties to the first suit, both innocent and guilty. But there can be no doubt that the benefit conferred by the section is given only to an innocent party not privy to the fraud. For, though the words of the section would, by themselves and independent of the general law, allow a party to set up his own fraud in procuring the former judgment in order to defeat it (which has been characterised as a startling proposition),<sup>21</sup> it is clear that a guilty party would not be permitted to defeat a judgment by showing that, in obtaining it, he had practised an imposition on the Court.<sup>22</sup> A participant in a fraud, when that fraud is effected, cannot impeach the transaction on the ground of such fraud.<sup>23</sup> But, in that case, a party is precluded not by any rule of evidence, but by the general principles of justice which forbid a person to plead his own fraud.<sup>24</sup> In the case cited, where the nephew of a testator applied for a revocation of a grant of probate on the ground of perjury and fraud, alleging that he could have proved this at the time of the grant but had refrained because the executor had promised him a payment which had since been withheld, his application was refused on the ground that on his own showing he had been a party to the fraud.<sup>25</sup> There is clear authority for the proposition that a party to the decree cannot complain of any fraud practised by himself and another upon the Court. In other words, a party could not be permitted to take advantage of his own baseness or permitted to defeat a judgment by showing that in obtaining it he had practised an imposition on the Court. It would indeed be otherwise, if one of the parties and the Court were deceived by the fraud of another. In such a case, the jurisdiction of the Court to set aside a decree cannot be denied, provided the alleged fraud is established, and there is no excessive delay in bringing the action after the discovery of fraud.<sup>1</sup>

(c) *Privies.* It is no doubt a general rule, that a Court will not interfere actively in favour of a party who has been *particeps criminis* in an illegal or fraudulent transaction, and this rule ordinarily applies to privies in estate.<sup>2</sup> But the rule, that a privy in estate cannot set up fraud is not of general application. There are cases which form an exception to it, such as cases in which

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- 20. Nilmony v. Aimunissa, (1885) 12 C. 156.
- 21. Ahmedbhoy v. Vullebhoy, (1882) 6 B. 703 at p. 710, per Latham, J., having regard to the maxims *allegens suam turpitudinem non est audiendus* and *nemo ex dolo suo proprio relevetur aut auxilium capiat*.
- 22. Nistarini v. Nundo, 26 C. 891, 907.
- 23. Kondi Ravji v. Chunnilal Rupchandra, 1929 Bom. 1: I. L. R. 53 Bom. 75; 119 I. C. 229; 30 Bom. L. R. 1539.
- 24. Rajib v. Lakhan, (1899) 27 C. 11, 22, 23.
- 25. Kishoribhai v. Ranchodia, 38 B. 427; 25 I.C. 37; A. I. R. 1914 B. 114.
- 1. Shripadgouda v. Govindagouda, 1941 Bom. 77, 81; I. L. R. 1941 Bom. 160; 193 I.C. 795; 42 Bom. L. R. 1185.
- 2. See Rangammal v. Venkatachari, 18 Mad. 378, on appeal 20 Mad. 323: 6 M. L. J. 64.

the act in which the parties concur is against the principles of morality or public policy. In such cases, the Court sees the necessity of supporting the public interest, however blamable the parties themselves may be. Cases such as marriage-breakage bonds, contracts in restraint of trade may be given as illustrations. Another exception is where the collusive fraud has been on a provision of the law enacted for the benefit of the privies. No Court will permit that which is prohibited by law to be carried out by an indirect and circuitous contrivance. The rule which prevents a person who is a party from pleading the illegality of his act does not hold good as against persons claiming through such party, if they are the parties sought to be defrauded. So, where by means of a fraud practised on the Court, the owner of considerable property caused a decree to be passed against himself as defendant in a collusive suit upholding a fictitious *wakfnamah*, by which it was intended to tie up the property in perpetuity for the benefit of the direct descendant of the *waqif* to the exclusion of his collateral heirs, it was held in a suit by such heirs to recover possession of their share by inheritance of the property so dealt with, (a) that a Court, which was otherwise competent to entertain the suit, had jurisdiction, on the finding that it had been obtained by means of fraud, to treat the previous decree as a nullity, and (b) that the plaintiffs were not prevented from setting up the plea that the previous decree had been obtained by fraud by the fact that the person who practised such fraud was their predecessor-in-title.<sup>3</sup>

**8. Fraud accomplished and fraud attempted.** There are some exceptions or quasi-exceptions to this general rule that a man cannot set up an illegal or fraudulent act of his own in order to avoid his own deed. A distinction exists between those cases in which the fraud is only attempted but not carried into effect and those in which it has actually been carried into effect. In the former case, the party attempting to commit fraud is not precluded from maintaining any action to set aside the fraudulent action, but in the latter case he is not allowed to take advantage of his own wrong and is precluded from maintaining an action to set aside the fraudulent transaction actually carried into effect.<sup>4</sup>

In *Symes v. Hughes*,<sup>5</sup> a fraudulent transfer was set aside in order that effect might be given to a compromise arranged between the transferor and his creditors in the interests and for the protection of innocent third parties. So, if a voluntary deed has been kept in the hands of the grantor and has never been acted upon and the grantees have not been informed of its existence, a court of equity will treat it as imperfect instrument and if the grantees surreptitiously gets possession of it, a court of equity will give relief against it.<sup>6</sup>

In *Venkatadri v. Pedavenkayamma*,<sup>7</sup> it was noticed that a defendant could be allowed to show the turpitude of both himself and the plaintiff in order to protect himself against an action by the plaintiff to give effect to a contract or deed entered into for an illegal or immoral purpose. This exception was allowed not out of sympathy for the wrong-doer but on grounds of public

3. Barkat-un-nissa v. Fazl Haq, 26 A. 272.

5. (1870) L. R. 9 Equity 475.

4. Goberdhan v. Ritu, 23 Cal. 962; Jadunath v. Ruplal, 33 Cal. 967; Honapa v. Narsapa, 23 Bom. 406.

6. Cecil v. Butcher, (1821) 2 Jac. & W. 565.

7. 10 Mad. 17.

policy, namely, that the court will not assist a plaintiff to recover property or enforce a contract in respect of which he has no true title or right. It is true that the rule of public policy could not be applied without allowing the defendant to benefit by it, but still the benefit was allowed to him by accident, as it were, and not in order to secure him any right to which he was entitled.<sup>8</sup>

To sum up : Though a party to the judgment, order or decree may show that the judgment, order or decree was obtained by fraud of his adversary, he will not be permitted to show that it was obtained by his own fraud. Generally, a person can neither plead his own fraud nor the fraud of his predecessor-in-interest through whom he claims. But the rule that the privy in state cannot set up fraud as an answer is not of general application. Where the fraud practised is of a provision of the law enacted for the benefit of the privies, the privies are not estopped from proving the fraud of their predecessor-in-interest.<sup>9</sup>

In all these cases, the court may decline to move and may answer the plaintiff in the words of Story's Equity, Section 268 : Where the party seeking relief is the sole guilty party or where he has participated equally deliberately in the fraud or where the agreement which he seeks to set aside is founded on illegality, immorality or based on unconscionable conduct on his own part ; in such cases courts of equity will leave him to the consequences of his own inequity and will decline to assist him to escape from the coils which he has studiously prepared to entangle others.

**9. Collusion.** (a) *General.* As in the case of the term "fraud", the Act contains no definition of the word "collusion" for the purposes of this section. "Collusion" is the uniting for the purposes of fraud or deception, and has been defined to be deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person or for some improper purpose. Collusion in judicial proceedings is a secret agreement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose. It appears to be of two kinds : (a) when the facts put forward as the foundation of the sentence of the Court do not exist, (b) when they exist, but have been corruptly preconcerted for the express purpose of obtaining the sentence. In either case, the judgment obtained by such collusion is a nullity.<sup>10</sup>

8. Holman v. Johnson, (1775) Cowper 341, and Lucknidas v. Mulji, 5 Bom. 295; see also Immani Appa Rao v. Gollappalle, 1961 (2) M. L. J. (N. R. C.) p. 58.

9. See Ahmedbhoy v. Vullebhoy, 6 Bom. 703 at p. 712.

10. Wharton's Law Lexicon, (1892) p. 151; 12th Ed. (1915) p. 187 cited in Laxmi Narain v. Mohd. Shafi, 1949 E. P. 141 at 149. This definition is perhaps in some respects too limited. Proof of collusion in the sense that the parties, even without fraud, were not really in contest, will vitiate the judgment; Earl of Bandon v. Becher, (1835) 3 C. and F. 510; Girdlestone

v. Brighton Aquarium Co., 1879) 4 Ex. D. 107 referred to in Nistarini v. Nundo, (1899) 26 C. 891 at p. 909. The former action in the case last cited was once brought, not for the purpose of giving the person named as plaintiff the fruits of it or indeed any benefit whatever from it, but for the protection of the defendants. It was held that there was no fraud in procuring the former judgment, but that it was no bar inasmuch as there had been collusion (deceit) and the defendants in the second action were in truth both plaintiff and defendants in the former action, the judgment in which was pleaded as

"Collusion", however, is not the appropriate term to apply to the obtaining of a decree by a fraud on the Court.<sup>11</sup>

(b) *Burden of proof.* The burden of proving fraud or collusion lies on the party alleging it.<sup>12</sup>

(c) *Plea if open in suits under Order XXI, Rules 63, C. P. C.* It has been held by the Madras<sup>13</sup> and the Andhra<sup>14</sup> High Courts that where a claim preferred under Order XXI, Rule 58, C. P. C., having been upheld by the executing Court, the decree-holder files a suit under Order XXI, Rule 63 of the Code, it is open to the defendant to raise a defence that the decree obtained by the plaintiff was obtained by fraud or collusion. But the Bombay,<sup>15</sup> Patna<sup>16</sup> and the Calcutta<sup>17</sup> High Courts have taken a contrary view. According to these Courts the issue that can be raised in a suit instituted under the provisions of O. XXI, R. 63, must in essence be of the same nature as the issue in the claim case in the executing Court, although the ambit of the enquiry of that issue would be more detailed in the suit. In the execution proceedings, the judgment-debtor cannot challenge the validity of the decree under execution on the ground of fraud and the claimant can only urge that the property attached is his property and not of the judgment-debtor. He cannot urge that the decree is bad or even that the execution is barred by time. A suit, under Order XXI, Rule 63 of the C. P. C., is a mere continuation in a different forum of the claim proceedings and the claimant cannot be allowed in that suit to question the validity of the decree under execution to which he was not a party and by which he is not directly affected. It has, however, been held that a certificate of sale obtained by fraud is vitiated and that the defendant could show that both the certificate and the sale were vitiated by the fraud of one of the parties and should hence be ignored.<sup>18</sup>

**10. Who can show collusion?** It is clear that a stranger to a judgment can avoid its effect by proof of collusion. But a party who has himself procured the judgment by his collusion cannot ordinarily do so. While a decree fraudulently obtained may be challenged by a third person,<sup>19</sup> or innocent party<sup>20</sup> who stands to suffer by it in the same or any other Court; yet

a bar. The meaning of this section is that if collusion is proved then the judgment cannot act as a bar; (*Mst.*) *Parbati v. Gajraj Singh*, 1937 All. 28: 166 I. C. 624; 1936 A. L. J. 1162. *In Sardarmal v. Aranyaval*, (1896) 21 B. 205, 215, it was held that there was no collusion.

- 11. *Bindeshwari v. Bageshwari*, 1936 P. C. 46, 48: 163 I. A. 53: I. L. R. 15 Pat. 208; 160 I. C. 68; 1936 A. L. J. 104: 38 Bom. L. R. 389: 40 C. W. N. 289: 62 C. L. J. 521: 70 M. L. J. 122: 1936 M. W. N. 321: 1936 P. W. N. 17.
- 12. *Venkaṭa Seshayya v. Kotiswara Rao*, 1937 P. C. 1: 64 I.A. 17: 166 I.C. 1; *Hafiz Mohammad Fateh Nasib v. Swarup Chand Hukum Chand*, 1942 Cal. 1: I. L. R. (1941) 2 Cal. 434: 200 I.C. 822: 73 C. L. J. 475.
- 13. *Naranayyan v. Nageswarayan*, 17 Mäd. 389.
- 14. *Gurujada Vijaya Lakshmamma v. Yarlagadda Padmanabham*, 1955 Andh. Pra. 112.
- 15. *Gulibai v. Jagannath Galvankar*, 10 Bom. 659.
- 16. *Deoki Singh v. Shri Thakur Raghvindra Bhagwan*, 1939 Pat. 430: 183 I. C. 371: 5 B. R. 922: 1939 P. W. N. 229.
- 17. *Hashim Ali Khan v. Iffat Ara Hamidi Begum*, 1942 Cal. 180: 200 I. C. 392: 74 C. L. J. 261. 46 C. W. N. 561.
- 18. *Sukhi v. Prayag*, A. I. R. 1959 Pat. 508.
- 19. *Chenvirappa v. Puttappa*, 11 B. 708, 713; *Darbarilal v. Mabbub Ali Mian*, 1927 All. 538 (2): I. L. R. 49 All. 640: 101 I.C. 513.
- 20. In cases cited ante.

as between parties themselves to a collusive decree neither of them can escape its consequences.<sup>21</sup> Strangers no doubt may falsify a decree by charging collusion; but a party to a decree not complaining of any fraud practised upon himself cannot be allowed to question it. It is not competent to a party to a collusive decree to seek to have it set aside.<sup>22</sup> A party to a collusive decree is bound by it, except possibly when some other interest is concerned that can be made good only through him.<sup>23</sup> The distinction between fraud and collusion has been said<sup>24</sup> to lie in this, that a party alleging fraud in the obtaining of a decree against him is alleging matter which he could not have alleged in answer to the suit, whereas a party charging collusion is not alleging new matter. He is endeavouring to set up a defence which might have been used in answer to the suit, and that he cannot be allowed to do so consistently with the principle of *res judicata*.<sup>25</sup>

**11. Generally.** The question of fraud, as affecting judgment and decree, was considered by the Bombay High Court on general grounds of English law in the case of *Amedbhoy v. Vullebhoy*,<sup>1</sup> which must be read in conjunction with the previous observations. After a division of persons into three classes, with reference to their position as affected by the judgment, viz. (a) privies, (b) persons who, though not claiming under the parties to the former suit, were represented by them therein, (c) strangers, neither privies to nor represented by the parties to the former suit, the Court proceeded to consider the effect of a previous judgment on these three classes respectively, with reference to their capacity to dispute it.

In the first place, the judgment may be an honest one obtained in a suit conducted with good faith on the part of both plaintiff and defendant. In such a case, the previous judgment is clearly binding both on class (a) and class (b); class (c) (strangers to the former suit) will be in no way affected by the judgment if it be *inter partes*, but if it be one *in rem* passed by a competent Court<sup>2</sup> they will be bound by and cannot controvert it.<sup>3</sup> In the second place, the judgment may be passed in a suit really contested by the parties thereto, but may be obtained by the fraud of one of them as against the other. There has been a real battle but a victory unfairly won. In this case again, class (a) and class (b) and as regards judgments *in rem* class (c) are in one and the same position, which is that of the parties themselves. The judgment is binding on them so long as it remains in force, but it may be impeached for fraud and set aside if the fraud be proved. In the third place, the previous judgment may have been obtained by the fraud and collusion of both the parties to the former suit. In this case, there has been no battle, but a sham fight. As between

- 21. Chenvirappa v. Puttappa, 11 B. 708.
- 22. Varadarajulu v. Srinivasalu, (1897) 20 M. 333; see also Shripadgouda v. Govindagouda, 1941 Bom. 77: I. L. R. 1941 Bom. 160: 193 I.C. 795: 42 Bom. L. R. 1185.
- 23. Chenvirappa v. Puttappa, 11 B. 708; Kondi Ravji v. Chunnilal Rupchand, 1929 Bom. 1: I. L. R. 53 Bom. 75: 113 I.C. 229: 30 Bom. L. R. 1539.
- 24. Varadarajulu v. Srinivasalu, (1897) 20 M. 333 at p. 338.

- 25. ib.; see also Sahib Rai v. Bahari Rai, 1927 All. 494: 101 I. C. 765. If it be proved that the decree was obtained by the collusion of others, there can be no *res judicata*; Krishnabupatti v. Ramamurthi, (1892) 16 M. 198.
- 1. (1882) 6 B. 703.
- 2. v. S. 41 ante.
- 3. Ahmedbhoy Hubibhoy v. Vullebhoy Cassumbhoy, (*supra*).

the parties to such a judgment, it is binding. The same rule will apply between the privies of these parties,<sup>4</sup> except probably where the collusive fraud has been on a provision of the law enacted for the benefit of such privies.<sup>5</sup> Thus in the undermentioned case, *A*, with the intention of defeating and defrauding his creditors, made and delivered a promissory note to *B* without consideration, and collusively allowed a decree to be obtained against him on the note, and conveyed to *B* a house in part satisfaction of the decree; it appeared that certain of *A*'s creditors were consequently induced to remit part of their claims. *A* having died, his widow and legal representatives under Hindu law sued *B* to have the note and conveyance set aside and to have the defendant restrained by injunction from executing the decree but it was held that the plaintiff was not entitled to relief in respect of the note and the decree, although she was not personally a party to the fraud, inasmuch as she claimed through *A* by whose contrivance and collusion the defendant was enabled to obtain the decree.<sup>6</sup> But as regards class (b), persons represented by but not claiming through the parties to the former suit and (where a judgment *in rem* is in question) class (c) strangers, any member of either class may, in any subsequent proceeding, whether as plaintiff or defendant, treat a previous judgment so obtained by fraud and collusion as a mere nullity, provided, of course, that he clearly establishes the fact of the fraud and collusion.<sup>7</sup> It has been held, in the Calcutta High Court, that a consent decree cannot be set aside on motion on the ground that it was obtained by fraud and misrepresentation, but that a separate suit must be brought for that purpose.<sup>8</sup> And in a case in the Allahabad High Court, where it was alleged that a compromise was obtained by undue influence, it was held that a decree obtained by consent or on a compromise can be attacked in a separate suit, not only upon the ground of fraud, but upon any ground which would be sufficient for invalidating the agreement upon which the decree was based.<sup>9</sup> *Semblé*: having regard to the wide terms of this section, it is not possible to say that it is not open to a Court other than the Court from which a grant has issued, in cases of fraud or collusion, to deal with the matter and decide whether the grant has been obtained by fraud or collusion. But the better course in such cases would be, when it is open to a party alleging fraud to apply to the Court, from which the grant issued, to stay the suit to enable an application to be made to revoke the grant.<sup>10</sup>

**12. Setting aside decrees on ground of mistake.** A decree of a Court cannot be challenged in another action on the ground of mistake in its adjudication. The Section allows judgments, orders or decrees, to be challenged in collateral proceedings only on ground of fraud or collusion in obtaining them, or on the ground of incompetency of the Court which delivered them. Mistake as such does not find mention in the section as a ground

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| 4. Ahmedbhoy Hubibhoy v. Vullebhoy Cassumbhoy, (1882) 6 Bom. 703; Rangammal v. Venkatachari, 18 M. 378, on appeal 20 Mad. 323.   | 8. Foolcoomary v. Woodoy, (1898) 25 Cal. 649.   |
| 5. Ahmedbhoy Hubibhoy v. Vullebhoy Cassumbhoy, (1882) 6 Bom. 703.  | 9. Shami v. Ramjas, (1911) 34 A. 143; 9 A. L. J. 1; 13 I.C. 20 following Huddersfield Banking Co. v. Henry Lister & Sons, Ltd., L. R. (1895) 2 Ch. 273; (Mst.) Gulab v. Badshah (1909) 13 C. W. N. 1197; and Sarbesh v. Hari, (1910) 14 C. W. N. 451. |
| 6. Rangammal v. Venkatachari, 18 M. 378.   | 10. Rakshab v. Tarangini, 1921 Cal. 332; 25 C. W. N. 207; 62 I. C. 448.   |
| 7. Ahmedbhoy Hubibhoy v. Vullebhoy Cassumbhoy, (1882) 6 B. 703 at pp. 710–714, and see also Baikanta v. Mohendra, 1 C. L. J. 65. |   |

therefor. One of the maxims in statutory interpretation is *expressio unius est exclusio alterius* (the express mention of one thing implies the exclusion of another). When incompetency, fraud and collusion have alone been mentioned as grounds for avoidance of decrees, the implication is that no other ground is available therefor. Mistake must, therefore, be ruled out as a ground for relief against adjudication in civil judgments, orders and decrees.<sup>11</sup>

## OPINIONS OF THIRD PERSONS, WHEN RELEVANT

### GENERAL

#### SYNOPSIS

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| <ol style="list-style-type: none"> <li>1. Topical introduction.</li> <li>2. Opinions when admissible,</li> </ol> | <ol style="list-style-type: none"> <li>3. Distinction between "matter of fact" and "matter of opinion".</li> <li>4. Summary.</li> </ol> |
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**1. Topical introduction.** The opinions of any person, other than the Judge by whom the fact is to be decided, as to the existence of facts in issue or relevant facts are, as a rule, irrelevant to the decision of the cases to which they relate. To show that such and such a person thought that a crime had been committed, or a contract was made, would either be to show nothing at all, or it would invest the person whose opinion was proved with the character of a judge. The use of witnesses being to inform the tribunal respecting facts, their opinions are not in general receivable as evidence, though what is a matter of opinion is sometimes a question of some difficulty. The ground of exclusion of such evidence is that opinions, in so far as they may be founded on no evidence, or evidence not recognized by law, are worthless, and in so far as they may be founded on legal evidence, they tend to usurp the functions of the court and jury, whose province alone it is to draw conclusions of law and fact.<sup>12</sup>

But, in few cases, it is not only to some extent inevitable, but also sometimes positively desirable, that a witness should, in some measure, usurp *de facto* what is traditionally defined as the function of the jury, or the judge, when there is no jury. Thus, on questions of identity, handwriting, condition, age, appearance or resemblance of persons or things, or the general character of the weather, or the general conduct of a business or of persons during a certain period, or the general character of a meeting alleged to be seditious, clearly, only evidence of opinion can be given, and would in most cases be received.<sup>13</sup> This is on the short ground that the witness is, in some circumstances, very much more competent to perform the function than is the jury or the Judge. Such evidence cannot be said to be irrelevant, if that

11. Vasudevaru v. Raman Pillai, A. I. R. 1963 Ker. 217.

12. Halsbury's Laws of England, 3rd Ed., Vol. 15, p. 320. See Phipson, 11th Edn., pp. 1271, 1272 citing Carter v. Boehm, 3 Burr. 1905, 1918; Ford v. Tynte, (1864) 2 De G. J. & S. 127; North Cheshire Co. v. Manchester Co., 1899 A.C. 83, 85 and Davie

v. Edinburgh Magistrates, 1953 S.C. 34; 1953 S. L. T. 54 where Lord President Cooper said, "The parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert."

13. Cakle's Cases and Statutes, 8th Ed., p. 120.

word is taken in the Thayrian sense of "having no probative value". The cases in which such evidence is admissible are specified in Sections 45–51.<sup>14</sup> A distinction must, however, be drawn between the cases where an opinion may be admissible under Sections 6–11 (independently of its correctness as such) as forming a link in the claim of relevant facts to be proved, and those in which an opinion is tendered merely as such, and is sought to be made use of solely by reason of the correctness of its finding upon its subject-matter. In the last-mentioned case, the opinion will be excluded unless it be one of those which are permitted to be given in evidence under the abovementioned sections. That a man holds a certain opinion is a fact (Section 3); and this fact, when relevant, must, like others, be proved by direct evidence. Subject to a proviso in favour of the opinions of experts who cannot be called as witnesses, oral evidence, if it refers to an opinion or to the grounds on which that opinion is held, must be the evidence of the person who holds that opinion on those grounds (Section 60).

The weight of such evidence depends on the maxim *cui libet insua arte perito est credendum*, and the grounds of its admissibility are contained in the general rule "that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the character of a science or art, as to require a course of previous habit or study in order to obtain a competent knowledge of its nature."<sup>15</sup> On the other hand, it is equally clear that the opinions of skilled witnesses cannot be received, when the inquiry relates to a subject which does not require any peculiar habits or course of study in order to qualify a man to understand it.<sup>16</sup> Thus, witnesses are not permitted to state their views on the construction of documents<sup>17</sup> or on matters of moral or legal obligation<sup>18</sup> or on the manner in which other persons would probably have been influenced had the parties acted in one way rather than another, because, on such points, the court is as capable of forming an opinion as the witnesses themselves.<sup>19</sup> When the subject is one upon which the jury is as capable of forming an opinion as the witnesses, the reason for the admission of such evidence fails, and it will be rejected.<sup>20</sup>

14. Steph., Introd., 167; Phipson, Ev., 11th Ed., 503; Best, Ev., s. 511; Powell, Ev., 9th Ed., 37-55; Lawson's Expert and Opinion Evidence, 1905; Wigmore, Ev., s. 1917 et. seq.
15. Taylor, Ev., s. 1418; as to meaning of the term "expert", see Lawson's Expert and Opinion Evidence, 1905.
16. Taylor, Ev., s. 1419; see Pranjivandas v. Mayaram, (1863) 1 Bom. H. C. R. 148 at p. 155. See remarks of Lord Bramwell in G. v. M., 10 App. Cas. 171, 200 and of Vaughan Williams, J., in R. v. Silverlock, (1894) 2 Q. B. 766.
17. Marquis of Camden v. Inland Revenue Commissioners, (1914) 1 K. B. 641, at 647-650 C. A. (on appeal sub nom Inland Revenue Commissioners v. Marquis of Camden, 1915 A. C. 241 (H.L.); but see Emperor v. Nathalal Vannmali, A. I. R. 1939 Bom. 339; I.L.R. 1939 Bom. 434; 184 I.C. 252; 40 Cr. L. J. 891; 41 Bom. L. R. 548.
18. Campbell v. Richards, (1933) 5 B. & Ad. 840 at 846, per Lord Denman, C. J..
19. Taylor, Ev., s. 1419; Greenleaf, Ev., s. 441.
20. Ramadge v. Ryan, (1832) 9 Bing. 333; Collins Arden Products v. Barking Corp., (1943) K. B. 419 and see Concentrated Foods v. Champ, (1944) K. B. 342 at p. 350; Broughton v. Whittaker, (1944) K. B. 269; Clark v. Ryan, (1960) 103 C. L. R. 486; see for a recent example Lord Parker's observations in D. P. P. v. A. and B. C. Chewing Gum, Ltd., (1967) 2 All E. R. 504, 506.

**2. Opinions when admissible.** The opinions of skilled witnesses are admissible in evidence, not only where they rest on the personal observation of the witnesses themselves, and on facts within their own knowledge, but even where they are merely founded on the case as proved by other witnesses at the trial. "The opinions of scientific men upon proved facts may be given by men of science within their own science."<sup>21</sup> But here the witness cannot, in strictness, be asked his opinion respecting the very point which the court or jury is to determine.

The opinion of an expert witness, however eminent in his field he may be, must not be read as conclusive of the fact which the Court has to try.<sup>21-1</sup> Such opinion may be invited, in exceptional circumstances, where there is no dispute as to facts or their interpretation, but it must be considered by the Court as nothing more than relevant. Any opinion which tries to determine the very issue which the Court has to try must be disallowed, though the Court may consider it, if there is no dispute as to facts whatever.<sup>22</sup> An expert may refer to text-books to refresh his memory or to correct or confirm his opinion,<sup>23</sup> e. g., a doctor to medical treatises, a valuer to price-lists, a foreign lawyer to codes, text-writers, and reports. If he describes particular passages therein as accurately representing his views, they may be read as part of his testimony, though not (in England) as evidence *per se*.<sup>24</sup> The guilt or innocence of the accused has to be determined by the tribunal appointed by law and not according to the test of anyone else.<sup>25</sup> Expert evidence is nearly always a weak type of evidence, much more so in the case of an expert who has not sufficient knowledge on that subject.<sup>1</sup> The opinion of an expert is open to corroboration or rebuttal,<sup>2</sup> and when the opinion is relevant the grounds upon which such opinion is based are also relevant.<sup>3</sup> The evidence of expert is to be received with caution, because they may often come with such a bias in their minds to support the cause in which they are embarked that their judgments becomes warped, and they themselves become, even when conscientiously disposed, incapable of expressing a correct opinion.<sup>4</sup>

21. Folkes v. Chadd, (1782) 3 Doug 157 cited with approval in United States Shipping Board v. S. S. "St. Albans", A. I. R. 1931 P. C. 189; 131 I.C. 771.

21-1. Kamala Kuer v. Ratan Lal, A.I.R. 1971 All. 304.

22. Baswantrao Bajirao v. Emperor, A. I. R. 1949 Nag. 66; I. L. R. 1948 Nag. 711; 50 Cr. L. J. 181.

23. S. 159 post.

24. Taylor, Ev., s. 1422; Sussex Peerage Case, 11 C. & F. 85, 114; Collier v. Simpson, 5 C. & P. 73; Nelson v. Bridport, 8 Beav. 527; Concha v. Murietta, 40 Ch. D. 543.

25. State of Mysore v. Sampangiramiah, A. I. R. 1953 Mys. 80, 82; I. L. R. 1953 Mys. 171.

1. Melappa v. Guramma, A. I. R. 1950 Bom. 129, 135.

2. S. 46 post.

3. S. 51 post.

4. See Best, Ev., s. 514 et seq., and

per Lord Campbell in Tracy Peerage case, 10 C. & F. 191; See remarks of Jessel, M. R., in Abinger v. Ashton, L. R. 17 Eq. 358 at 374; "An expert is not like an ordinary witness, who hopes to get his expenses, but he is employed and paid in the sense of gain, being employed by persons who call him. Undoubtedly there is a natural bias to do something serviceable for those who employed you and adequately remunerated you". See also Goday v. Ankitam, (1871) 6 Mad. H. C. R. 85, 87, 88; Hari v. Moro, (1886) 11 B. 89; Sadiqa Begam v. Ataullah, A. I. R. 1933 Lah. 885; 144 I.C. 497; 34 P. L. R. 788; but see Lila v. Bijoy Protap, A. I. R. 1925 Cal. 768; 87 I. C. 534; 41 Cr. L. J. 300. And as to criminal cases, see Srikant v. R., (1905) 2 A. L. J. 444.

And thus, the evidence of a handwriting expert is not, ordinarily, sufficient ground for conviction of a forgery charge without corroboration.<sup>5</sup>

**3. Distinction between "matter of fact" and "matter of opinion"**  
 Accurately to distinguish 'matter of fact' from 'matter of opinion' is not less difficult than to distinguish it from 'matter of law'. In 1898, Thayer wrote : "In a sense all testimony to matter of fact is opinion evidence, i. e., it is a conclusion formed from phenomena and mental impressions."<sup>6</sup> Amongst English writers Phipson, for instance, has said : "As most language embodies inferences of some sort, it is not possible wholly to dissociate statement of opinion from statement of fact."<sup>6-1</sup> No statement can be the mere reduction to words of data perceived, to the exclusion of all mental process by the person making the statement. A human being cannot behave as a mere 'dictaphone'. The position has been put very lucidly by another American writer on the Law of Evidence.

"Our whole conscious life is a process of forming working beliefs or opinions from the evidence of our senses, few of them exactly accurate, most of them near enough correct for practical use, some of them seriously erroneous. Every assertion involves the expression of one or more of these opinions. A rule of evidence which called for the exclusion of opinion in this broad sense would therefore make trials quite impossible."<sup>7</sup>

The average man tells his story in the only way he knows. He is unaware of the extent to which inference enters into his perceptions. Interference and insistence on the factual form, even if it were possible and even if it were otherwise desirable, would in practice only confuse the witness and pervert the truth.

One thing emerges clearly; all statements partially based upon inference have never been, are not, and cannot be, excluded. The most that can be said is that some inferences, if made by a witness, are objectionable. Evidence based on an inference or inferences of this sort is, for the purposes of law of evidence, called opinion. Evidence which is not based on such an inference is, for the purposes of law of evidence, called fact. The difference is a creature of the law. Text-book writers who propound the opinion rule usually treat expert testimony as an exception. They also treat as exceptions certain categories of non-expert testimony. These categories are variously listed by different writers. Most lists tend to include evidence on questions of identity, handwriting, condition, age, appearance or resemblance of persons or things; on the general character of the weather, or the general conduct of a business or of persons during a certain period, or the general character of a meeting alleged to be seditious.

An instance, erroneously supposed to be simply an 'opinion', is found in cases, where, the phenomena being too numerous or intangible to permit of

5. Venkata Row, *In re*, 14 I.C. 418: (1913) 36 M. 159; Manmohan Singh v. State, I. L. R. (1969) 2 Punj. 173: 1969 Cr. L. J. 932; A. I. R. 1969 Punj. 225 (243) (reason-identification of handwriting an imperfect science).

6. Thayer, *A Preliminary Treatise on Evidence — Common Law* (1898), p. 524.  
 6-1. Phipson, *Ev.*, 11th Ed., p. 530.  
 7. J. M. Maguire, *Evidence—Common Sense and Common Law* (1927), p. 24.

correct or effective individual statement, witnesses are permitted to state simply the impression such phenomena produced in their minds. This, apparently, is simply another method of stating facts.<sup>8</sup> Thus, a witness can testify as to whether a person appeared to be in 'good health' or the reverse; or seemed hostile or friendly; or appeared intoxicated or looked excited; or scared, old or young, or was of a particular age, pleased or agitated, or that two persons seemed to be attached to each other, or that a building or document was in good or bad preservation or the like. Such persons are not experts properly so called though experts with the same facilities for observation, may, of course, testify in the same manner and to the same points. The obvious, and perhaps, the only, limitation placed on evidence of this nature, which may be described as the opinions of non-experts, is that the witness will not be allowed unnecessarily to invade the province of the Judge or jury, substituting his opinion for theirs.<sup>9</sup> But such evidence is admitted on the grounds that positive and direct testimony is unattainable.<sup>10</sup> As all language embodies inferences of some sort, it is not possible wholly to dissociate statements of opinion from statements of fact. The evidentiary test has been said to be that if the fact stated necessarily involves the component facts, it will be admissible as amounting to a mere abbreviation; if it does not necessarily involve them, but may be supported upon several distinct bases of fact, the particulars only should be given and not the inference. Thus, though a witness might, without objection, state that '*A* shot *B*', or '*A* stabbed *B*', yet the statement that '*A* killed *B*' would be improper as involving a conclusion that might be remote and doubtful, and apply equally to a variety of different incidents.<sup>11</sup> So, it was held, that a witness's statement that a party 'is in possession' is no evidence of that fact; that the question of possession is a mixed one of law and fact; and that the evidence produced must give the various acts of ownership which go to constitute possession so that the Court may arrive at its own conclusion.<sup>12</sup> However, in a subsequent case, it was laid down that a statement by a witness that a party is in possession, is, in point of law, admissible evidence of the fact that such party was in possession;<sup>13</sup> such general and vague statements are, however, as a rule of but little value.<sup>14</sup> A

8. Best, Ev., Amer. Notes to S 473; See Cornwall Lewis, "Influence of Authority", 1; Sully's Illusions, 328; Wigmore, Ev., s. 1919. It is, of course, not intended under the Act to exclude evidence of this description. See Cunningham, Ev., 190, and s. 3 ante, definition of "fact".
9. Best, Ev., 473, 474, 517; Taylor, Ev., s. 1416; Lawson's Expert and Opinion Evidence, post; see next note; Jame's Law of Experts, 32; Wharton, Ev., s. 502.
10. Taylor, Ev., s. 1416. Such opinions have been described as "opinions from necessity", and the rule is stated as follows: "The opinions of ordinary witnesses derived from observations are admissible in evidence. When from the nature of the subject under investigation, no better evidence can be obtained, or in fact cannot otherwise be presented to the tribunal, e.g. question relating to time, quan-

8. Best, Ev., Amer. Notes to S 473; See Cornwall Lewis, "Influence of Authority", 1; Sully's Illusions, 328; Wigmore, Ev., s. 1919. It is, of course, not intended under the Act to exclude evidence of this description. See Cunningham, Ev., 190, and s. 3 ante, definition of "fact".
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11. Phipson, Ev., 11th Ed., 530; Best, Ev., Amer. Notes to s. 511, supra; Wharton, Ev., ss. 15, 509–513; Stephen, J., in 3 Southern Law Rep. (Amar.) 567; and see Taylor, Ev., s. 1416: "On some paticular subjects, positive and direct testimony is often unattainable. In such cases, a witness is allowed to testify to his belief or opinion, or even to draw inferences respecting the fact in question from other facts which are within his personal knowledge". See also Powell, Ev., 9th Ed., 54; Best, Ev., s. 517.
12. Ishan v. Ram, (1868) 9 W. R. 79.
13. Maniram v. Devi, (1869) 4 B. L. R. 97 (F.B.); 13 W. R. 42.
14. See Notes to S. 110 post.

common instance of such opinion—evidence of non-experts—is that which is given respecting the identity of persons and things,<sup>15</sup> as also respecting the genuineness of disputed handwriting.<sup>16</sup> In *Fryer v. Gathercole*,<sup>17</sup> Parke, B., remarked: "In the identification of persons you compare in your mind the man you have seen with the man you see at the trial." The same rule of comparison belongs to every species of identification, as for instance, the identification of handwriting.<sup>18</sup>

The opinions of witnesses are also admissible to prove the innuendoes of libel, where ordinary words are used in a peculiar sense, or where a slanderous meaning is imputed to apparently innocent language. But in such cases a foundation must be laid by first asking the witness whether there was anything in the circumstances of the case, or in the conduct or tone of the speaker, to prevent the words conveying their ordinary meanings. The question may then be put, "What did you understand by the words?"<sup>19</sup> In cases of riot only what the witnesses actually saw and heard as to what a mob was doing and saying is admissible to prove the nature of the assembly; their opinions and impressions that the assembly appeared to be unlawful are not evidence.<sup>20</sup> A person may always testify to his own mental and physical condition; his testimony being based not on inference but on consciousness,<sup>21</sup> but it is not so with respect to the mental condition of others. Thus, neither the opinion of non-experts nor general reputation is admissible to prove insanity;<sup>22</sup> the proper course being for the witness to state the facts which he considered gave rise to that conclusion. Witnesses may, however, as has been already observed, describe the apparent condition of people or things, e. g., that a person appeared to be drunk or sober or a building or document in good or bad preservation, and the like. Another case in which the opinions of witnesses are received is when they are allowed to speak to character.<sup>23</sup>

- 15. Taylor, Ev., s. 1416. Witnesses may not only state their belief as to the identity of persons present in Court or not but may identify them by photographs [Firth v. Firth, (1896) F. 74] produced and proved to be theirs. The same rule applies to the identification of things (*Fryer v. Gathercole*, 13 Jur. 542), e.g., opinion may be given as to the resemblance of an engraving to a picture not produced [*Lucas v. Williams*, (1892) 2 Q. B. 118, 116]; or even of a portrait that is produced by one of the parties in Court (*Milles v. Lamson, "Times"*, Oct. 29, 1892; *McQueen v. Phipson, "Times"*, July 1, 1897); *Phipson*, Ev., 11th Ed., 507; *Wigmore*, Ev., s. 1917.
- 16. v. s. 47, post.
- 17. 13 Jur. 542.
- 18. See Best, Ev., s. 233; S. 47 post. See Harris' *Law of Identification*, (1892) Treating of persons; name, idem sonans; identity of prisoner, photographs, opinion, evidence; murder identification; ancient identity of real estate; identification of records and documents; handwriting; personal property, view of premises by jury; compulsory physical examination, mistaken identity, etc.
- 19. Odgers on Libel, 567; Starkie on Libel, 5th Ed., 465; Wharton, Ev., 975; *Phipson*, Ev., 11th Ed., 527; *Daines v. Hartley*, 3 Ex. 200, referred to in *Cunningham*, Ev., 191; *Burnswick v. Harmer*, 3 C. & K. 10; *Barnet v. Allen*, (1858) 3 H. & N. 376; *Simmons v. Mitchell*, (1865) 6 App. Cas. 155, 163; *Curtis v. Peek*, (1865) 13 W.R. (Engl.) 230; *Hough v. London Express Newspapers, Ltd.*, (1940) 2 K. B. 507; cf. *Tolley v. Fry*, (1931) A. C. 333.
- 20. *Jogi Raut v. Emperor*, 1928 Pat. 98, 99: 105 I.C. 234; 28 Cr. L. J. 906: 9 P. L. T. 260.
- 21. v. ante p. 697 (Vol. 1.) section 32 under "7. Statement before injury".
- 22. *Wright v. Tatham*, (1898) 7 A. & E. 313; *R. v. Neville*, (1887) Cr. & Dix. Ab. Cas. 96; *Greenslade v. Dare*, 20 Beav. 284, nor under this Act.
- 23. *Phipson*, Ev., 11th Ed., 529; see Notes to S. 55 post.

Value may also be proved by the opinion of any witness possessing knowledge of the subject. There are many things in almost universal use, the value of which any one may testify to, it being a matter of common knowledge. In other cases, the opinion of an ordinary witness would not be sufficient. The market-value of land is not a question of science and skill upon which only an expert can give an opinion. Persons living in the neighbourhood may be presumed to have a sufficient knowledge of the market-value of property from the location and character of the land in question, and so also witnesses may express their opinions as to the value of goods and chattels. "Market-value", said Mr. Justice Story, in an early case, "is necessarily a matter of opinion as well as of fact, or rather of opinions gathered from facts. How are we to arrive at it? Certainly not by the mere purchase made by a single person; or by purchases made by a few persons; for in either case they may have purchased above or below the market-price, or the market-price may be fluctuating and the sales too few to justify any general conclusion. Buyers may refuse to buy at a particular price; sellers may refuse to sell at a low price. In this state of things we must necessarily resort to opinions of merchants and others conversant in trade as to what under all the circumstances is the fair market-price or value of the goods. In the next case, the knowledge of their market-price being thus, in fact, a matter of skill, judgment and opinion, it is in no just sense mere hearsay; but is in the nature of the evidence of experts."<sup>24</sup> In the case cited it was said that the market-value of land may be roughly defined as the price which a vendor, willing but not compelled to sell, might reasonably expect to obtain from a willing purchaser.<sup>25</sup>

**4. Summary.** Thus, the opinion of a witness on a question whether of fact or of law is irrelevant. A witness has to state the facts which he has seen, heard or perceived. It is not his function to draw inferences from the facts observed or perceived by him. That is the province of the Judge.

There are important exceptions which are categorised in sections 45 to 51.

It often happens that the subject-matter of enquiry so partakes of the character of science or art as to require the course of previous habit or study and in regard to which inexperienced persons are unlikely to prove capable of firm or correct judgment. Therefore, an important exception is, that the opinions of persons having special knowledge of the subject-matter of the enquiry and described as experts are made relevant. Secondly, there are matters on which it is naturally impossible for any witness to give positive evidence of facts which he has observed. He must, if he says anything at all, speak as to his opinion or belief on matters which are essentially matters of opinion or are so complex or indefinite that he can only form a general

24. Alfonso v. United States, (1843) 2 Story 421 (Amer); Lawson's Expert Evidence, 431-436, 439; it is no objection to the evidence of a witness testifying as to market-value that such evidence rests on hearsay; Wharton, Ev., 449; Wigmore, Ev., s. 1940. See as to market-rate, Narain Chunder v. Cohen, (1884) 10 C. 565 and as to market-value under Municipal and Land Acquisition Acts,

see Manindra v. Secretary of State, A. I. R. 1914 Cal. 198; I. L. R. 41 Cal. 967: 23 I. C. 412; 18 C. W. N. 884; Harish v. Secretary of State, (1907) 11 C. W. N. 875; Secretary of State v. Sarla Devi, A. I. R. 1924 Lah. 548; I. L. R. 5 Lah. 227: 79 I.C. 74, and cases cited therein.

25. Kailas v. Secretary of State, (1913) 18 I.C. 638; 17 C. L. J. 34.

opinion upon them. It can only be so in matters of common or general knowledge. Similarly, the opinions of ordinary witnesses derived from observation have to be admitted when, from the nature of the subject under investigation, no better evidence can be obtained, or the fact cannot otherwise be presented to the tribunal. This evidence comes from non-expert or ordinary witnesses. This is the division made in the well-known classic of Lawson on the Law of Expert and Opinion Evidence reduced to rules and with illustrations from adjudged cases.<sup>1</sup>

There are, however, essential distinctions between the evidence given by experts and the opinion evidence of non-experts or ordinary witnesses. In the case of an expert, his evidence is not confined to what actually took place but he can give his opinion on facts. Secondly, the expert can speak to experiments made by him behind the back of the other party. Thirdly, he may cite text-books of accredited authority in support of his opinion and may refresh his memory by reference to them (Section 159). The expert, fourthly, may state facts relating to other cases bearing similarly to cases under the enquiry, in order to support his opinion. The evidence of such other transactions which are inconsistent with the opinions of experts may also be given (Section 16). The two common grounds are that on questions on which the opinions of experts and non-experts are given, they must state the data on which the opinions are based, and, secondly, the opinions of both experts and non-experts should have weight according to their opportunities and qualifications.

The term 'expert' has been defined in the well-known text-books on the Law of Evidence as follows : Rogers defines an expert in any science, art or trade as one who by practice and observation has become experienced therein. Lawson defines an expert as a person who has special knowledge and skill in the particular calling to which the enquiry relates (Rule 2).<sup>2</sup> The term 'expert' seems to imply both superior knowledge and practical experience in the art or profession ; but generally nothing more is required to entitle one to give testimony as an expert than that he has been educated in a particular art or profession.<sup>3</sup> The opinions of skilled witnesses are admissible whenever the subject is one upon which competency to form an opinion can only be acquired by a course of special study or experience.<sup>4</sup> The term 'expert' is rather misleading. It really means a person who by reason of his training or experience is qualified to express an opinion, whereas an ordinary witness is not competent to do so. He need not be an expert in the sense that he is accepted as an "authority" on the subject by persons in his own profession or calling. The necessary essential is that he should be skilled in that on which he is called upon to give an opinion. Such a person can give evidence whenever the subject is one upon which competency to form an opinion can only be acquired by special experience, e.g., science, art, trade, handwriting, finger-prints, foreign law, ballistics, etc. When the subject is one upon which the court or jury is as capable of forming an opinion as the witness it is not usual to admit the evidence of expert opinion. It will be seen from this that expert evidence is merely 'opinion' evidence based on special skill or experience.

1. R. H. Thomas & Co. v. St. Louis, (1883) (U. S. A.).  
2. Greenleaf: Evidence, s. 440.

3. Phipson, 11th Ed., p. 507.  
4. Popple: Canadian Criminal Evidence, 2nd Ed., p. 166.

Section 45 of this Act lays down two limitations, namely, that the persons who are called experts must first of all be competent to depose as an expert in enquiries relating to a point of foreign law or of science or art or as to the identity of handwriting or finger impressions and, secondly, they must have special skill therein.

There is an essential difference between the English and American concepts on the one hand and Section 45 of this Act, on the other, integral to the categories constituting the subjects of expert testimony. Rule 2 of Lawson states : "On questions of science or skill or relating to some art or trade persons instructed therein by study or experience may give their opinions. Such persons are called experts." The scope is the same in English authorities. It will thus be seen that this section (Sec. 45) does not specifically mention trade or skill. Both the English and American authorities are inclined to widen the scope of the expression 'science or art' as much as possible. The decisions show that expert evidence has been frequently admitted on matters not of pure science or higher science or pure art. In English and American text-books, the words used are "science or art and trade or skill" and under this phrase is included knowledge, evidence or skill of medical men, engineers, artists, surveyors, valuers, accountants, engravers, naturalists, mechanics, artisans, masons, blacksmiths, shop-keepers, farmers, rail-road men, etc. There is absolutely no reason to suppose that the Indian Legislature intended to make a departure from English law on the subject by confining expert testimony to matters of pure science or art. Sir James Stephen in his Digest on the Law of Evidence defines the word "science or art" as including all subjects on which a course of special study or experience is necessary to the formation of an opinion. In fact the tendency of Indian case-law is towards placing a liberal construction on the words "science or art". In a judgment of the Madras High Court in *In re Velayudhan*,<sup>5</sup> which has been followed in *Basudeo Gir v. The State*,<sup>6</sup> such a liberal interpretation has been placed. In that case, the question which arose was whether the opinion of a footprint expert can be said to be inadmissible in evidence under Section 45. The learned Judges referred to the word 'science' which has been defined in the Universal Dictionary of English language as 'great proficiency, dexterity, skill, based on long experience and practice' and held that it was sufficiently wide to include the evidence of an expert and that the very amendment of section 45 to include finger impressions showed that it was the policy of the Legislature to take full advantage of progress in science. Govinda Menon and Mack, II., concluded that the word 'science' occurring in section 45 should be held to be comprehensive enough to include the opinion of an expert in footprint as well. It is but proper that such a liberal interpretation should be placed on the words 'science and art' as would make available to Courts the fruits of the progress of science or art. The word 'skill' has been used in defining the term 'expert' and this may be taken to include skill in trade or any business or employment. In short, the phrase 'science or art' should not be construed in a narrow sense. All subjects in which peculiar skill and judgment or experience or special study is necessary to the formation of an opinion should be made to come within the term. Art in its legal significance embraces every operation of human intelligence whereby something is produced outside of nature, and the term 'science' includes all human knowledge which can be

5. Referred Trial No. 14 of 1954.

6. A. I. R. 1959 Pat. 534; 1959 Cr.

L. J. 1855; I. L. R. 38 Pat. 69.

forms of law. The decision of the Supreme Court in *Hanumant v. State of M. P.*,<sup>7</sup> excluding evidence of experts on typewriting impressions would seem to indicate that section 45 might be suitably amended by substituting for the words "or of science or art" the words "or of science, art, skill or trade or others of like kind" bringing it in conformity with the English and American authorities on subjects of expert evidence. This matter, it is respectfully submitted, may fitly engage the attention of the Indian Law Commission. By giving a wider sense to the meaning of the word 'expert', in matters of technical nature, Courts may obtain useful assistance from persons, official or non-official, specially skilled, e. g., officers of the Excise, Posts and Telegraphs Departments, Nasik Security Printing Press, goldsmiths, blacksmiths, carpenters, boot-makers, *shikaris*, motor mechanics and others. Thus, expert evidence will not be confined to classified and specialised professions. It will become applicable wherever peculiar skill and judgment are applied to a particular subject, or are required to explain results or trace them to their cause.<sup>8</sup>

Thus, in America, Lawson includes those as persons of science or technical skill who can give opinion as experts, artists and scientists,<sup>9</sup> farmers and agriculturists,<sup>10</sup> insurers,<sup>11</sup> lawyers and jurists,<sup>12</sup> mechanics and workmen in regard to matters of technical skill in their trades, e. g., nautical men in marine cases and railroad men in questions of railroad management,<sup>13</sup> physicians and surgeons<sup>14</sup> and bankers, merchants, manufacturers, clerks and persons in other occupations and calling, on questions particularly within their knowledge, e.g., trade terms. In regard to trade, see Phipson on Evidence, 11th Ed., pp. 511 and 512.

In regard to the opinions of ordinary witnesses Lawson and Phipson categorise them as including opinion evidence of witnesses concerning identity of person or thing, resemblances and photographs, handwriting, value and on matters of common or general knowledge and finally opinions from necessity. The opinions from necessity include opinions of ordinary witnesses derived from observation, when, from the nature of the subject under investigation, no better evidence can be obtained, or the facts cannot otherwise be presented to the tribunal, e. g. questions relating to time, quantity, number, dimensions, height, speed, distance or the like; or age, the physical or mental condition or appearance of a person or his manner, habit, conduct or sanity; the disposition or temper of animals, matters of colour, weight, light or darkness, the state of the weather and similar facts; mental and moral aspects of humanity, such as disposition, temper, anger, etc., intoxication, general character and particular phases of character and other conditions of things both moral and physical too numerous to mention. In slander and libel, where the words of a libel are shown that they have borne a different meaning when uttered, the opinion of such a witness as to the intended manner is admissible. Similarly, the opinions of witnesses, as to whom the words were understood by them as referring to, are admissible.<sup>15</sup>

In Indian Courts also, often the terms, used by an ordinary opinion witness, namely, that he "understood" or it was his "impression" or that it was

7. A. I. R. 1952 S.C. 343; 1952 S.C. A. 623; 1952 S. C. J. 509; 1952 S.

C. R. 1091; 54 Cr. L. J. 129.

8. Rogers, 2nd Ed., p. 25;

9. Title I, Ch. I.

10. Ib. Ch. II.

11. Ib. Ch. III.

12. Ib. Ch. IV.

13. Ib. Ch. V.

14. Ib. Ch. VI.

15. Title II, Ch. III, Rules 45 to 70.

his "belief", give rise to heated objections. It is interesting to note that in this connection Lawson points out in rule 66 that a witness in testifying that he understood 'so and so' from what was said by or took place between parties at a certain time, may mean to state what the parties in fact or in substance said or did; or he may mean merely to give his information from what he said or did. In the former case, his testimony is competent and in the latter it is not. Similarly the "impression" of a witness is competent, if derived from a recollection of facts stated by him ; but if it is merely his belief founded upon hearsay or upon inferences it is not competent.<sup>16</sup> The witness may testify to his "belief" and may be examined as to its ground, e.g. the question whether A at a particular time was in the employ of B. The belief of B founded on entries in his books that he was, is admissible.<sup>17</sup> Often a witness uses language indicative of an incompetent opinion, or conclusion which will be found on a patient understanding to be nothing more than that he is really stating a fact and in which case his evidence is admissible.<sup>18</sup> The rule upon evidence in the matter of opinion has been thus summarised.<sup>19</sup> The general rule is that a witness must only state facts; and his mere personal opinion is not evidence. But this rule is subject to the following exceptions, namely : (a) In questions of identification, a witness is allowed to speak as to his opinion or belief. (b) A witness's opinion is receivable in evidence to prove the apparent condition or state of a person or thing. (c) The opinion of skilled or scientific witnesses is admissible in evidence to elucidate matters which are of a strictly professional or scientific character. Sections 45, 46 and 51 of this Act deal with the last exception, and Sections 47 and 51 with the first, in so far as it bears on the question of identification of handwriting. Sections 48–50 add further exceptions relating to opinions on general customs and rights,<sup>20</sup> to usages, tenets, and the like<sup>21</sup> and to opinions on relationship,<sup>22</sup> provided such opinions are expressed by conduct.

45. *Opinions of experts.* When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting<sup>23</sup> [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art,<sup>24</sup> [or in questions as to identity of handwriting]<sup>25</sup> [or finger impressions] are relevant facts.

Such persons are called experts.

#### *Illustrations*

(a) The question is, whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

- 16. Rule 67.
- 17. Rule 68.
- 18. Rule 72.
- 19. Powell, Ev., 111, et seq.
- 20. S. 48 post.
- 21. S. 49 post.
- 22. S. 50 post.
- 23. Ins. by the Indian Evidence (Amendment) Act, 1899 (5 of 1899), S. 3. For discussion in Council as to whether "finger-impressions" in-

- clude "thumb-impressions", see Gazette of India 1898, Pt. VI, p. 24.
- 24. Ins. by the Indian Evidence (Amendment) Act, 1872 (18 of 1872), S. 4.
- 25. Ins. by the Indian Evidence (Amendment) Act, 1899 (5 of 1899), S. 3. For discussion in Council as to whether "finger-impressions" include "thumb-impressions" see Gazette of India, 1898, Pt. VI, p. 24.

(b) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

46. *Facts bearing upon opinions of experts.* Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts when such opinions are relevant.

#### *Illustrations*

(a) The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(b) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.<sup>1</sup>

#### SYNOPSIS

|   |  |
|---|--|
| 1. Principle.                                   | 6. Foreign law.  |
| 2. Expert.                                      | 7. Competency of foreign law expert.                           |
| 3. Competency.                                  | 8. "Science or art".   |
| 4. Value and evaluation of expert evidence :    | 9. Medical evidence :  |
| (a) General                                     | (a) General.   |
| (i) Lack of knowledge.                          | (b) Opinion evidence.  |
| (ii) Inaccuracy of expression.                  | (c) Medico-legal reports.                                      |
| (iii) Partisanship.                             | (d) Medical witness.   |
| (b) Conflict between expert and other evidence. | (e) Medical witness giving evidence as a witness.              |
| (c) Conclusion.                                 | (f) Value of expert evidence.                                  |
| 5. Subjects of expert testimony.                | (g) Cases where medical evidence conflicts with oral evidence. |

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1. Folks v. Chadd, (1782) 3 Doug. 157.

10. Opinion as to age and time of death :
  - (a) General.
  - (b) Horoscopes.
  - (c) Birth Registers.
  - (d) School Registers.
  - (e) Medical evidence—Age.
  - (f) Medical evidence — Time of death.
11. Handwriting expert — Detection of forgery :
  - (a) General.
  - (b) Style or forms of letters as fixed after the deviations from the model.
  - (c) Skill.
  - (d) Connections.
  - (e) Shading.
  - (f) Movement.
  - (g) Embellishments.
  - (h) Terminals.
  - (i) Slant.
  - (j) Width.
  - (k) Spacing.
  - (l) Speed.
  - (m) Proportions.
  - (n) Alignment.
  - (o) Penhold.
  - (p) Pen presentation.
  - (q) Pen pressure.
  - (r) Arrangement.
12. Handwriting :
  - (a) General.
  - (b) Use of evidence of handwriting expert.
13. Anonymous letters.
14. Value of evidence of handwriting experts.
15. Typewritten documents :
  - (a) General.
  - (b) Typewriter.
16. Finger-prints.
17. Forged finger-prints.
18. Value of evidence of finger-print experts.
19. Finger-prints of twins.
20. Palm-impressions.
  - (a) General.
  - (b) Palm-prints and toe-prints.
  - (c) Sweat pores or Poroscopy.
21. (a) Footprints :
  - (i) General.
  - (ii) Observation of footprints.
  - (iii) Origin of footprints of different kinds.
  - (iv) The foot and its features.
  - (v) Reproduction of footprints.
  - (vi) Casts.
  - (vii) Taking prints of suspects for comparison.
  - (viii) Measurement test.
  - (ix) Superimposition test.
  - (x) Second case.
  - (xi) Third case — Sunken prints — Mould and casts.
  - (xii) Final test.
  - (xiii) Footprints as evidence.
  - (xiv)
    - (a) Tyre marks.
    - (b) Forensic Ballistic Expert.
    - (c) Anthracene powder and ultra-violet lamp.
    - (d) Photographic Expert.
    - (e) Anthropologist.
    - (f) Expert in Psychiatry (Psychiatrist)
    - (g) The Psychiatric Report for the Court.
    - (h) Polygraphic Expert.
    - (i) Charmed rice.
    - (j) Dog tracking evidence.
22. Hypothetical questions.
23. American views and suggested reforms.
24. Grounds of and corroboration and rebuttal of, opinion.
25. Refreshing memory.
26. Credit of experts.
27. Opinion of expert not called as a witness.
28. Medical certificate.
29. Forensic Science : Laboratory Expert or Chemical Examiner :
  - (a) General.
  - (b) Report of Chemical Examiner, etc.
  - (c) The Serologist.
  - (d) Professor of Anatomy.
30. Public Analyst.
31. Government Analyst.
32. Case-law.
33. Mode of making expert opinion as evidence.
34. Non-expert opinion.

**1. Principle.** The use of witnesses being to inform the tribunal respecting facts, their opinions are not in general receivable as evidence. Facts should be stated and not inferences. The rule, however, is not without its exceptions. Being based on the presumption that the tribunal is as capable of forming a judgment on the facts as the witness, when circumstances rebut this presumption, the rule naturally gives way, and the opinions of specially skilled persons are receivable in evidence.<sup>2</sup> The foundation on which expert

2. *Rest. Eyc.*, ss. 511-513. See Introduction ante, and notes, post.

testimony rests is the supposed superior knowledge or experience of the expert in relation to the subject-matter upon which he is permitted to give an opinion as evidence.<sup>3</sup> But the expert's opinion does not take away the common man's judgment. They have the right to think and judge things from day-to-day experience.<sup>4</sup> Expert evidence is nearly always a weak type of evidence, especially in the case of one who has not sufficient knowledge on the subject.<sup>5</sup>

**2. Expert.** The phrase "expert" testimony is not applicable to all species of opinion evidence. A witness is not giving expert testimony who without any special personal fitness or special intelligence simply testifies as to the impressions produced in his mind or senses by that which he has seen or heard, and which can only be described to others by giving the impression produced upon the witness. Neither is he giving such testimony, strictly speaking, when he is testifying as to matters which require no peculiar intelligence and concerning which any person is qualified to judge according to his opportunities of observation. Expert testimony properly begins with testimony<sup>6</sup> concerning those branches where some intelligence is requisite for judgment and when opportunities and habits of observation must be combined with some practical experience. An expert is one who is skilled in any particular art, trade or profession, being possessed of peculiar knowledge concerning the same.<sup>7</sup> The witness must have made a special study of the subject or acquired a special experience therein. "The question is," Lord Russell said, "Is he peritus; is he skilled; has he adequate knowledge?"<sup>8</sup> Thus, if a person has acquired special experience, such as a Commissioner and Administrator of a Corporation in which capacity he has gained knowledge of the value of land situated in different parts of the city, his opinion founded on such knowledge entitles him to give evidence pertaining to the market-value of land within the Corporation.<sup>9</sup> The expert operates in a field beyond the range of common knowledge. A question of common knowledge such as whether the hammering of steel plates with hammers weighing up to four pounds causes noise, an expert has no advantage over a non-expert. In order to come to a finding of fact on the existence of a private nuisance by noise, if there is sufficient material, it is unnecessary to call for expert evidence.<sup>10</sup> Many definitions have been given<sup>11</sup> but for the purposes of this Act, the term is defined by Sec-

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- 3. Rogers on Expert Testimony, 21.
- 4. Bir Bahadur v. State, A. I. R. 1956 Assam 15, 16.
- 5. Nellappa v. Guramma, A. I. R. 1956 Bom. 129.
- 6. As to the relative value of testimony and extracts from scientific treatises, see Sheo Bahadur Singh v. Beni Bahadur Singh, 6 O. L. J. 178: 51 I. C. 419; A. I. R. 1919 Oudh 136
- 7. Rogers, op. cit., s. 1., Punjab Singh v. State, 1974 Kash. L. J. 404: 1974 J. & K. I. R. 607.
- 8. R. v. Silverlock, (1894) 2 Q. B. 766; 63 L. J. M. C. 293; 72 L. T. 298: 43 W. R. 14; 18 Cox C.C. 104, per Lord Russell of Killowen, C. J., cited with approval in United States Shipping Board v. The Ship "St. Albans", 1931 P. C. 189; 131 I.C. 771.
- 9. Collector, Jabalpur v. Nawab Ahmed Yar Khan, 1970 J. L. J. 466 (474); 1970 M. P. L.J. 465; 1970 M. P. W. R. 349.
- 10. Gotham Construction Co. v. Amulya Krishna, 72 C. W. N. 717; A. I. R. 1968 Cal. 91 (98).
- 11. Rogers, op. cit., s. 1; Lawson's Expert Evidence, 2; in Vander Donck v. Thelluson, (1849) 8 C. B. 812, Maule, J., said: "All persons, I think, who practise a business or profession which requires them to possess a certain knowledge of the matter in hand are experts, so far as expertness is required". Jessel, M. R., in Lord Abinger v. Ashton, (1873) 17 Eq. 358 at pp. 373-374, described experts as remunerated witnesses available on hire to pledge their oath in favour of the party who has paid them.

tion 45. In a case relating to lands and buildings in a cantonment, one Col. Knowles, Deputy Inspector and Adviser of Lands in Cantonment, was examined as an expert and he stated in evidence that "the Government of India thinks that I am an expert in the matter of cantonment lands". Referring to his evidence a Division Bench of the Allahabad High Court observed: "We do not for a moment doubt the qualifications of Col. Knowles to advise Government in regard to cantonment lands. He has no doubt had very valuable experience and the Government of India may well be justified in regarding him as its expert outside the Courts. But in the law and as applied to a witness, the term 'expert' has a special significance and no witness is permitted to express his opinion unless he is an expert within the terms of Section 45, Evidence Act, or, in special cases, is permitted to express such opinion by some special law".<sup>12</sup>

In a civil suit in which the genuineness of signatures on certain documents is disputed, the plaintiff has no right to compel the defendant to choose, as expert witness on his side, a person of the plaintiff's choice.<sup>13</sup>

A Maulvi learned in the personal law, viz. Mohamedan Law, is not an 'expert' within the meaning of Section 45. A court cannot ascertain the law by taking the evidence of a Maulvi but it can take into consideration texts contained in '*Roddul Mohtar*' and '*Fatwai-Alamgiri*' which are well-known books on Mohamedan Law.<sup>14</sup>

An architect, though expert in designing of buildings and constructions thereof, cannot be treated as an expert on the question of cost of construction without furnishing data of rates of wages and materials.<sup>14-1</sup>

An Excise Inspector who has tested lacs of samples of contraband articles during the course of his career is an expert. His opinion that the article seized is contraband can be accepted.<sup>14-2</sup> But where the Excise Inspector did not state anything about his qualification or experience, he cannot be treated as expert and his opinion that the contents of the seized canister were illicit liquor cannot be relied upon.<sup>14-3</sup> The Allahabad High Court has also held that the opinion of the Excise Inspector that the article seized from the possession of accused is 'charas' is not sufficient for conviction.<sup>14-4</sup> See also the undernoted case as regards Excise Inspector.<sup>14-5</sup>

A person having special knowledge of the value of land by experience though not by any profession can be treated as an expert.<sup>14-6</sup> An experienced

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| 12. Ram Dass v. Secretary of State, A. I. R. 1930 All. 587; 128 I. C. 411.   | 14-2 Verra Kanakrao v. State of A. P., 1975 Cr.L.J. 953 (Andh. Pra.); 1974 Andh. L. J. 437; Sri Chandra Batra v. State of U. P., 1974 S.C.C. (Cr.) 409; A.I.R. 1974 S.C. 639; 1974 Cr. L. J. 590. |
| 13. Narasimhan, T. A. v. Narayana Chettiar, I. L. R. (1968) 1 Mad. 805; (1968) 2 M. L. J. 48 (49).   | 14-3. Pitambar v. State, 1975 Cr. L. J. 948 (All.).   |
| 14. Dharam Das v. Hussain Khan, (1868) 19 Raj. L. W. 611 (613); Masjid Shahid Ganj v. Shiromani Gurudwara Prabandhak Committee, Amritsar, A. I. R. 1940 P. C. 116.                   | 14-4. Ram Autar v. State of U. P., 1973 Cr. L. J. 1096 (All.).  |
| 14-1. Diwan Chand v. Tirathram, A. I. R. 1972 Delhi 41; I. L. R. (1971) 2 Delhi 437; Amar Nath v. Union of India, 1975 Rajdhani L. R. 38 (Delhi); (1975) 77 Punj. L. R. (Delhi) 115. | 14-5. State v. Sanwal Ram, 1971 Cr.L.J. 200 (Raj.).   |
|  | 14-6. Collector, Jabalpur v. Nawab Ahmed, A. I. R. 1971 M. P. 32; 1970 M. P. L. J. 465; 1970 M. P. W. R. 349; 1970 Jab. L. J. 466.  |

goldsmith's opinion about the metal being gold and the extent of its purity is admissible, though he based his opinion on the test by touch-stone and not by any chemical test,<sup>14-7</sup> but the opinion about extent of purity of gold unless backed by data is not admissible.<sup>14-8</sup>

The evidence of an expert witness differs from that of an ordinary witness in the following respects : (a) he can give his opinion, not merely state what took place; (b) he can detail experiments he made even behind the back of the other party; (c) he can cite books of admitted authority; (d) he can cite other cases and reports of other transactions throwing light on the fact in issue, i.e. for the purpose of showing similarity in symptoms or in results from certain causes.

From anyone else such statements would be inadmissible.<sup>15</sup> It has however been held that a photographer with 25 years' experience in the line could well give expert evidence, even though he had not obtained a degree or diploma in the subject.<sup>16</sup>

**3. Competency.** The competency of an expert should be shown before his testimony is properly admissible.<sup>17</sup> The competency of an expert, that is, that he is possessed of the necessary qualifications, is a preliminary question for the Judge; though in practice considerable laxity prevails upon the point. An expert need not be a paid professional expert who makes a living by giving such evidence, but he must have devoted sufficient time and study to the subject to make his evidence trustworthy. Though the expert must be skilled by special study or experience, the fact that he has not acquired his knowledge in the course of professional experience goes merely to weight and not to admissibility. Thus unqualified practitioners, hospital students and dressers have been permitted to testify as medical experts, and on questions of handwriting not only specialists but post-office officials, lithographers and bank clerks and a solicitor "who had for some years given considerable attention and study to the subject and had several times compared handwriting for purposes of evidence though never before testified as an expert"<sup>18</sup> have been permitted to testify as experts.<sup>19</sup> If the examination-in-chief (there being no separate preliminary examination according to the practice of Indian Courts) clearly shows no competency, the opinion evidence of the witness will be excluded. In *prima facie* cases of competency, the witness will be allowed to give his evidence and also probably in doubtful cases for what the evidence is worth. It is not easy for an incompetent person to sustain himself in the character of an expert witness. The want of qualification may be shown by cross-examination<sup>20</sup> or otherwise.<sup>21</sup> An expert is fallible, like all

14-7. Abdul Rahman v., State of Mysore, 1972 Cr. L. J. 406 (Mys.); 1971 M. L. J. (Cr.) 420; (1971) 2 Mys. L. J. 422.

14-8. Asstt. Collector Customs v. Pratap Rao, 1972 Cr. L. J. 1135; 1972 M. L. J. (Cr.) 296; 1972 Ker. L. T. 307.

15. Powell's Ev., 9th Ed., pp. 41-42.

16. Govinda Reddy, *In re*, A. I. R. 1958 Mys. 150; I. L. R. 1957 Mys. 177.

17. Jarat v. Bissessur, (1911) 99 C. 245; Raj Kishore v. State, A. I. R.

1969 Cal. 321 (332).  
R. v. Silverlock, (1894) 2 Q.B. 766.

19. Phipson, Ev., 11th Ed., 511 and cases there cited; Best, Ev., s. 576.

20. Rogers, op. cit., 41.

ib. In America upon the preliminary examination the Court may examine other witnesses to determine whether the expert whose opinion is to be offered is qualified but the parties cannot, it appears, after a witness has been admitted to testify as an

other witnesses, and the real value of his evidence consists in the logical inferences which he draws from what he has himself observed, not from what he merely surmises or has been told by others. Therefore, in cross-examining him, it is advisable to get at the grounds on which he bases his opinion.<sup>22</sup> Thus, in the case of a testimony by the Fire-arms Expert, it is necessary that the data collected by him with respect to the fire-arm should be supplied along with the enlarged photographs taken by him, with a view to enable the Court to verify if his opinion is correct. This becomes necessary in cases where the identity of the gun that had been used to commit the offence, has got to be adjudged.<sup>23</sup> The peculiar knowledge or skill may be derived from experience<sup>24</sup> in the particular matter in question whether gained in the way of his business or not,<sup>25</sup> or the study<sup>1</sup> of a matter without practical experience in regard to it may qualify a witness as an expert. But it has been held in

expert, give evidence of the mere opinion of other experts as to the qualifications of the first; Rogers, op. cit., 85; s. 163 post, excludes evidence to contradict answers to questions tending to shake the credit of the witness by injuring his character. Even assuming that there is a distinction between competency and credit, the Act makes no provision allowing evidence of the opinions of one expert upon the qualifications of another. It has, however, been held in America competent for one expert to testify as to the skill of another where the knowledge of the witness was derived from personal observations as distinguished from an opinion based on such expert's general reputation; *Laros v. Com.*, (1877) 84 Pa. St. 200 cited in Lawson's Expert Evidence, 236; Roger's Expert Testimony, 85. In this case *A* on a trial gave an opinion as an expert. The opinion of *B*, an expert in the same department derived from personal knowledge as to the skill of *A*, was held admissible; the Court remarking "that it was not a question of mere reputation but of *B*'s own knowledge acquired from full opportunity of observations. If I have seen a workman doing his work frequently and know his skill myself surely if I am myself a judge of such work, I can testify to his skill." The Act does not appear to admit of evidence of this character either as corroborating see Ss. 156 and 157) or impeaching the credit (see Ss. 146, 153 and 155) of a witness. Secs. 46 and 51 deal with the opinions and not with the competency of the expert. The sections cited deal with the corroboration of

his testimony or with his credit, not with his competency. Of course, his competency is assailable directly by cross-examination and indirectly by evidence of the opinions of other experts who give contrary conclusion of the facts, and by proof of facts, inconsistent with his opinions. But there appears to be no provision for direct impeachment of his competency otherwise than by cross-examination.

The observations as to evidence in corroboration or impeachment of party's want of skill refer merely to evidence in support of impeachment of his testimony. Of course such evidence may be given where the question of skill is a fact in issue in the case. It has also been held that where persons offer themselves as experts to testify respecting a business in which their experience has not been very great, it is competent to call persons of greater experience and enquire of them how much time and experience are necessary to make one an expert in respect to that business. *Mason v. Phelps*, 48 Mich. 127 (Amer), cited in Lawson's Expert Testimony, 236.

22. Powell, Ev., 9th Ed., p. 42.
23. Kodur Thimma Reddi, *In re, A. I. R.* 1957 Andh. Pra. 758: (1957) 2 Andh. W. R. 156; 1957 Cr. L. J. 1091.
24. Rogers, op. cit., s. 18; but the opinion of an expert is not confined to matters or questions which he has actually seen or heard of; Lawson, op. cit. 255.
25. *R. v. Silverlock*, (1894) 2 Q. B. 766.
1. Rogers, s. 19.

America that a witness cannot testify as an expert in a particular matter when that matter does not pertain to his special calling or profession and his knowledge of the subject of enquiry has been derived from study alone, it being considered unwise to recognise the principle that a person might qualify himself to testify as an expert merely by devoting himself to a study of the authorities for the purpose of giving such testimony when such reading or study is not in the line of his special calling or profession. Thus, where the question was whether the editor of a stock journal who had read extensively on the subject of "foot-rot" could testify as an expert in relation to that disease, it was held that he could not.<sup>2</sup> Of course, no exact test can be laid down by which one can determine with mathematical precision how much skill or experience a witness must possess to qualify him to testify as an expert. That question rests within the fair discretion of the Court, whose duty it is to decide whether the experience or study of the witness has been such as to make his opinions of any value.<sup>3</sup> Recitals in books are not sufficient guide for testing the correctness of the evidence of an expert.<sup>3-1</sup> For a Court untrained in medicine to attempt, largely without trained assistance, to ascertain what certain medicines were prescribed for and what should be prescribed for biliary colic by reference to medical books is entirely unsound.<sup>4</sup>

The evidence of expert should be based on his own observations and findings and not on hearsay.<sup>4-1</sup> Where a medical officer tries to give an opinion about the mental condition of a person on a particular data not on the basis of the medical examination conducted by him but on hearsay from other persons as to the behaviour of the person, such opinion is only his presumption and not expert opinion admissible under the Evidence Act.<sup>4-2</sup> An opinion of a medical expert based on operation notes made by some other surgeon is not admissible.<sup>4-3</sup> Similarly evidence of a doctor given on the basis of X-ray taken by another is of no value.<sup>4-4</sup>

**4. Value and evaluation of expert evidence.**<sup>5</sup> (a) *General.* The Model of Evidence, p. 198 : Proceedings beginning in the fourteenth century, show the Judges availing themselves of the aid of experts without formally calling them as witnesses; from that time this testimony has been received in the common law courts. The necessity for it is everywhere conceded. The abuses which have developed since experts have to be witnesses for litigants are everywhere commented upon not only by the Bench and the Bar but also by members of the learned profession.<sup>6</sup> It is, therefore, the duty of courts to scrutinise the expert opinion tendered in evidence very closely and to find-out the basis upon which it was made. After all it is only an opinion evidence and cannot be safely

2 Rogers, p. 48; see argument in R. v. Silverlock, (1894) 2 Q. B. 766 at p. 768; Bristow v. Sequeville, (1850) 5 Ex. 275.

3. ib., s. 21.

3-1. Piara Singh v. State of Punjab, A. I. R. 1977 S.C. 2274; 1978 M. L. J. (Cr.) 186; (1978) 1 S.C.J. 200; 1977 Cr. L. J. 1941; 1977 S.C.C. (Cr.) 614; (1977) 4 S.C.C. 452.

4. Superintendent and Remembrancer of Legal Affairs v. P.C. Ghosh, A. I. R. 1924 Cal. 611; 83 I.C. 631; 26 Cr. L. J. 71; 28 C. W. N. 579.

4-1. Datar Singh v. State of Punjab,

1975 S.C.C. (Cr.) 530: (1974) Cr. L.J. 908.

4-2. State v. J. Gaspar Noronha, A.I. R. 1971 Goa 3; 1972 Cr. L. J. 36.

4-3. Manchida v. State, 1972 W.L.N. 867 (Raj.).

4-4. Gháribdas v. State, 1973 All.Cr.R. 198.

5. See Aiyer and Aiyer: Art of Cross-Examination, Ch. VI, Detection of Falsehood in Expert Testimony (Published by Law Book Co., Allahabad

6. See references collected in Wigmore, Evidence, 3rd edition, (1940) S. 563, Note 2.

relied upon unless the basis of opinion is found to be firm.<sup>6-1</sup> Accused in a rash driving case was in the opinion of the doctor under the influence of drink because his breath smelt of alcohol and his gait was unsteady, but urine or blood tests were not taken, the data was insufficient for any firm basis of such opinion.<sup>6-2</sup>

The infirmities of expert evidence fall under three heads: (i) lack of knowledge, (ii) inaccuracy of expression, and (iii) partisanship.

(i) *Lack of knowledge.* Often lack of sufficient knowledge upon the subject they undertake to testify upon is the greatest blemish of expert evidence. Best on Evidence, Section 574, says: "There can be no doubt that testimony is daily received in our courts as scientific evidence to which it is almost a profanation to apply the term". In *State v. Walter*,<sup>7</sup> the Court said: "Any one who has listened to vain babblings and oppositions of science falsely so called, which swell the record of the testimony of experts when the hopes of a party depend rather upon mystification than enlightenment will see the wisdom of the rule excluding mere opinion evidence. Some so-called experts will not hesitate to go upon the stand and testify upon matters of the gravest concern with little or no preparation. Their concern seems to be whether or not they can prevent the lawyers from tangling them up on cross-examination; and if they feel that the lawyer does not know anything about the subject they assume the position without the slightest hesitation. They wish to impress observers with their omniscience and would never admit a lack of knowledge of anything suggested or enquired about as they feel that it will be destructive of their own reputation and of the standing of scientific men generally. In fact a learned writer has stated, 'I don't know' is the hardest thing for some experts to say and yet they don't know—in many many cases they don't know. No man ever mastered all the knowledge in any of the sciences. Graveyards all over the country are eloquent with the statement 'medical men don't know'. From the grated windows of the asylum come the hollow voices crying out alienists don't always know'. From the wrecked and bleeding victims of the fallen bridge but recently constructed by skilled engineers, come the wail 'they don't always know' and from the dust-covered archives of the advocate's office where they recorded the proceedings in some case in which through an error of some lawyer injustice was done and right was defeated comes the sad refrain 'they don't always know'. In fact one of the first things which an expert should learn to say is 'I do not know'. In fact Dr. Taylor says advising medical witnesses that they should be well prepared on all parts of the subject on which they are about to give evidence. They must be free enough to say to the lawyer 'upon the facts as you present them in your hypothesis I cannot tell—I want more facts'. Therefore no lawyer should undertake to examine an expert until he has given a thorough study to the subject of the examination and no expert should allow himself to become a witness without a careful study of the subject. The expert and the examiner should both feel that the contest is not one of wit or wisdom and that it makes small difference how much one knows except so far as the knowledge may aid the court in getting at the truth in order that justice may be done."

6-1. *Lachhmi Ram v. State of H. P.*,  
1971 Sim. L. J. (H.P.) 329.

6-2. *Bachubhai Hassanalli v. State of*

*Maharashtra.* (1971) 1 S.C.W.R. 99.  
7. 65 Me. 74.

(ii) *Inaccuracy of expression.* Another source of just criticism is in the language employed by some experts upon the witness-stand. Experts should have a vocabulary in the witness-stand and this vocabulary should not be the same as that which should be used in a lecture to a scientific body; it should be adapted to the conditions. The great consideration is that the expert should feel a moral responsibility not only for the correctness of the words he utters but he should feel a responsibility for the effect of the words he utters. When injustice is done through a failure to understand his testimony or a misconstruction of his testimony he cannot shield himself behind the fact that he told the truth. He is responsible for the injustice if by reasonable methods of expression he could have impressed the truth upon the mind which under the law was compelled to weigh the facts and draw the conclusion therefrom.

Not only in the words used do the experts either falsify or mystify but they do it in their manner and tone and gesture. A man as well as a woman can say 'no' and mean 'yes' and the expert who is defending his pet theory cannot shield himself from falsehood by merely using a word or words which are in fact correct but which in method of expression and meaning are incorrect. The expert is responsible not only for his words but for the effect of his words.

There is a common tendency amongst experts especially in medicine, surgery and mental diseases to exaggerate conditions by giving some high sounding names to some simple affection known to the ordinary person by some simple designation and also to give undue significance to little things which are unfounded as they occur in the ordinary affairs of life. The old man whose will is in contest had a poor memory therefore he had senile dementia; but a thousand businessmen are daily forgetting to attend to some detail of business, forgetting perhaps the names of their customers with whom they had weekly or monthly transactions, and yet they are successful in the business world. The man who seeks to avoid the charge of murder on the ground of insanity is shown to have had epileptic fits. The expert is at once convinced that he is a maniac while some of the great men who have taken part in the affairs of the world are known to have been subjects of epilepsy.

(iii) *Partisanship.* Many experts do not have a true conception of the office of a witness. They are too ready to assume that they are employed to support or oppose a certain proposition in a case. They first find out what a party desires to have established and they then proceed with untiring zeal to find authorities and reasons for supporting them for their position. Their judgment of things becomes warped and they have developed a prejudice against all opposition whether of men or books. In fact whereas the sole duty of a witness is to carry truth, plain unvarnished truth, to the mind of the court and the office of the witness is to convince the human mind on the Bench of existence or non-existence of a fact and a witness should be impartial and should understand the grave responsibility which rests upon him and he should feel that it is just as great a crime to induce the mind of the Judge to reach a wrong conclusion in the case, as it is for the Judge to disregard the evidence and announce a conclusion which his mind rejects and which his conscience repudiates. The expert witness becomes not unoften a man who is paid a retainer to make a sworn argument; and the higher the fee the greater the partisanship. We have all heard the old jeer about the three kinds of liars—white liars, black liars and expert witnesses.

The following extracts from well-known works dealing with expert evidence will give expression to this well-founded criticism. Mr. Taylor in his treatise on the Law of Evidence says: Expert witnesses become so warped in their judgment by regarding the subject in one point of view that even when conscientiously disposed they are incapable of expressing a candid opinion.<sup>8</sup> It is safe as a general rule to assume that a professional expert witness is a partisan willing and eager to serve the party who requests his services. Indeed all experts, whether professional or non-professional, are very apt to zealously espouse the cause of the party by whom they are called. There are to be sure exceptions to the general rule but they are not numerous enough to more than prove the rule. The wise examiner will assume that all experts called by his adversary are prepared to do him all the harm they can and that they will avail themselves of every opportunity that is offered them to give his client's cause a thrust or a blow. A professional expert witness has been defined to be a man who is paid a retainer to make a sworn argument. Bitter as this definition is, it is not entirely inaccurate. Expert witnesses usually with swiftness and avidity seize every opportunity offered to them to put into court an argument in the form of an opinion and such an argument is more hurtful because of the guise it wears. As an argument and nothing more, it will do little mischief but as an apparent opinion it may do much. The statement of the danger to be apprehended suggests the course to be pursued. It is not by their artifice that sometimes deceives and confuses the ordinary witnesses that the testimony of a professional expert witness may be broken down but they are almost always shrouded and cunning ones, sometimes indeed learned and skilful ones and they come prepared for a contest with the advocate upon cross-examination.<sup>9</sup> "The witnesses now in worst repute are what are called expert witnesses—that is, witnesses retained and paid to support by their evidence a certain view on a scientific or technical question. We have all heard the old jeer about the three kinds of liars—white liars, black liars and expert witnesses. Yet the expert witness is often not really a witness at all. He is a trained man who, like Counsel, comes forward to maintain for a fee a certain view on an uncertain point, and to give his reasons for that view. I have more than once, when listening to an expert's evidence, thought it was a pity he was sworn at all. In fact, they regard themselves, and lawyers to a large extent regard them, as advocates. I remember once when a distinguished scientist was cross-examined as to a different view which had been maintained by him on the same point in another case, answering Counsel indignantly, 'you seem to forget, Sir, that I like you, was then appearing on the other side.' And the Judge seemed to think this reply was reasonable. And so it would have been better had the scientific 'witness' not been sworn on both occasions to tell 'the truth, the whole truth, and nothing but the truth'.<sup>10</sup> Aiyer and Aiyer: 'The Art of Cross-Examination' (1972) has collected the American and English dicta on Partisanship of expert testimony in Chapter VI of which two brief extracts will suffice. One New York Judge said: "The present system of presenting the testimony of experts is poorly calculated to assist in arriving at the exact truth. The expert produces a witness as almost invariably giving assurance that he will swear to an opinion favourable to the party calling him and for this usually receives a fee proportioned to his estimate of the value of his opinion to the side for which he testifies. I believe the experience of all

8. Elliot's "Advocate", p. 263.

9. Strahan: "Bench and Bar", p. 65.

10. Cited in *In re Srinivasulu Naicker*, 68 Law Weekly 61; A. I. R. 1955 M. 179, per Ramaswami, J.

concerned in the administration of justice tends to the conclusion that this species of evidence is less satisfactory than any other; and it is a common remark that where there is any room for a difference of opinion experts in about equal numbers will generally be found testifying on each side."<sup>11</sup> With all men in all employ, said another New York Judge, benevolence and sympathy with those who seek a mere opinion upon subjects of expert knowledge dominate the judgment that is given. It is a human tendency and is the weakness of all expert testimony. Therefore experts on both sides of a case become too often eager attorneys before the trial is ended and before the testimony is given.<sup>12</sup>

The Model Code of Evidence, to put an end to this unseemly spectacle of trials developing into a battle of experts, instead of using skilled persons to search out the truth has provided a mode of handling experts. Experts are appointed by the Court but testimony may be given by other experts. Careful reports are made and filed rather than hasty conclusions being received in a hurried trial. The report except as to inadmissible matter may be read by the expert in evidence. An expert may state his inferences from relevant matters perceived by him or from evidence introduced in the trial even though they embrace the ultimate issues to be decided. Unless the Judge orders otherwise, the expert may express those inferences without stating the data from which he draws them. The expert may always be cross-examined as to this data. The Code also provides for fixing reasonable compensation for experts and a method of payment.<sup>13</sup>

There is nothing in the Evidence Act which requires the evidence of an expert to be corroborated.<sup>14</sup> But in practice Courts do not ordinarily base their decision on expert evidence alone, unless it is supported by other evidence, external and internal, except that much greater reliance is placed on evidence of Finger Print Experts.<sup>15</sup> In *Ramchandra v. State of Uttar Pradesh*,<sup>16</sup> the Supreme Court has said that expert evidence as to handwriting cannot be made the sole basis of a conviction. In *Sidheswar Ganguly v. State of West Bengal*,<sup>17</sup> it was held that the value of the opinion of a doctor as to the age of a person depends not only on his careful physical examination and application of the recognised pointers and indices for determining age but also on the support it receives from other corroborative evidence. The limitations of the evidence of a medical expert are set out in *Nagindra Bala v. Sunil Chandra*.<sup>18</sup>

A medical witness, called in as an expert, is not a witness of fact. His evidence is really of an advisory character given in the form of an opinion on the facts submitted to him and is not to be given by reference to the facts

- 11. *Potter v. M'Alpine*, 3 Dem. N. Y., 108.
- 12. *Wright v. Southern Express Co.*, 80 Fed Rep. 85.
- 13. See Chapter V, Rule 402 to Rule 410 of the Model Code of Evidence.
- 14. *Ladharam v. Emperor*, A. I. R. 1945 Sind 4; I. L. R. 1941 K. 305; 218 I. C. 379; 46 Cr. I. T. 490.
- 15. P. P. v. R. M. Ganesh, 1957 M. W. N. (Journal) 28 (Ramaswami, J.) Cr. A. 164 of 56; See also State of

- Mysore v. D. C. Nanjappa, (1968) 1 Mys. L. J. 457; 1968 M. L. J. (Cr.) 226 (234).
- 16. A. I. R. 1957 S.C. 381; 1957 Cr. L. J. 559.
- 17. A. I. R. 1958 S.C. 148; 1958 Cr. L. J. 273; 1958 S. C. A. 147; 1958 S. C. J. 349.
- 18. A. I. R. 1960 S.C. 706; 1960 Cr. L. J. 1020; (1960) 2 S. C. A. 468; (1960) 3 S. C. R. 1.

collected independently by himself.<sup>19</sup> The evidence of a medical man or other skilled witness however eminent, as to what he thinks may, or may not, have taken place under a particular combination of circumstances however confidently he may speak, is ordinarily a matter of mere opinion. The medical evidence cannot be substantive evidence of the charge but only corroborative of the charge.<sup>20</sup> The evidence of medical men, though relevant and valuable, should be received with caution because their opinions may also be sometimes perverted and they themselves become incapable of expressing correct opinion, without any particular motive except the pleasure of perjuring themselves.

(b) *Conflict between expert and other evidence.* In the following cases direct testimony has been preferred to experts' testimony :

- (1) Experts suggesting that a particular thing could not have been done, whereas the whole of the direct evidence for the prosecution points to the act having been done by the respondent.<sup>21</sup>
- (2) Evidence of the expert, who visited the patient on one day was that she would not be capable of a particular action the next day after his visit, was held to be hypothetical when the direct evidence led established that the act had been done.<sup>22</sup>
- (3) Medical evidence given with reference to the symptoms deposed by the witnesses as to the general condition and state of the health of a person will be preferred to isolated extracts from medical works.<sup>23</sup>
- (4) Theories of medical men or skilled witnesses of any sort against the facts positively proved.<sup>24</sup>
- (5) As to soundness of the mind, while making a will, the evidence of the witnesses present at the time of making will is to be preferred to the evidence of a doctor.<sup>25</sup>
- (6) A school leaving certificate is more reliable as to age than the opinion of doctor who was cursorily examined in Court for a few minutes.<sup>1</sup>
- (7) Expert evidence, which is against the common experience every one has, is not by itself evidence of any actionable negligence.<sup>2</sup>
- (8) Evidence supporting eye-witnesses should be preferred to that of experts.<sup>3</sup>

19. Sunil Chandra Roy v. State, A. I. R. 1954 Cal. 305, 322; 57 C. W. N. 962; 55 Cr. L. J. 805.
20. Mohammed Khan & another v. Emperor, A. I. R. 1934 Pcs. 27; 148 I. C. 1043; 35 Cr. L. J. 961.
21. Queen-Empress v. Wazir Ali, (1889) All W. N. 74.
22. Shiddubai Rudra Gauda Desai v. Nilappagauda Bharmagauda, A. I. R. 1924 Bom. 457; 83 I. C. 616.
23. Rawat Sheo Bahadur Singh v. Beni Bahadur Singh, A. I. R. 1919 Oudh 186; 51 I. C. 419; 6 O. L. J. 178.

24. Queen v. Ahmed Ally, (1869) 11 Suth. W. R. (Cr.) 25.
25. Perera and others v. Perera and another, 1901 App. Cas. 354; Saradindunath Rai Chaudhuri & others v. Sudhir Chandra Das & others, A. I. R. 1923 Cal. 116; I. L. R. 50 C. 100; 69 I. C. 48.
1. Sucha Singh v. State, A. I. R. 1951 Simla 283.
2. (1866) 1 C. P. 300.
3. Gura v. State, 1955 N. U. C. (Pepsu) 3280.

The evidence of a native doctor who cannot say whether the injuries inflicted were sufficient in the ordinary course of nature to cause death or were likely to cause death, or a witness relying solely on text-books the evidence not being exhaustive of all the possible circumstances,<sup>4</sup> or the testimony of a medical officer who did not take X-ray on the interpretation of the X-ray negative is of no value.<sup>5</sup>

The evidence of ordinary Kavirajs as to mental and physical condition of persons is of little value.<sup>6</sup>

Therefore, when direct evidence is led and accepted, it is hardly necessary to consider expert opinion, though direct evidence can be appreciated in the light of expert opinion.<sup>7</sup>

(c) *Conclusion.* To conclude, the expert's evidence is only a piece of evidence. A judge of fact will have to consider his evidence along with the other evidence. Which is the main evidence and which is the corroborative one depends upon the facts of each case. It is the duty of the trial Court to come to a conclusion, on a question of fact, on a consideration of the entire evidence including that of the expert.<sup>8</sup>

Experts are not expected to be decisive in their opinions.<sup>9</sup> Their evidence can never be conclusive, as it is opinion evidence.<sup>10</sup> Where a person claims to be an expert but there is no evidence about the nature of training received by him and his qualifications, and there are no data from which he arrived at his conclusion, the evidence given by him is neither legal nor sufficient.<sup>11</sup>

*Sources consulted :* Phipson, 11th Ed., pp. 507, 508 and foll.; Best : Ev., Sections 513-516; Model Code of Evidence, Ch. V, p. 198 and foll.; Roger on Expert Testimony, Sections 121-124; Lawson : Expert and Opinion Evidence; Rao and Rao : Expert Evidence, 2nd Ed. (1961); Wigmore : Evidence, 3rd Ed. (1940), Section 563, Note 2 ; Taylor, Ev. : Sections 1416-1425 ; Aiyer and Aiyer : The Art of Cross-Examination, Ch. XXIV, p. 680 and foll., (1961 Ed.) (Law Book Co., Allahabad) ; Popple : Canadian Criminal Evidence, 2nd Ed.

**5. Subjects of expert testimony.** The subjects of expert testimony mentioned by the section are foreign law, science, art, and the identity of handwriting or finger-impressions. Expert testimony on any other subject

4. In re Kattameedi Chenna Reddi and another, A. I. R. 1940 Mad: 710; I. L. R. 1940 M. 254.
5. Halubha Mamubha and others v. The Kutch Government, A. I. R. 1951 Kutch 13.
6. Bankim Bihari Maiti v. Shrimati Matangini Dasi, A. I. R. 1919 P. C. 157.
7. Gulamamaq v. Kutch State, A. I. R. 1952 Kutch 4, 5.
8. Hussenaiah v. Yerraiah, (1954) 2 M. L. J. (Andh.) 39; A. I. R. 1954 Andh. Pra. 39; Moosa v. Khoo, (1985) 157 I.C. 82.
9. Ishwari Prasad v. Mohammad Isa, (1963) 3 S. C. R. 722; 1963 B. L. J. R. 226; A. I. R. 1963 S.C. 1728.
10. See Xec Ayub Mineiro v. State, A. I. R. 1966 Goa 17 (F.B.).
11. State v. Madhukar Gopinath, A. I. R. 1967 B. 61; I. L. R. 1965 B. 257; 67 Bom. L. R. 226; 1967 Cr. L. J. 167; 1965 Mah. L. T. 402.

is not admissible.<sup>12</sup> The words "science or art", if interpreted in a narrow sense, would exclude matters upon which expert testimony is admissible both in England and America, such as questions relating to trades and handicrafts.<sup>13</sup> But it is apprehended that these words are to be broadly construed, the term 'science' not being limited to the higher sciences and the term 'art' not being limited to the fine arts, but having its original sense of handicraft, trade, profession and skill in work, which, with the advance of culture, has been carried beyond the sphere of the common pursuits of life into that of artistic and scientific action. In some cases it may be difficult to determine whether the particular question be one of a scientific nature or not and consequently, whether skilled witnesses may or may not pass their opinions on it. The following tests may be applied :

Is the subject-matter of inquiry such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without the assistance of experts? Does it so far partake of the character of a science or art as to require a course of previous habit or study in order to obtain a competent knowledge of its nature, or is it one which does not require such habit or study?<sup>14</sup> As Taylor has observed : "It is in short a general rule, that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the character of a science or art, as to require a course of previous habit or study, in order to obtain a competent knowledge of its nature."<sup>15</sup> Stephen in his Digest of the Law of Evidence also says that "the words 'science or art' include all subjects on which a course of special study or experience is necessary to the formation of an opinion."<sup>16</sup> The amendment of the section relating to finger-impressions does not operate to limit in any way the wide meanings which should be given to the expression 'science or art'.<sup>17</sup> For subjects which have been held to come under the heading "Science and Art," see notes, post.

**6. Foreign Law.** Foreign law must, according to the English rule, unless an opinion has been obtained under the statutory procedure mentioned below,<sup>18</sup> be proved as a fact by skilled witnesses, and not by the production of the books in which it is contained.<sup>19</sup> It must, in general, be proved on oath, either orally, or, in some cases, by affidavit<sup>20</sup> and not by the mere certificates of experts, though this strictness has occasionally been relaxed.<sup>21</sup>

- 12. Harakchand v. State, A. I. R. 1954 M. B. 145; 1954 M. B. L. J. 574; 55 Cr. L. J. 1847.
- 13. "On questions of science or skill, or relating to some art or trade, persons instructed therein by study or experience may give their opinions such persons are called experts. Every business or employment which has a particular class devoted to its pursuit is an 'art' or 'trade'. Lawson, op. cit., 2; Taylor, Ev., s. 1417.
- 14. This opinion has been cited and followed in Bachraj Factories, Ltd. v. Bombay Telephone Co., Ltd., A.I.R. 1939 Sind 245 at 248; 184 I.C. 36

and Mahadeo Dewanna v. Vyankambabai, A.I.R. 1948 Nag. 287 at 288; I.L.R. 1947 Nag. 781; 1947 N. L.J. 478. See also Taylor, Ev., s. 1418.

- 15. Taylor, Ev., s. 1418.
- 16. Stephen's Dig. Art. 49.
- 17. Sidik Suniar v. Emperor, A.I.R. 1942 Sind 11; I.L.R. 1941 Kar. 525; 198 I.C. 110; 48 C.L.J. 308.
- 18. v. Notes to s. 38 ante.
- 19. ib. Taylor, Ev., ss. 1423, 1425.
- 20. Westlake v. W., (1910) P. 167.
- 21. Re Oldenbury, 9 P.D. 284; Re Kringeman, 32 L.J.P. 16; Karjina v. Tass Agency, (1949) 2 All.E.R. 274.

If the foreign law is contained in a code or is in written form, the question is not as to the language of the written law, but what the law is as shown by its exposition, interpretation and adjudication, and the Courts are not in general entitled to construe a foreign code themselves without expert assistance.<sup>23</sup> If, however, no witnesses are called to give expert evidence on the foreign law concerned, the Court itself may, in exceptional circumstances and with the consent of the parties, construe and apply that law on the assumption that the rules of construction applicable to that law were the same as the English rules of construction.<sup>24</sup>

In India such law may not only be proved under this section by the evidence of persons specially skilled in it, but also, under Section 38, by the production of a book printed or published under the authority of the foreign Government.<sup>25</sup> Foreign customs and usages may be proved by any witness, whether expert or not, who is acquainted with the fact.<sup>26</sup>

Before admitting opinion evidence in respect of foreign law the court has to be satisfied *prima facie* that it is really necessary to examine the foreign law.<sup>25-1</sup> What the law in a foreign country is, is a question of fact and has to be proved by the parties setting it up.<sup>1</sup> There can be no better evidence of it than a judgment of the highest tribunal in that country.<sup>2</sup> An expert may be called to state what the law of a foreign country on a particular point is,<sup>3</sup> but where that is laid down in a particularly elaborate manner in a code of that country,<sup>4</sup> it is the duty of the Court in this country to interpret it as best as it can. It is not entitled to rely on any outside opinion, however eminent, as to the interpretation of that Code.<sup>5</sup> The Muslim law and the Hindu law are parts of the law of the land which the Courts in India administer as being within their own knowledge and competence. It is the duty of the Courts themselves to interpret the law of the land and to apply

- 22. Lazard Brothers & Co. v. Midland Bank Ltd., (1933) A.C. 289 at p. 298, per Lord Wright; Buerger v. New Life Assurance Co., (1927) 96 L.J.K.B. 980 at pp. 941, 942, per Lord Atkin, L.J.; see also Camille and Henry Dreyfus Foundation Inc. v. Inland Revenue Commissioners, (1954) Ch. 672 C.A.; (1954) 2 All. E.R. 466 (admission of evidence of New York lawyers on meaning of two common English words which were capable in the context in which they were used in American law of being terms of art); affirmed without dealing with this point in (1965) A.C. 39 H.L.; (1955) 3 All.E.R. 97.
- 23. Jabbour v. State of Israel, Absentee's Property Custodian, (1954) 1 All.E.R. 145 at p. 153; see also Re Cohn, (1945) Ch. 5.
- 24. v. Notes to S. 38 ante, *et seq.* and to S. 60, v. post.
- 25. Ganes v. Lanesborough, 1 Peake R. 18; Sussex Peerage case, 11 C. & F. 124; Mostyn v. Fabrigas, 1 Cowp. 174; Vander Donckt v. Thelluson, (1849) 8 C.B. 812; Lindo v. Belisario, 1 Hagg.C.R. 216; see S. 49 post. As to the construction of foreign documents, see Di Sora v. Phillips, 10 H.L.C. 624; Phipson, Ev., 11th Ed., 517; Taylor, Ev., s. 1424.
- 25-1. Hindustan Heavy Chemicals v. Krebs, I.L.R. (1972) 1 Cal. 506.
- 1. Khoday Gangadara Sah v. Swaminadha Mudali, A.I.R. 1926 Mad. 218 : 92 I.C. 112 : 22 M.L.W. 679.
- 2. Sugandhan Bhikam Chand v. Mangibai Gulabchand, A.I.R. 1942 Bom. 185 : I.L.R. 1942 Bom. 467 : 201 I.C. 759 : 44 Bom.L.R. 358.
- 3. An advocate of the Scottish Bar is often called as a witness in the English courts to explain the law of Scotland on any particular point that arises.
- 4. The Ceylon Civil Procedure Code in the case cited.
- 5. Palaniappa Chetty v. Nagappa Chettiar, A.I.R. 1930 Mad. 146 : 123 I.C. 600.

it and not to depend on the opinions of witnesses, however learned they may be. It would be dangerous to delegate their duty to witnesses produced by either party. Foreign law, on the other hand, is a question of fact with which Courts in India are not supposed to be conversant. Opinions of experts on foreign law are therefore allowed to be admitted.<sup>6</sup> In many circumstances a Court in India has to apply the laws of other countries, e.g. the law of the country where the land in dispute is situate, or where the contract in suit was made or was to be performed, as the rules set out in Dicey's Conflict of Laws will clearly show. This is done pursuant to the rules of private international law adopted by the Courts of all civilised countries. This circumstance, however, does not make the laws of those countries part of the law of this country and it cannot be argued that no expert evidence is admissible in respect of those foreign laws. Likewise, when the Government of India Act, 1915 enjoined the application of Jewish law in certain specified matters the Jewish law did not cease to be foreign law and did not become part of the law of this country. No foreign law becomes part of the law of this country merely by the circumstance that it is to be applied by the Courts in this country. Such foreign law remains a foreign law and consequently under this section, expert evidence is admissible in respect of such foreign law.<sup>7</sup>

7. **Competency of foreign law expert.** In *Bristow v. Sequeville*,<sup>8</sup> the Legal Adviser to the Prussian Consul in England was called to prove the law of Cologne, but the Court of Exchequer held that he was not competent, apparently on the ground that he had no practical acquaintance with that law. But there are cases in which the Courts have not insisted that an expert in foreign law should be a practising lawyer of the country concerned.<sup>9</sup> In foreign law, the expert may be either a professional lawyer, or a person *peritus in arte*, i.e. the holder of an official situation which requires and therefore implies legal knowledge<sup>10</sup> or a teacher of law.<sup>11</sup>

8. **"Science or art".** As already stated above, the words "science or art" are to be broadly construed so as to include all subjects on which a course of special study or experience is necessary to the formation of an opinion "and embrace also the opinion of an expert in footprint as well".<sup>12</sup> So Sherring's Hindu Tribes and Castes, Russell's Tribes and Castes, and Castes and Tribes of the Nizam's Dominions by Syed Siraj-ul-Hassan have been held to be admissible as books written by persons who made a special systematic study of the customs and manners of the different castes and tribes, the areas

6. *Aziz Banu v. Mohammad Ibrahim Husain*, A.I.R. 1925 All. 720 : I.L.R. 47 All. 823 : 89 I.C. 690 : 23 A.L.J. 768; *Masjid Shahidganj v. Shiromani Gurudwara Prabandhak Committee, Amritsar*, A.I.R. 1940 P.C. 116 : 67 I.A. 251 : I.L.R. 1940 Lah. 493 : 189 I.C. 1 : 1940 A.L.J. 522 : 42 Bom.L.R. 1100 : 44 C.W.N. 957 : (1940) 2 M.L.J. 903 : 1940 M.W.N. 818 : 52 L.W. 266; *Amarnath v. Mrs. Amarnath*, A.I.R. 1948 Lah. 126 : I.L.R. 1947 Lah. 621 (S.B.).

7. *Jacob v. Jacob*, A.I.R. 1946 Cal. 90 : I.L.R. (1944) 2 Cal. 201 : 225 I.C. 384; 48 C.W.N. 513. 8. (1850) 5 Ex. 275.

9. For example, *Wilson v. Wilson*, (1903) P. 157; *Brailey v. Rhodesia Consolidated, Ltd.*, (1910) 2 Ch. 95; *Bardfod v. Bardfod*, (1918) P. 140.

10. *Sussex Peerage case*, (1844) 11 C. & F. 85, 124.

11. *Brailey v. Rhodesia Consolidated, Ltd.*, (1910) 2 Ch. 95.

12. *Vasudeo Gir v. State*, A.I.R. 1959 Pat. 534.

occupied by them and other connected matters.<sup>13</sup> On a question of value in a land acquisition case, the opinions of experts like brokers and surveyors are admissible although such evidence is of little value unless it is supported by other evidence and unless the data in support of the opinions are also given.<sup>14</sup> A haulage contractor who owns several lorries and also fits a large number of tyres every month for other companies has been held to be an expert on the quality, wear and usage of tyres.<sup>15</sup> An Assistant Mint Master of the Calcutta Mint is an expert within the meaning of this section.<sup>16</sup>

In cases of murder by shooting with a pistol, the evidence of the fire-arms expert could be admissible and even decisive to prove the fact that a cartridge found near the deceased could have been fired by the pistol produced by the accused.<sup>17</sup>

In cases of infringement of trade-marks, however, evidence of businessmen as to whether or not one mark is calculated to deceive purchasers into the belief that they are buying the goods of one manufacturer when they are not his goods, is not admissible as it does not really amount to an expert opinion upon any question of science or art within the meaning of this section.<sup>18</sup>

Telephony is a science or art upon which expert evidence is admissible.<sup>19</sup> So also Psychiatry which is a special branch of medical science dealing with causes, symptoms, courses, and treatment of disorders and diseases of mind.<sup>20</sup> The expressions "science or art" can no more be kept confined to narrow compass in modern progressive times. When telephony, psychiatry etc. are subjects on which an expert opinion is admissible there is no reason why an expert opinion be not admitted in regard to printed or typewritten words.<sup>20-1</sup> An Excise Sub-Inspector is an expert in his own department and is able to distinguish liquors so that his opinion as to whether certain liquor is illicit or not is admissible.<sup>21</sup> From their experience, police officers are able to diagnose the nature of crime just as a doctor is able to diagnose a disease. So their belief that a gang was operating is entitled to respect. Statements in police records, as to the suspected members of the gang, however, are an

13. Mahadeo Dewanna v. Vyankamma-bai, A.I.R. 1948 Nag. 287; I.L.R. 1947 Nag. 781; 1947 N.L.J. 478.
14. Harish Chander Neogy v. Secretary of State, (1907) 11 C.W.N. 875; Government of Bombay v. Merwanji Muncherji Cama, 10 Bom.L.R. 907; In the matter of Government of Bombay, I.L.R. (1908) 33 Bom. 325; Secretary of State v. Sarla Devi Chaudhri, A.I.R. 1924 Lah. 548; I.L.R. 5 Lah. 227; 79 I.C. 74; Pribhu Diyal v. Secretary of State, A.I.R. 1931 Lah. 364; 135 I.C. 183.
15. Globe Automobile Co. v. K. A. K. Master, I.L.R. 8 Rang. 81; 157 I.C. 12.
16. Mt. Gilli v. Emperor, A.I.R. 1925 Oudh 616; 88 I.C. 848; 26 Cr.L.J. 1232; 2 O.W.N. 377.
17. Kalua v. The State of Uttar Pradesh, A.I.R. 1958 S.C. 180; 1957 S.C.R. 187.
18. Macdonald & Co. v. Holland and Moss, 41 I.C. 539; 10 S.L.R. 175; A.I.R. 1917 Sind 86.
19. Bachraj Factories Ltd. v. Bombay Telephone Co., Ltd., A.I.R. 1939 Sind 245; 184 I.C. 36.
20. Deorao v. Emperor, A.I.R. 1946 Nag. 321; I.L.R. 1946 Nag. 946; 226 I.C. 377; 47 Cr.L.J. 918; 46 N.L.J. 656; see also In re Sankappa Shetty, A.I.R. 1941 Mad. 326; 194 I.C. 332; 42 Cr.L.J. 558; 1940 M.W.N. 963; 51 M.L.N. 689; Baswantrao v. Emperor, A.I.R. 1949 Nag. 66; I.L.R. 1948 Nag. 711; 50 Cr.L.J. 181, where the question how far the medical evidence is admissible has been thoroughly discussed.
- 20-1. I.L.R. (1975) 1 Punj. 327.
21. Ram Karan Singh v. Emperor, A.I.R. 1935 Nag. 13; 154 I.C. 341; 36 Cr.L.J. 511.

entirely different matter and such lists should not be included in the evidence.<sup>22</sup>

In order to prove that the article seized are instruments of gaming, it is not essential to examine an expert in every case. The fact may be proved by proper evidence.<sup>23</sup>

It is impossible to say that gambling is either an art or a science within the meaning of this section. It may be that under Section 49 post, a police officer might give evidence that he had had a long experience amongst people who indulged in *Satta* gambling in a particular district and from that experience supported by instances which he should be prepared to give so as to establish his means of knowledge, he was satisfied that a system or code prevailed among such persons, and he might then express an opinion (which would be relevant under the section) that the slips in question were prepared in accordance with that system or code and had a certain meaning.<sup>24</sup>

"The opinions of medical men are admissible upon questions within their own province, e. g. insanity, the causes of disease or death or injuries, the effects of injuries, medicines, poisons, the consequence of wounds, the conditions of gestation, the effects of hospitals upon the health of a neighbourhood, the likelihood of recovery; those of actuaries as to the average duration of life with respect to the value of annuities; those of naturalists as to the ability of fish to overcome obstacles in a river; those of chemists as to the value of a particular kind of guano as a fertiliser, the safety of a non-explosive camphene and fluid lamp; the constituent parts of a certain chemical compound; the effects of a particular poison; fermentation of liquor; those of geologists as to the existence of coal seams; those of botanists as to the effects of working coke ovens upon trees in the neighbourhood; those of persons of specially skilled in insurance matters, such as the opinion of an insurance agent and examiner that a partition in a room increased the risk in a fire-policy; and so with other branches of science.

"The opinions of artists are admissible as to the genuineness and value of a work of art; the opinion of a photographer as to the good execution of a photograph, though a non-expert might speak to its being a good likeness; the opinion of an engraver or professional examiner of writings as to erasure in a document; those of engineers as to the cause of obstruction to a harbour; that the erection of a dam would not cause the adjoining land to be overflowed by backwater; that certain drains do not lessen the quantity or flow of water; that a contract for doing a piece of work or building a vessel did not call for connecting the engines by a centre shaft; that a bridge built of wood should have been built of stone in order to withstand

22. Amdumiyan v. Emperor, A.I.R. 1937 Nag. 17 : I.L.R. 1937 Nag. 315 : 166 I.C. 582, 587 : 38 Cr.L.J. 237, 251 (F.B.); see also Baksho v. Emperor, A.I.R. 1930 Sind 211 : 126 I.C. 468 : 31 Cr.L.J. 1046 : 24 S.L.R. 252.

23. State of Gujarat v. Jagannbhai, (1966) 3 S.C.R. 613 : 1967 S.C.D. 1 : (1966) 2 S.C.J. 723 : 1966 Cr.L.J.

1227 : (1966) 7 Guj.L.R. 800 : 1966 M.L.J. (Cr.) 759 : A.I.R. 1966 S.C. 1633.

24. Harilal Gordhar v. Emperor, A.I.R. 1937 Bom. 385, 386-87 : I.L.R. 1937 Bom. 670 : 171 I.C. 282; 38, Cr.L.J. 1047 : 39 Bom.L.R. 613; see also Harakchand Radha Kishan v. State, A.I.R. 1954 M.B. 145.

a flood and the like; those of seal-engravers as to the impressions from a seal; those of officers of a fire brigade as to the cause of a fire; those of military men as to a question of military practice; those of post-office clerks as to post-marks; those of ship-builders, marine surveyors and engineers as to the strength and construction of a ship; and (when the Court is not sitting with assessors) those of nautical men as to the proper navigation of a vessel.<sup>25</sup>

Where the exact place in a harbour at which a collision took place was sought to be fixed by evidence of land surveyors as to the position to be deduced from photographs taken at the time the Privy Council held that the skill required for such a purpose was not that of a land surveyor and that therefore they were not experts.<sup>1</sup> So also the science of identification of hair has not attained the certainty of a scientific study.<sup>2</sup> The opinion of Director of Health Services on scientific points is admissible as an expert opinion.<sup>3</sup>

**9. Medical evidence.** (a) *General.* Forensic medicine is quite different from "healing art". The medical jurist expert has got to look at the facts more with the eyes of a lawyer than with the eyes of a doctor. Thus, to the Doctor acting as healer, a dead-body with marks of injury present on it is of no importance at all, because the patient is beyond healing. But the medical jurist has to decide whether the injuries are post-mortem, or ante-mortem, whether they are accidental or homicidal or suicidal and whether they are dangerous to life. But though forensic medicine is largely connected with criminal jurisprudence and it is one of the chief aids for the detection of crimes and assessment of criminal liability, it has also a bearing on the administration of civil justice. It is of the utmost importance, for instance, in the matter of life insurance.

Lyon has conveniently divided the wide field of medical jurisprudence under the following heads :

- I. Identification of persons, (i) living, (ii) dead;
- II. General examination of persons, (i) living, (ii) dead ;
- III. Death, (i) natural, (ii) unnatural.

A. Homicidal, B. Suicidal, C. Accidental.

These include asphyxial deaths such as death caused by suffocation, hanging, strangling, drowning, etc., and also deaths caused by burns, lightning strokes, starvation, etc.

- IV. Assaults, wounds and injuries, (i) homicidal, (ii) self-inflicted, (iii) accidental.

25. Lawson's Expert and Opinion Evidence; Wharton, Ev., ss. 441, 446; Phipson Ev., 11th Ed., 511, 512; Taylor, Ev., ss. 1418, 1417 *et seq.* and cases there cited. As to evidence of medical witnesses and reports of Mint Officers, Chemical Examiners and other Government Scientific Experts see Cr.P.Code, 1973 ss.

291, 292 and 293.  
 1. United States Shipping Board v. The Ship "St. Albans", A.I.R. 1931 P.C. 189; 131 I.C. 771.  
 2. Ganesh v. State of M.P., 1959 M.P. L.J. (Notes) 23.  
 3. Madan Mohan v. State, 1958 Cr.L.J. 574.

These include burns, scalds, lightning strokes, etc.

V. Sexual matters—such as virginity, impotence, defloration, pregnancy, birth, delivery, rape, abortion or foeticide, infanticide and unnatural sexual offences.

#### VI. Insanity.

#### VII. Toxicology or poisoning.

A medical man may be required to give evidence in a case, owing to his knowledge of certain facts concerning the subject-matter of a trial or inquiry. He is put on oath and states the facts known to him; so far he has performed the duty of an ordinary or common witness, a witness of facts and nothing more may be asked of him. But in most cases, he is also required to answer questions of opinion based on the facts which he has deposed to, or which have been witnessed to by others. This duty places him in the position of an expert. The evidence of experts is given on oath and is subjected to cross-examination.

An expert is one who is skilled in any particular art, trade or profession, being possessed of peculiar knowledge concerning the same. When a witness is appearing in a trial as an expert, it is preliminary essential that, before his evidence is recorded, he must prove himself to be an expert in the particular science, art or trade he represents.

The evidence of a medical witness who made a post-mortem examination is, as that of a medical expert, admissible, first, to prove the nature of the injuries which he observed and secondly, as opinion evidence with respect to the manner in which those injuries were inflicted, and as to the cause of death. A witness who has not seen the body can give nothing but opinion evidence.

(b) *Opinion evidence.* The general rule as to opinion evidence is that the question must be put to the witness hypothetically in this way : assuming such and such facts to be true, what is your opinion on the matter ? Assuming such and such an injury of such and such kind to have been inflicted, what is your opinion as to the nature of the weapon by which it was possibly or probably inflicted ? The facts suggested to the witness must be facts suggested by the evidence legally admitted.<sup>4</sup>

It may also be noted, where an expert witness has been examined on a scientific subject in support of the prosecution, passages in scientific treatises cannot be used by the defence in refutation of the expert's opinion, unless those passages have been put to the prosecution expert and unless notice has been given to him by cross-examination of the deduction which the defence seek to draw from them, so that he may give an answer if he can.<sup>5</sup> Where

4. Queen-Empress v. Meher Ali, Mullaik, I.L.R. 15 Cal. 589.  
5. In re Roghuni, I.L.R. 9 Cal. 455 (461); see also Grande Venkatarat-

nam v. Corporation of Calcutta, 22 C.W.N. 745; 19 Cr.L.J. 753; 46 I.C. 593; 28 C.L.J. 32; A.I.R. 1919 C. 862.

the general condition and the state of the health of a person is in issue, isolated extracts from medical works ought not to be preferred to evidence of a medical man, who should be examined with reference to the symptoms deposited to by the witnesses and to whom extracts might be put.<sup>6</sup>

Medico-legal knowledge does not consist so much in the acquisition of facts, as in the power of arranging them, and in applying to the purposes of the law the conclusions to which they lead. Any man with ordinary common-sense, and the talent of arranging facts, may, after mastering the rudiments of medical jurisprudence, be able to prosecute or defend a case with success. A witness can give his evidence only in answer to questions put to him. It follows, therefore, that in order to be able to examine or cross-examine a witness properly, the lawyer must have a knowledge of the questions to be asked, and it will depend upon the questions that he puts, whether he will be successful in eliciting from the witness all the facts that bear upon the case. If the Public Prosecutor fails to put to the doctor a question which is considered necessary, the Court should itself put it.<sup>7</sup>

The examination of a medical witness in this country is only too often of a most perfunctory character, and there is frequently no cross-examination at all. If advocates and pleaders acquire even an elementary knowledge of medical jurisprudence they might possibly save many an innocent man from punishment, or obtain the conviction of the guilty.

In the examination of an expert witness, it is a common practice with counsel to produce a book by a well-known author, and to ask the witness if he is acquainted with it as an authority. If the answer is in the affirmative, counsel may read an extract, and ask the witness if he agrees with the opinion expressed in it. The extract read may have been selected by counsel because it supports his contention, but it may not always represent the author's views, and if the witness has any doubt on this point, he should ask to see the book. A witness who, deliberately, by study and by his own experience, has formed an opinion on a subject, should not allow himself to be overawed by eminent authors. If it happens that he does not agree with them, he should say so, and give his reasons for the opinion he holds.

It is not uncommon to be requested to answer yes or no to a question. If a question is one which a witness considers cannot be correctly answered in this way he should inform the court. Never attempt to answer a question you do not understand; always ask to have it made clear. Lawyers being unfamiliar with medical science often ask unmeaning questions. Opinions should only be given after careful consideration.

(c) *Medico-legal reports.* A medical man is frequently required, in the first instance before giving evidence, to furnish a written report of the result of his examination of a case, and to give his opinion on various points connected with it. In a case of assault, for example, he is asked to examine the

6. Rawat Sheo Bahadur Singh v. Beni Bahadur Singh, 51 I.C. 419 : 6 O.L.J. 178 : A.I.R. 1919 Oudh 136; Bhagwandas v. State of Rajasthan, A.I.R. 1957 S.C. 589 : 1957 Cr.L.

J. 889.  
7. Emperor v. Haria Dhobi, A.I.R. 1937 Pat. 662 (664): 18 P.L.T. 857 : 39 Cr.L.J. 156 : 172 I.C. 780:

injured person and submit a report in the form supplied by the police. The form provides for a full description of the injuries, and for the opinion as to their probable consequences and manner of causation. An injury report by a doctor is an admissible piece of evidence in proof or disproof of the theory of accident, as where the defence is that the death was due to accidental gun-shot.<sup>8</sup> He may be required to examine and report on an alleged insane. If he makes a post-mortem examination, he is required to furnish a report in the prescribed form and to give his opinion as to the cause of death. It probably would be useful that he should also be required to record the length of time which in his opinion has elapsed since death took place.<sup>9</sup> It is most essential that the time of the post-mortem should be recorded, as in many cases it assists the court in determining whether the death took place at the time alleged or not.<sup>10</sup> Considering the important nature of the evidence generally furnished by the results of a post-mortem examination, the results of the observation should be carefully recorded.<sup>11</sup> The evidence of a doctor, who conducted the post-mortem, as to the age of injuries on the dead body cannot be relied upon for giving the time of occurrence if he failed to note the age of injuries in his report.<sup>12</sup>

A medico-legal report is a document of great importance and in suspicious cases the police are guided by this report; an inquiry might be taken up or abandoned according to the opinion given in this report. Therefore, every care should be taken in making so important a document. The report should be divided into two parts: the first to contain a statement of facts, the second, opinions or inferences drawn from the facts.

The drawing up of the first part will, as a rule, present no difficulty; it requires care and method, so that no fact may be omitted. The description of appearances should be full, in simple language, avoiding all technical terms as much as possible; where these have to be used, explanation of them should be added. The second part deals only with deductions drawn from the facts. It is the expert and the most important part of the report, and also the more difficult. This part should be as brief as possible and expressed in the simplest words, avoiding exaggeration, and only those inferences which are justified by the statement of facts should be drawn.

In many cases great difficulty is experienced in giving an opinion; the post-mortem appearance may be indefinite; no lesion sufficient to account for death may be found.

The body may be in an advanced stage of decomposition. In India it is rare to find a dead body free from the traces of putrefaction after twenty-four hours of death.<sup>13</sup>

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| 8. Bisipati Padhan v. State, I.L.R. 1969 Cut. 505 ; 35 Cut.L.R. 362 ; 11 O.J.D. 71 : 1969 Cr.L.J. 1517 : A.I.R. 1969 Orissa 289 (293).        | 10. Dwarka v. Emperor, A.I.R. 1931 Oudh 119 : 131 I.C. 439. |
| 9. Debendra Narayan Chakravarty v. Emperor, 33 C.W.N. 632 : A.I.R. 1929 Cal. 244; Mehr Singh v. Emperor, A.I.R. 1935 Lah. 805 ; 160 I.C. 187. | 11. Pochudayan v. Emperor, 12 Cr.L.J. 124 : 9 I.C. 730.     |
|   | 12. Basudeo Mahto v. State, 1970 P.L.J.-R. 376 (383).       |
|   | 13. Kehri v. Crown, 3 Lah.L.J. 147 : A.I.R. 1921 J. 6(3).   |

For example, it is well known that death may result from a blow on certain parts of the body and no sign of injury be discoverable after death. It is manifest that, in such cases, no opinion as to the cause of death is possible from an examination of the body, and in order to come to a conclusion, the examiner must be informed of the fact that the deceased received a blow on a certain part of the body. With this information, and the absence of all lesions in the body, he is justified in giving the opinion, that death was due to shock or cardio-respiratory inhibition caused by the blow.

There exists in the minds of many persons, the erroneous belief that a post-mortem examination must necessarily, and in all cases, reveal the cause of death. It is not so. A post-mortem examination generally reveals the mode of death, but often not the cause, and in a considerable number of cases, a knowledge of the circumstances attending the death is absolutely necessary to enable a medical expert to give an opinion. The diagnosis of shock as the cause of death can only be inferential. Fatal concussion of the brain from a blow cannot be diagnosed by a post-mortem examination; it can only be inferred from the history and absence of lesions.

When the examiner makes use of the history of the case supplied to him by the police or by others, in arriving at an opinion as to the cause of death, he must be careful to mention it in wording his opinion thus: "From the history of the case and the post-mortem appearances I am of opinion that deceased died from shock caused by a blow." It is advisable that the history of the case should be obtained in writing. If a statement is made to the examiner, he should reduce it to writing, and enter it in the first part of the report, giving the name of his informant.

If a medical witness is able to do so, he should always make a sketch of the injuries found on examination. It conveys more to the trying judge or magistrate than a lengthy description in words.

Even though the surgeon performing the post-mortem examination is certain that the death caused was by asphyxia due to throttling, he is not at liberty to destroy the viscera if he was required to do so by the Investigating Officer because the latter might have considered it necessary to rule out the possibility of death by poisoning.<sup>13-1</sup>

(d) *Medical witness.* Medical officers, like other persons, are bound to attend Court on receipt of summons and to give evidence if required by the Court. They cannot refuse to give evidence for reasons which they may consider to be sufficient, but they should represent to the Court as regards fees payable to them. Any dictation of terms on which they would give evidence is unnecessary and should be avoided.<sup>14</sup> A medical witness, like any other witness in a case, must give his evidence orally in the presence of the accused. Where he is allowed to prove statements at the trial of other accused persons in the absence of the accused under trial, such mode of giving evidence is illegal.<sup>15</sup> No consent or admission by the prisoner's advocate to dispense with

13-1. State of Maharashtra v. Manglya Dhavu, A.I.R. 1972 S.C. 1797: 1972 Cr.L.J. 570 (S.C.): 1972 S.C.R.(Cr.) 424: (1972) 8 S.C.C. 46: 1972 S.C.C.(Cr.) 237.

14. Chauthi Singh v. Emperor, A.I.R. 1937 All. 768: 39 Cr.L.J. 113: 172 I.C. 31.  
15. Sardara v. Emperor, 27 Cr.L.J. 571: 94 I.C. 139 A.I.R. 1926 Lah. 675.

the medical witness can relieve the prosecution of proving by evidence the nature of the injuries received by the deceased and that the injuries were the cause of death.<sup>16</sup> Medical witnesses as experts called upon to express opinions cannot always be in a position to form definite opinions as to the precise sufficiency of injuries to cause death.<sup>17</sup> Expert medical opinion of a surgeon who conducted the post-mortem examination is relevant.<sup>18</sup>

When, however, the deposition of a Civil Surgeon or other medical witness is taken and attested by a magistrate in the presence of the accused, or taken on commission under Chapter XL, Cr. P. C., 1898 (now Chapter XXIII of Cr. P. C., 1973), it may be given in evidence in any inquiry, trial or other proceeding under the Cr. P. C., although the deponent is not called as a witness. The Court may, if it thinks fit, summon and examine such deponent as to the subject-matter of his deposition.<sup>19</sup> The above procedure is, however, not intended to be applied where the medical witness is present in Court. Ordinarily it is, however, the practice to call the doctor as a witness in the Sessions Court when the death of a person is involved. In cases of murder or of manslaughter it is unreasonable to expect the jury to convict if a proper exposition and explanation of the medical evidence is not given *viva voce* by a doctor who can deal with the matter and satisfy the jury.<sup>20</sup>

If a person wants to rely on the opinion of a doctor expressed in a certificate, and the doctor is alive, he must lead direct oral evidence under section 60 *post*. The certificate of the doctor is inadmissible in evidence. And such inadmissible evidence does not become admissible because it is incorporated or mentioned in an endorsement of the Registrar under Section 35 of the Registration Act, 1908, that the executant of a deed (of adoption) was of sound mind. For the court to consider the opinion of the doctor referred to in the Registrar's endorsement would be violative of the rule excluding hearsay evidence.<sup>21</sup> The certificate of a medical or expert witness can be used by the witnesses concerned as an aid to their memory.<sup>22</sup>

No doubt Sec. 509, Cr. P. C., 1898 (now Sec. 291 of Cr. P. C., 1973), permits the deposition of a medical witness taken in the Commitment Court to be given in evidence at the sessions trial but that is subject to the condition that the accused should have been given full opportunity to cross-examine the witness and the Court may, if it thinks fit, summon and examine such a witness as to the subject-matter of his deposition. Where, therefore, the accused reserved the cross-examination of the medical witness in the Commitment Court which apparently was allowed and the witness was summoned by the Sessions

16. Rangappa Goundan v. Emperor, 37: Cr.L.J. 471 : 161 I.C. 663: A.I.R. 1936 Mad. 426.
17. Dr. S. N. Vyas v. State of Rajasthan, I.L.R. (1966) 16 Raj. 81 : 1966 Raj. L. W. 215 (220): A.I.R. 1966 Raj. 164 (169) (derogatory aspersions on the doctor expunged).
18. Mehr Ilahi v. Emperor, 12 Cr.L.J. 485: 12 I.C. 93.
19. Sec. 509, Cr.P.C.
20. Debendra Narayan Chakravarty v. Emperor, A.I.R. 1929 Cal. 244 : 30 Cr.L.J. 1031: I.L.R. 56 C. 566.
21. Gopi v. Madanlal, A.I.R. 1970 Raj. 190 (196); Sris Chandra Nandy v. Annapurna Ray, A.I.R. 1950 Cal. 178 (worst form of hearsay evidence); City of Ahmedabad v. Gandhi Shantilal Girdharilal, A.I.R. 1961 Guj. 196; Mohd. Ikram Hussain v. State of U.P., A.I.R. 1964 S.C. 1625 (1631) (medical report not before court) but reference to it made in affidavit of another person held not admissible).
22. Bhanwarlal v. State of Rajasthan, 1970 Raj.L.W. 68 : 1970 A.C.J. 267 (270).

Court to give evidence on behalf of the prosecution, the Sessions Court was apparently in error in refusing to re-summon the witness when he did not attend and in admitting the evidence of the witness given in the Commitment Court.<sup>23</sup>

The standard text-books on Medical Jurisprudence usually contain a section of instructions to doctors in regard to the manner of giving evidence in Court. Their usefulness and comprehensiveness depend upon the practical experience of the authors. One of the most instructive expositions is that of R. C. Ray, L. M. S., Emeritus Lecturer, Forensic Medicine, Carmichael Medical College, in his Outlines of Medical Jurisprudence<sup>24</sup> and which golden advice is as useful today, as when it was penned half a century ago.

(e) *Medical witness giving evidence as a witness.* (1) If summoned to a Court of Law, go to court well prepared not only with the minutest details of facts and opinions likely to be deposed to, but, also with the very language and form in which they can be best delivered. It is best to rehearse in private, what one is going to say, and to get up all the most up-to-date literature on the subject, or to get oneself coached in it by one competent to do so.

(2) Attend Court punctually with the subpoena that has been served on you and with any notes or other papers, books, materials, etc., bearing on the subject of evidence.

(3) You may have to give evidence as (a) a common witness of facts—seen by or known to you; or (b) as an expert witness<sup>25</sup> to interpret, or give your opinion on, real or hypothetical facts, or opinions or inferences placed before you—from your own knowledge and experience. Do not deduce such opinion from imaginary or ideal circumstances, nor dispute facts already proved at the trial.<sup>1</sup> An expert opinion is also liable to be cross-examined.

(4) If a passage from any book is read out, you should not signify your agreement (or otherwise) with it, without yourself reading the entire passage in its context.

(5) Do not say a word more than is necessary to answering the question asked. If called upon to say a simple “yes” or “no”, you may say so; but at the same time tell the Court that such answer is likely to convey a wrong impression, if that is so.

(6) As a rule every piece of evidence must be orally delivered and be direct, i. e., refer to facts actually seen, heard or perceived by you.<sup>2</sup> Hence, you are not allowed to read out from documents, while giving evidence. As an expert witness, however, you can refresh your memory from (i) notes taken by your own hand, or by others to your dictation, at the time and spot of occurrence, and (ii) from professional treatises.<sup>3</sup> Where a living author's

23. *Shivadhin v. King-Emperor*, A.I.R. 1923 Pat. 116 (118); 60 I.C. 662; Cox : Medico-Legal Court Companion, Third Ed., 1939.

24. *Hare Pharmacy*, 37 Amherst St. (Calcutta), 1st Ed., (1900)

25. S. 45 Indian Evidence Act.  
1. Sections 45 and 60, Indian Evidence Act.  
2. Section 60, Indian Evidence Act.  
3. Sections 159 and 161, Indian Evidence Act.

views are in evidence, the opinions expressed in his published book are not accepted as evidence, unless it be physically impracticable to have him in court.<sup>4</sup> Every kind of evidence, oral or documentary, is liable to cross-examination; and all notes, from which memory is being refreshed, must be open to the inspection of the counsel of the opposite side; they are liable to be filed with the records of the case, unless from reasons of State, or of public safety, the court disallows.<sup>5</sup> Finger-prints, photographs and radiographs (X-ray shadow photographs), provided they are taken at different places—and show the injured and sound sides and are properly explained by experts, chemical examiner's reports,<sup>6</sup> a deposition on oath before a magistrate, specially if given by a medical witness<sup>7</sup> or by a person since dead, an attested will or a will taken down by the medical man at the request of a dying man, and the recorded declaration of a dying man as to the circumstances or cause of his death, are the only seven kinds of writings that are accepted as evidence in the absence of the persons who made such statements in writing.<sup>8</sup>

(7) In criminal cases, if compelled by the presiding officer, you are bound to divulge professional secrets (which are otherwise inviolable); you can, in such cases, with the permission of the court, write out your answer for the perusal of the court and jury. No action for defamation can lie in respect of any evidence given in any Court. No public officer who considers that disclosure of any secret would cause public interests to suffer, shall be compelled to divulge them.<sup>9</sup>

(8) Remember that as you depose on oath, you may be tried for perjury if you wilfully speak an untruth. Take nobody's side except that of truth, regardless of the consequences to which your honest opinions may lead and never feel ashamed to say, when necessary 'I do not know'. You should be 'unawed by fear and uninfluenced by favour or enmity'.

(9) If you cannot honestly come to any independent conclusion of your own, do not be prompted by vanity or fear into giving out an irresponsible opinion or acquiescing in the opinion of another, however eminent that person may be, but tell the court about your hesitations and the reasons therefor.<sup>10</sup>

(10) As an educated man, do not lose temper at counsel's cross-examination, nor answer as if you were personally aggrieved or insulted. Don't argue with counsel. Avoid reserved or defiant manners, and don't indulge in feelings about legal procedure or other matters connected with the trial.

(11) If a counsel's question does not fully elicit the truth, supply the omission; if there is double meaning in any question, first draw court's attention to it and then answer the question if you can. In no other case, are you to volunteer a statement.

(12) Give your evidence slowly, distinctly, calmly and concisely, and use non-technical terms as far as possible and avoid exaggerations and unnecessary adjectives.

4. Section 60, Indian Evidence Act.

5. Section 101, Indian Evidence Act.

6. Section 293, Criminal Procedure Code, 1973 and S. 45, Indian Evidence Act.

7. Section 291, Cr.P.C., 1973.

8. Section 164, Cr.P.C. and S. 32, Indian Evidence Act.

9. Section 124, Indian Evidence Act.

10. This also holds good about writing reports calling for decisive opinions.

(13) Do not answer a question unless and until you have fully understood its meaning.

(14) If compelled to answer a relevant question, that answer cannot incriminate you.<sup>11</sup>

(Similar instructions to medical witnesses will be found in Modi's Local Classic Medical Jurisprudence and Toxicology, and the other very useful text-books like Gribble's Outlines of Medical Jurisprudence of India, Kamath's Medical Jurisprudence, Lyon's Medical Jurisprudence for India.)

(f) *Value of expert evidence.* The evidence of experts is nearly always a weak type of evidence,<sup>12</sup> and is to be received with caution.<sup>13</sup> The evidence of a medical man or other skilled witness, however eminent, as to what he thinks, may or may not have taken place under a particular combination of circumstances, however confidently he may speak, is ordinarily a matter of mere opinion. Human judgment is fallible. Human knowledge is limited and imperfect.<sup>14</sup> Moreover, it must be borne in mind that an expert witness, however impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him. The mere fact of opposition on the part of the other side is apt to create a spirit of partisanship and rivalry so that an expert witness is unconsciously impelled to support the view taken by his own side. Besides, it must be remembered that an expert is often called by one side simply and solely because it has been ascertained that he holds views favourable to its interests.<sup>15</sup> In assessing the pre-collision value of a launch, if the expert fails to take important factors into consideration and his opinion is not backed by sufficient data, the court will be justified in not accepting his opinion.<sup>16</sup> Direct evidence, clear and cogent and supported by circumstantial evidence, will be preferred to expert's evidence based on incomplete data.<sup>17</sup> The opinion of an expert must be supported by reasons and it is the reasons, and not the *ipse dixit*, which are of importance in assessing the merit of the opinion.<sup>18</sup> The testimony of a doctor is that of an expert and great weight should be attached to it but it may be discarded if there are good reasons for doing so.<sup>19</sup> The opinion of a medical witness, however eminent he may be, must not be read as conclusive of the fact which the Court has to try. It must be considered as nothing more than relevant. It cannot be suggested that because the evidence of a particular expert was accepted by a Court in one case it must be accepted in every other case.<sup>20</sup> The opinion of an expert witness, not based on any well-designed inexorable laws

11. Section 132, Indian Evidence Act.
12. Melappa v. Guramma, A.I.R. 1956 Bom. 129.
13. Panchu Das v. R., 1 C.L.J. 385.
14. Queen v. Ahmed Ally, 11 W.R.Cr. 25.
15. Ryen on Criminal Evidence in British India Edition 1912, page 127, quoted with approval in Hari Singh v. Sardarni Lachmi Devi, 1921 Lah. 126 : 59 I.C. 220 : 12 P.L.R. 1921.
16. Lionel Edwards, Ltd. v. State of West Bengal, 70 C.W.N. 452; A.I.R. 1967 Cal. 191 (194).
17. A. Nagireddi v. State, (1968) 1

- Andh.W.R. 178 : 1968 M.L.J. (Cr.) 131 (148).
- Palaniswamy Vaiyapuri v. State, 68 Bom.L.R. 941 : 1967 Mah.L.J. 25 : 1968 Cr.L.J. 453 ; A.I.R. 1968 Bom. 127 (139) (doctor not examined her answer to written queries made by the Sub-Inspector in a letter which was not produced).
- Abu Pramanik v. Emperor, 1942 Cal 239 : 199 I.C. 610 : 43 Cr.L.J. 565 : 74 C.L.J. 423.
- Basant Rao v. Emperor, 1949 Nag. 66 : I.L.R. 1948 Nag. 711 : 50 Cr.L.J. 181.

of nature, cannot be taken as decisive especially where there is evidence opposed to it.<sup>21</sup> Thus, for example, a conviction for kidnapping a minor cannot be based on the sole basis of the evidence of the medical expert especially when there is no direct evidence to prove that the victim was below the age of 18.<sup>22</sup> But the evidence of the medical expert cannot be brushed aside on the ground that it is at variance with the opinion of authors in medical treatises, when the books were not put to him during his examination and when the opinions of the authors were not shown to have been given in regard to circumstances exactly similar to those in the particular case before the Court.<sup>23</sup> In a charge under Section 361, I. P. C., the conclusive test regarding the age of the victim is the ossification of bones. For this an X-ray examination is necessary. Then alone the Court would attach weight to the opinion of the medical expert under Section 45 of the Evidence Act.<sup>24</sup> Insanity may be proved by the evidence of a medical expert but where such evidence is not available, the Court can, from other evidence in the case, satisfy itself that there was insanity.<sup>25</sup>

The opinion of a doctor as to the mental condition of a person at a particular time based on the facts which he had heard in Court, is not given in his capacity as an expert and to such an opinion no importance can be attached.<sup>1</sup>

(g) *Cases where medical evidence conflicts with oral evidence.* Where there is a conflict between the medical evidence and the oral testimony of witnesses, the evidence can be assessed only in two ways. A Court can either believe the prosecution witnesses unreservedly and explain away the conflict by holding that the witnesses have merely exaggerated the incident, or rely upon the medical evidence, and approach the oral testimony with caution testing it in the light of the medical evidence. The first method can be applied only in those cases where the oral evidence is above reproach and creates confidence and there is no appreciable reason for the false implication of any accused. Where the evidence is not of that character and the medical evidence is not open to any doubt or suspicion, the only safe and judicial method of assessing evidence is the second method.<sup>2</sup> Where there are alleged eye-witnesses of physical violence which is said to have caused a person's death the value of medical evidence adduced by the prosecution in support of its case is only corroborative. It proves that the injuries could have been caused in the manner alleged and death could have been caused by the injuries, so that the prosecution case being consistent with matters verifiable by the medical science, there is no reason why the eye-witnesses should not be believed. The medical evidence does not itself prove the prosecution case. The use which the defence can make of medical evidence is to prove by it that the injuries could not possibly have been caused in the manner alleged or death could not possibly have been caused by the injuries, and if it can do so, it

21. Mansel Pleydell of Simla v. Emperor, 1926 Lah. 313 : 96 I.C. 641 : 27 Cr.L.J. 977.
22. Kishori Lal v. State, A.I.R. 1957 Punj. 78 : 1957 Cr.L.J. 475.
23. Sunder Lal v. State of M.P., 55 Cr.L.J. 257 : A.I.R. 1954 S.C. 28; Bhagwan Das v. State of Rajasthan, A.I.R. 1957 S.C. 589.
24. Laimayum Tonjou Singh v. Mani-

- pur Administration, A.I.R. 1962 Manipur 5 : (1962) 1 Cr.L.J. 49.
25. Jagat Singh v. Ganpat, 1968 J.L.J. 283 : 1967 M.P.L.J. 17.
1. State v. Jose Gaspar Nethohona, 1971 Cr.L.J. 36 : A.I.R. 1971 Goa 3 (7).
2. Thakur v. State, 1955 All. 189, 191 : 56 Cr.L.J. 473; Swaran Singh v. State, (1968) 34 Cut.L.T. 187.

discredits the eye-witnesses. More it is not required to do, but less is of no use to it. If it can only prove that the injuries or the death could also have been due to other causes, it proves nothing, because thereby the version of the eye-witnesses is not dislodged and they are not discredited. But if it can prove that the injuries or the death could not possibly have been caused in the manner alleged, it is wholly irrelevant to try to prove in what other way or ways they could have been caused.<sup>3</sup> Where there is clear conflict between the evidence of eye-witnesses according to which only a single injury could have been caused, but according to the medical evidence there were four injuries, the eye-witnesses could not be believed.<sup>4</sup> If the prosecution case was of injury by sharp-edged weapon and the doctor stated the injury to be of blunt weapon ruling out the possibility of use of sharp-edged weapon, the accused will be acquitted.<sup>4-1</sup> When the discrepancy between the direct evidence and medical evidence is only in respect of the distance from which the shot was fired, the discrepancy is insignificant.<sup>4-2</sup> When two medical experts have given different opinions, that one which corroborates the direct evidence has to be accepted.<sup>4-3</sup> Where the Court has the testimony of a considerable body of trustworthy witnesses of good position and undoubted respectively, who were able to observe facts and draw inferences therefrom, the opinion of a medical expert, who was not himself present at the relevant time, as to the probable state of a person should not outweigh and prevail over the testimony of such witnesses.<sup>5</sup> When direct evidence is led and accepted, it is hardly necessary to consider expert opinion, though direct evidence can be appreciated in the light of expert opinion.<sup>6</sup> The experts' opinion does not take away the common man's judgment—they have the right to think and judge things from day-to-day experience.<sup>7</sup> In a state of uncertainty regarding the age of a girl alleged to be kidnapped between the medical evidence based on the reliable test of fusion of epiphyses and the unreliable oral evidence in support of the age given in the school register, the benefit of uncertainty must go to the accused.<sup>8</sup>

Medical evidence is opinion evidence and it is only with regard to the physical aspect of the injuries that the opinion of a medical witness is relevant and admissible as the opinion of an expert. But in cases dealt with under the Workmen's Compensation Act, medical opinion is valueless to adjudge the loss of earning capacity, which alone would be the crucial issue in the case. The utmost that a medical witness can give is to give the percentage of the loss of the normal physical capacity or power; but it has no relation to the loss of physical capacity. It is therefore wrong to treat his evidence not only as rele-

3. Sunil Chandra Roy v. State, A.I.R. 1954 Cal. 305, 318-19 : 55 Cr.L.J. 805.
4. Golappa Avana Naik v. State, 1968 Cr.L.J. 929 : A.I.R. 1968 Goa 72 (75).
- 4-1. Gharib Das v. State, 1973 All.Cr.R. 198.
- 4-2. State of U. P. v. Sughar Singh, A.I.R. 1978 S.C. 191; Karnail Singh v. State of Punjab, A.I.R. 1971 S.C. 2119 : 1971 Cr.L.J. 1463: 1971 Cr. Ap.R. 388 (S.C.).
- 4-3. Piara Singh v. State of Punjab, A.I.R. 1977 S.C. 2274 : (1978) 1

- S.C.J. 200 : 1977 Cr.L.J. 1941 ; 1977 S.C.C. (Cr.) 614 : (1977) 4 S.C.C. 452 : 1978 M.L.J.(Cr.) 186.
5. Saradindu Nath Rai v. Sudhir Chandra Das, A.I.R. 1928 Cal. 116, 120 ; I.L.R. 50 Cal. 100 : 69 I.C. 48 : 35 C.L.J. 569.
6. Node Gulmamad Bachchu v. Kutch State, A.I.R. 1952 Kutch 4.
7. Bir Bahadur v. State, A.I.R. 1956 Assam 15.
8. Raunki v. State, 72 Punj.L.R. 332 : 1970 Cr.L.J. 1383 : 1969 Cur.L.J. 666 : A.I.R. 1970 Punj. 450 (452).

vant but as decisive on the question of the loss of earning capacity.<sup>9</sup> The opinion of a medical officer is at best an opinion and it cannot be used to contradict the positive evidence that the deceased took his last meal at 4 p. m. or had been stabbed at 5 p. m.<sup>10</sup>

If the injured person himself sues as plaintiff claiming damages for loss of expectation of life, some evidence, possibly of medical men, must be led to show that the injury has shortened his expectation of life, though some caution may be necessary before accepting the medical evidence. But if the injured person is dead and the suit is brought by that person's administrator, the fact of death of the injured person obviates to some extent the necessity of medical evidence that the accident has shortened the expectation of life.<sup>11</sup>

**10. Opinion as to age and time of death.** (a) *General.* In regard to medical evidence two aspects of importance in courtwork may engage our attention. Firstly, medical evidence in regard to the estimation of age is required both in civil and criminal cases. In civil cases, for instance, age has to be estimated in the absence of other evidence to find out whether a person was a minor or a major when he executed a document. In criminal cases medical evidence as to age is required whether a child is under seven years of age and section 82 applies or in cases of rape and kidnapping whether the girl is below or above the age when she can give valid consent or when it has to be decided whether a young person is a child or an adolescent offender above a certain age when the question of punishment or imprisonment to be inflicted arises. The medical evidence becomes all the more important because in our country as pointed out in Mehir and Gribbles : Outlines of Medical Jurisprudence in India, 5th edition (1908), Higginbothams, generally speaking very little reliance can be placed upon the witness's statement of age and in almost every case there is a witness who cannot tell his age and the court has to guess. it

The sources of finding out the age of an Indian are generally : (i) horoscopes, (ii) birth registers, (iii) school registers, (iv) medical evidence—Age and (v) medical evidence—time of death. Each source has its own infirmities' and medical evidence becomes the residuary important source.

(b) *Horoscopes.* It has been held that a horoscope is inadmissible unless its correctness is vouched either by its writer or by a person with special means of knowledge, a family Purohit. In the matter of proof of minority, the horoscope is not of very great evidentiary value, but the birth register is. Horoscopes have to be received with caution, because they can easily be fabricated and such fabrications are difficult of detection. Horoscopes are

9. Kali Das v. S. K. Mondal, A.I.R. 1957 Cal. 660, 662; Calcutta Licenssed Measures Bengal Chamber of Commerce v. Md. Hossain, 73 C. W.N. 491 : 1969 A.L.J. 92 : 1969 Lab.I.C. 971 : A.I.R. 1969 Cal. 377 (380).
10. Basappa Bhimappa v. State, A.I.R. 1961 Mys 21, 24 : 1961 (1) Cr.L.J. L.F.—165

- 120.
11. Vinod Kumar v. Ved Mitra, 1970 A.C.J. 189 : 1970 J.L.J. 504 : 1970 M.P.L.J. 306 : 1970 M.P.W.R. 338 : A.I.R. 1970 M.P. 172, 174; Flint v. Lovell; 1934 All.E.R. 200 approved by the House of Lords in Rose v. Ford, (1937) 3 All.E.R. 359,

not evidence by themselves and become admissible in evidence under sections 17, 18, 32 (5), 159 and 160 of the Evidence Act.<sup>12</sup>

(c) *Birth Registers.* In Southern India the birth register in rural areas is maintained under the Board's Standing Orders and the Village Officers' Manual and in the urban areas or municipal areas, it is maintained under the statutory provisions. This evidence is often subject to chicanery by attributing to the claimant in the suit the date of birth of an older or younger brother or sister as the name of the infant will not be entered since Namakaranam takes place later.<sup>13</sup> Similarly, the birth entries in Police Registers kept under Berar Patels and Patwari Law, App. XI-B, Sch., Rule 25, C. P. and Berar Police Regulations, regulation 427 and the entries of vaccination in Vaccination Register. They are relevant and admissible if the entries are satisfactorily connected with the persons whose birth dates are in question.<sup>14</sup>

(d) *School Registers.* It has been held that where the question is as to the age of a person, the entry as to his date of birth in the school register is admissible in evidence under section 35 of the Evidence Act, the entry being in a public register and made by a public servant in the discharge of his official duties. There is a presumption that when a boy is admitted into a school, he is accompanied by some close relative of his who is aware of his age. The entry of the boy's age in the school register is admissible. School certificates duly prepared according to authority in Government or State schools are relevant. But entries in school registers are of little value as evidence of age, when there is no evidence to show on what materials the entries are made. Not unfrequently incorrect dates of birth are entered owing to ignorance, faulty memory, a desire to avoid the student being detained as under-age in the S. S. L. C. class or to obtain Government service earlier, etc.<sup>15</sup> In a country where eighty per cent of the people are illiterate school registers may not always be forthcoming.

(e) *Medical evidence—Age.* The principal medico-legal means according to Modi's Medical Jurisprudence and Toxicology, 12th Edition, page 28, which enables one to form a fairly accurate opinion about the age of an individual, especially in earlier years are teeth, height and weight, minor physical signs and ossification of bones. But these medico-legal opinions based upon teeth, height and weight and minor physical features are notoriously liable to variations with the result that fixed deduction cannot be made with certainty. Take the teeth for instance. Modi in his Medical Jurisprudence at

12. Raja Gaundan v. Raja Gaundan, 17 Mad. 134; 25 Mad. 183; 38 Mad. 166 : A.I.R. 1938 C. 48; A.I.R. 1918 P.C. 45; A.I.R. 1916 P.C. 242; A.I.R. 1918 P.C. 118 : 10 L.W. 67; A.I.R. 1923 Nag. 164.
13. See Statutory Rules under, the Madras District Municipalities Act, 1920 corrected up to the end of 1954 compiled by the Examiner of Local Fund Accounts, Madras, 4th Edition (Thompson & Co., Ltd.), page 468 and following Registration of Vital Statistics—and Register No. 19 (Register of Births and Deaths of Cattle Disease and Mortality in the Revised Form of Village Account pub-
- lished by the Govt. of Madras).
14. Manikrao v. Deorao, A.I.R. 1955 Nag. 290; I.L.R. 1954 Nag. 709.
15. See Liladhar v. Mabibi, 149 I.C. 660 : 16 N.L.J. 232 : A.I.R. 1934 Nag. 44; Superintendent and Remembrancer of Legal Affairs v. Forhad, A.I.R. 1934 C. 766; Aga Jan v. Kesheo, A.I.R. 1940 Nag. 217; Munna v. Kameshri, A.I.R. 1929 Oudh 113; Manikchand v. Krishna, A.I.R. 1932 Nag. 117; Vishnu v. Kuruvilla, A.I.R. 1957 Ker. 103; Md. Hasan v. Saifday, 14 Lah. 470; Asanand v. Giaff, A.I.R. 1936 Lah. 508; Tanaki v. Ivotish, A.I.R. 1941 Cal. 41.

page 28 points out, that the estimation of age from the teeth with some amount of certainty is only possible up to 22 to 25 years of age; beyond that it is merely guesswork. Ray in his *Medical Jurisprudence*, 6th Edition, at page 41, says: "Regarding dentition, remember that it is (a) delayed by rickets, and (b) anticipated congenital syphilis....The order, rather than time, of eruption of teeth is fixed". In fact it is held in *Sultan v. Emperor*<sup>16</sup> that the indication afforded by the appearance of wisdom-teeth is notoriously untrustworthy.

Then coming to the height and weight, the ratio between these is too variable for any formula to be of much value.<sup>17</sup> Modi<sup>18</sup> discussing the evidentiary value of height and weight formally states at page 30: ".....the progressive increase in height and weight according to age varies so greatly in individuals that it cannot be depended upon in estimating age in medico-legal cases." Again, in the 1953 Edition, at page 111 it is mentioned: ".....such comparisons are of no value to the medico-legal jurist." Barry in his "*Legal Medicine in India*",<sup>19</sup> at page 17, states :

"Statistics relating to this subject will be found in all text-books on Medical Jurisprudence, but it may here be stated that most that can be derived from a study of statistics is probably the average for given races subject to almost infinite variation."

Minor physical signs like pubic hair, menstruation, etc., constitute notoriously unreliable data, varying as they do from individual to individual and depending upon several incidental causes. Lyon's *Medical Jurisprudence* for India, Tenth Edition (1953), at page 110, dealing with medical opinion as to the age of a person by his appearance, points out: "An estimate based entirely upon appearance may well be faulty by ten or more years. Everybody has met the old young man and the young old one. In *Sultan v. Emperor*,<sup>20</sup> it has been pointed out that in determining age by physical signs, a wide margin of error must be admitted.<sup>21</sup> As Lyon's *Medical Jurisprudence* (1953 Edition), page 85, puts it, ...."in determining age by physical signs, a medical man has no advantage over a layman. The mother will be a better authority than a doctor. However, in default of any other absolutely accurate one, the medical man must place some reliance on his method. Realising the shortcomings of this method he should avoid being dogmatic in stating his opinion."

Then finally turning to ossification of bones, in youth the age may be estimated with fair accuracy from the development and fusion of centres of ossification. Reference must be made to text-books on anatomy for full details of ossification of bones; but a summary of the ossification centres is given in all standard text-books on Medical Jurisprudence. Females are as a rule about a year ahead of the males in maturing their skeleton. As pointed out by Keith Simpson in his "*Forensic Medicine*" (1953 Edition) at page 28, "After twenty-five years the accuracy of age estimation deteriorates sadly. For some fifteen years, until about the age of forty, there is little but the general ap-

16. A.I.R. 1934 Sind 119 : 151 I.C. 984.

17. Lyon's *Medical Jurisprudence*, 1904 Ed. page 37.

18. *Medical Jurisprudence*.

19. Thacker & Co.

20. A.I.R. 1934 Sind 119 : 151 I.C. 984.

21. See also *Laimayum v. Manipur Administration*, A.I.R. 1962 Manipur 5 : (1963) 1 Cr.L.J. 49.

pearance to give guidance." Gonzales, Vance, Helpern and Umberger's American Classic Legal Medicine, Second Edition, at page 45 : "It may not be easy to estimate the age of the body by the osseous changes after the thirtieth year except in old age when senile changes occur." Again, "in later adult life individual personalities may alter the rate of osseous changes. Various endocrine disturbances may hasten or delay the rate of osseous changes or delay the appearance of the primary or secondary ossification centres or the closure of the epiphyses." Glaister's Medical Jurisprudence and Toxicology (9th Ed.) at page 83, deals with times of appearance of centres of ossification in the epiphyses and their fusion with diaphyses. An approximately accurate estimate of age is given by the centres of ossification, and the progress of that ossification in the unification of the bones. See the chronological order of appearance of centres of ossification in, and fusion of, some of the epiphyses given in Glaister's (*ibid*) at page 83 and following. But as concluded by Glaister at page 86 :

"From puberty, until the consolidation of the skeleton (at twenty-two or twenty-three or at the most twenty-five years), a fairly close estimate within a range of two to three years may still be made mainly on the progress of the union of the epiphyses. Thereafter, the range must lengthen; and after thirty years when the mature skeleton already begins to show signs of 'ageing' including the beginning of the progressive closure of the cranial sutures, it will be hardly safe to estimate more closely than in decades."

Sydney Smith and Fiddes in their "Forensic Medicine", Tenth Ed., page 79, sum up the whole position under the heading "Taking the whole question of age together" as follows :

"During the first six months we are mainly guided by the weight and height, assisted by the observation of certain other changes, such as the partial closure of the anterior fontanella and the fusion of the two halves of the mandible and in the first fortnight by changes in the umbilical cord and skin, which will be discussed under infanticide and pregnancy.

"Between six months and two years the eruption and calcification of the temporary teeth is the best guide, assisted by the observation of certain ossific centres and their size in the heads of the humerus and femur, the tarsus and carpus.

"From two to six years the ossification of the tarsus and carpus, and the appearance of centres in the epiphyses of long bones.

"From six to thirteen years the eruption and calcification of the permanent teeth, and the appearance of epiphyseal centres in the long bones.

"From thirteen to sixteen years the changes incident to the onset of puberty and the observation of ossification of the bones, especially in the region of the elbow joint.

"From sixteen to twenty-five years the union of epiphyses with their shafts, especially in the bones of the elbow, wrist and fingers, is the main guide. After the union of the epiphyses to the shafts the line often per-

sists as an epiphyseal scar which can be observed by X-rays or by section. The trabeculae are continuous across this scar in older bones, but show definite discontinuity in recent union. The union of the epiphyses at the sternal end of the clavicles, the secondary centres in the pelvis and the ends of the ribs are usual in the age period 22-25 years. The eruption of the third molars usually occurs about eighteen, but these teeth are often retained for long periods. If so retained, however, their roots become completely calcified by about twenty-five years. After the age of twenty-five, we must be guided by general retrogressive changes....."

Second in importance in capital offences for instance is medical evidence in fixing the time of death. It is essential to find out whether the time of death given by the prosecution witnesses tallies with the observations made by the doctor of the condition of the body at the time of its receipt for post-mortem examination and secondly from the degree of digestion of its stomach contents. In regard to the former, namely, rigor mortis or cadaveric rigidity it is well settled that without adequate data regarding certain factors e. g., the kind of death, age and vigour at the time of death, presence or absence of clothing, temperature of the surrounding media, etc. etc. no really accurate estimate of the actual time of death can be made. The time-table given for the onset of cadaveric changes in temperate climates furnished by text-books on medical jurisprudence is not applicable to this country of hot climate and where cadaveric changes generally occur differently and more quickly. Therefore, a doctor has to allow a considerable margin in regard to his estimation of actual time of death. In *Sucha Singh v. The State*,<sup>22</sup> this aspect of medical evidence has been thoroughly discussed.

In regard to the degree of digestion of stomach contents which is a circumstance usually employed to ascertain the time of death and concerning which our doctors are dogmatic in inverse proportion to their experience and qualifications, it is now well settled that this is an unreliable test.<sup>23</sup>

Therefore, when there is a conflict between the actual time of death regarding the evidence of reliable eye-witnesses and the medical evidence, courts have not hesitated to discard the medical estimate. In *Lachman Singh v. The State*,<sup>24</sup> their Lordships of the Supreme Court held after considering the other evidence in the case that the finding of the doctor did not necessarily affect the prosecution case as to the time of the occurrence and the necessity for full data to reach a proper conclusion based upon the condition of the digestion was emphasised. In *Doddamani v. State*,<sup>25</sup> the Mysore High Court held that the opinion stated by the medical officer was at best an opinion and could not be taken as contradicting the positive evidence of the witnesses as to when the deceased ate his last meal and when he was stabbed. Similarly, in *Mukanda v. State*<sup>1</sup> the Rajasthan High Court held that the medical estimate did not negative the other evidence about the time when the victim was belaboured.

It has been pointed out in *Chatu v. Govindan Kutty*<sup>2</sup> that on the question as to the age of a girl alleged to be taken from the custody of the father,

22. A.I.R. 1951 Simla 283.

23. See *In re Ramaswami*, A.I.R. 1938 Mad. 336; 1938 M.W.N. 36; *Ganga v. Emperor*, A.I.R. 1930 Oudh 60; 31 Cr.L.J. 689; *Dhanna v. State*, A.I.R. 1951 Raj. 37: 52 Cr.L.J. 201; *Nanak Chand v. Emperor*, A.I.R. 1932 Lah. 73: 32 Cr.L.J. 1036.

24. A.I.R. 1952 S.C. 167: 1952 Cr.L.

J. 863.

25. A.I.R. 1961 Mys. 21: (1961) 1 Cr.L.J. 120.

1. A.I.R. 1957 Raj. 331: 1957 Cr.L. J. 1187.

2. A.I.R. 1958 Ker. 121: 1958 Cr.L. J. 637.

the Magistrate was not right in preferring the opinion of the radiologist to the positive evidence furnished by the municipal birth register, the school admission register and the evidence of the girl's father, particularly when medico-legal opinion is that owing to variations in climatic, dietic, hereditary and other factors, affecting the people of different States of India, it cannot be reasonably expected to formulate a uniform standard for the determination of the age by the extent of ossification and the union of epiphyses in bones.

The opinion of a doctor as to the age of a person is a relevant piece of evidence, and it is quite a different question as to what weight in a particular case ought to be attached to such an opinion.<sup>3</sup> As observed by their Lordships of the Privy Council in *Banwari Lal v. Mahesh*,<sup>4</sup> the effect of the medical testimony is to render the other evidence adduced in the case as to the age of a person medically probable or improbable.<sup>5</sup> It is true that a doctor is in a better position to form an opinion about the age of a person than a layman. But where he does not bring any scientific knowledge to bear upon his opinion and bases it on physical peculiarities such as height, weight, etc., his statement is no more than an opinion.<sup>6</sup> Their Lordships of the Privy Council characterized such a certificate as "Worthless".<sup>7</sup> At any rate it is not sufficient by itself to fix the exact age.<sup>8</sup> Medical evidence as to age is not wholly conclusive.<sup>8-1</sup> However, in the undernoted case it was held that the evidence of Radiologist as to the age of the prosecutrix in a case of rape is conclusive and more convincing than the evidence of her illiterate parents.<sup>8-2</sup> In a case in which a doctor estimated the age of a girl from the development of her breast, height and weight and the appearance of pubic hair and the absence of wisdom-tooth, and the lower Court rejected his evidence on the ground that no ossification test was conducted, Panigrahi, J., of the Orissa High Court observed: "But I am not aware of any such tests having been conducted anywhere in India, particularly in Orissa." None the less Courts have acted on the opinion of doctors, arrived at without conducting any ossification tests, and based on other factors, as indicated above. The learned Judge seems to have ignored the conditions obtaining in this country, and has brushed aside the opinion of the doctor on the ground that he did not conduct the ossification test of the girl. The fact that the girl had attained puberty just four months prior to the occurrence must have impressed the jury, who saw the girl, considerably in returning their verdict and it is unfortunate that the learned Sessions Judge should have wholly overlooked this important piece of evidence.<sup>9</sup> Medical officers must not forget that the Courts must decide these matters beyond reasonable doubt and not on a preponderance of pro-

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- 3. Abdullah v. Mt. Zulkha, A.I.R. 1949 Pesh. 11.
- 4. 49 I.C. 540 : 21 O.C. 228 at p. 232 : 6 O.L.J. 168 : 41 All. 63 : 23 C.W.N. 577 : 1919 M.W.N. 490 : 45 I.A. 284 (P.C.).
- 5. Sripal Singh v. Jagdish Narayan, 56 I.C. 313 : 7 O.L.J. 219 : A.I.R. 1920 Oudh 164.
- 6. Emperor v. Qudrat, A.I.R. 1939 All. 708 : I.L.R. 1939 All. 871 : 185 I.C. 271 : 41 Cr.L.J. 142 : 1939 A.L.J. 980; Somgir v. The State of Gujarat, (1966) 7 Guj.L.R. 378, 382 (admission of doctor that ossification test is the surer one); Lai-mayum v. Manipur Administration, 1962 (1) Cr.L.J. 49 : A.I.R. 1962 Manipur 5 (No reasons elicited from doctor for his opinion).
- 7. Mahomed Syed Al Ariffin Bin Mahomed Ariff v. Yeohooi Gark, A.I.R. 1916 P.C. 242 : 43 I.A. 256 : 39 I.C. 401 : 19 Bom.L.R. 157 : 21 C.W.N. 257 : 1917 M.W.N. 162.
- 8. Bishnath Prasad v. Emperor, A.I.R. 1948 Oudh 1 : 230 I.C. 144 : 48 Cr.L.J. 542.
- 8-1. Hayath v. State of Mysore, 1972 Mad.L.J. (Cr.) 177 (Mysore); (1972) 2 Cut.W.R. 1836.
- 8-2. 1975 W.L.N. (U.C.) 225 (Raj.)
- 9. Anam Swain v. State, A.I.R. 1954 Orissa 33.

bability. If they are convinced beyond reasonable doubt they should say 'I feel certain accused is 19', and not 'I do not think he is younger than 19'.<sup>10</sup>

In cases involving a question of limitation medical evidence cannot throw much light, because from its very nature it is based on conjectures only and the Court cannot possibly look to it for the purpose of determining with precision the exact age of a particular person.<sup>11</sup>

(f) *Medical Evidence—Time of death.* There is no fixed method of determining the time for which a dead body has been under water. Various factors like age and sex of deceased or temperature and velocity of the current of water affect the body.<sup>11-1</sup>

**11. Handwriting expert—Detection of forgery.<sup>12</sup>** (a) *General.* The making of any mark upon any surface by direct human agency as a means of communicating information to a fellowman is in a broad sense handwriting, this may include engrossing and drawing and even painting. Nevertheless in its popular acceptation, the term handwriting is limited to that form of freely written characters which is usually adopted by the person in sending messages to another person. In its restricted sense therefore handwriting may be considered as a written speech of the individual.

The proof of handwriting and signature forms the bulk of our civil court work and the subject-matter of investigation in criminal offences like forgery. The relevant provisions of the Indian Evidence Act relating thereto are sections 45, 47, 67 and 73.

A detailed study of handwriting enables the exposure of the fraud. Writing is a thing that is tangible and almost every man who can write has a

- 10. Nga Myauk Nyo v. The King, A.I.R. 1938 R. 56 : 174 I.C. 338 : 39 Cr.L.J. 412.
- 11. Zinda v. Mst. Roshnai, A.I.R. 1928 Lah. 250 : 113 I.C. 53 : 100 L.L.J. 183.
- 11-1. Haribandhu v. State of Orissa, I. L.R. (1972) Cut. 1181 : 1972 Cut. L.R. (Cr.) 526 : (1972) 38 Cut.L.T. 1044.
- 12. Sources consulted: (1) Ames : Forgery. Its Detection and Illustrations (1901); (2) Hardless : Handwriting and Detection of Forgery (1919); (3) Ramanatha Iyer : Detection of Forgery (1927) (reproducing much anterior and now long-forgotten and scarce valuable research material from Journals, etc); (4) Brewester : Contested Documents and Forgeries (1922); (5) A. S. Osburn : Questioned Documents, second edition (New York) (1929); (6) C. A. Mitchell : Documents and Their Scientific Examination (1935); (7) Wharton : Criminal Evidence, 12th edition, Vol. II, pp. 458–466, etc.; (8) Underhill : Criminal Evidence, 5th edition, Vol. I, S. 318, etc.; (9) Russell A. Gregory : Identification of Disputed Documents, Finger

Prints and Ballistics (1957); (10) K. S. Ramamurti (a senior Madras expert): Handwriting and the Criminal (52 Mundaganni Amman Kovil Street, Madras-4); (11) Justice Ramaswami's Magisterial and Police Guide, Vol. I, p. 641 and foll. (M. L.J.); Aiyar & Aiyer's Art of Cross-Examination (1961 Ed.), Ch. XXVI, p. 803 and foll; (12) Journal Portions of 7 Cr.L.J. 106–108; 13 Cr.L.J. 9; 16 Cr.L.J. 95–99; 21 Cr.L.J. 46–50; 20 M.L.J. 234–236; (13) Radley : Photography in Crime and Detection (Chapman and Hall) (1948); (14) Leland Jones : Scientific Investigation and Physical Evidence [Charles Thomas Publisher, Springfield, Illinois, U.S.A. (1959), Ch. VII—Questioned Documents Examination]. (We are indebted to the Madras High Court Library, one of the most comprehensive Law Libraries for the scarce earlier sources consulted, in the preparation of these notes and which works constitute the common sources of our knowledge and comprise the basis of later compilation like Ramanatha Iyer's Detection of Forgery etc.).

character that those who are acquainted with it can readily recognise; and though it may by expert penmen be imitated, as a general rule its individuality is easily established. In general, there is a distinct prevailing character in every person's manner of writing which is easily discoverable by observation and when once known may be afterwards applied as a mental standard by which to test any other species of his writing whose genuineness is disputed. In each person's handwriting, there is some distinctive characteristic which as being the reflex of his nervous organisation is necessarily independent of his own will and unconsciously forces the writer to stamp the writing as his own. Thus, every man's handwriting has a definite and distinct character so much so that those familiar with it are at all times able to distinguish it from the others. The most striking feature in the handwriting of a person is the uniformity of his signature. Many persons habitually sign their names in a peculiar hand very different from the handwriting in the body of papers written by them; they adopt and persevere in a particular form of signature, while the general hand is constantly changing. A signature may, and very often does, possess great peculiarity; it may be in the form of letters or in some flourish which does not attend the writer's general style of writing. This peculiarity is made use of by some persons from the mere whim or caprice, by others by a desire to conceal the writer's usual style or to make his signature difficult to be imitated. Thus, different criteria may prevail in the identification of handwriting and signature of the same person.

In examining a disputed document the true test is not the extent of the similarities observed when compared with genuine documents, as forged documents usually are good imitations of genuine documents, but the nature and extent of the dissimilarities noticed. It is the differences which expose the true character of the document in question.<sup>13</sup>

The individuality of the writing and signature of any person giving it a fixed character distinguishing it from the handwriting and signature of every other person is the result of several factors constituting the basis of formation of handwriting. The formation of handwriting is brought about by several factors—

- (a) *Influence in the school room.* The use of a particular style of copy by the young student gives the first impulse for the formation of the peculiar style of his handwriting;
- (b) *Family influences.* Sometimes members of the same family possess striking similarities in the formation of their handwriting resulting from coincident constructions, example and hereditary family traits;
- (c) *Common business surroundings.* Men in certain businesses or professions sometimes adopt peculiarities of characters;
- (d) *Race and nationality.* The writing of the different races and nationalities in the world is marked and varied in its idiosyncrasies as are the physiognomies and other peculiar race characteristics;
- (e) *Sex.* The woman betrays her sex in her writing as much as in her daily actions;

(f) *Influence of the mind.* Writing has been rightly described as a mirror of the mind. Though writing ultimately becomes the automatic production of the hand, it is equally a fact that it does so as the pupil and agent of the mind;

(g) *Physical causes.* Several physical causes result in stamping upon the writing of different persons their own personality. One having short thick fingers the muscles of which with those of the hand and the arm are hardened and stiffened by severe labour and are little exercised in writing, cannot possibly write like one having long flexible fingers constantly exercising in writing.

There are four main movements in the formation of figures and letters : (1) finger, (2) wrist, (3) forearm, and (4) whole arm movement. These again are sub-divided according to various degrees of combination of each of the above movements as the simple finger movement, the advanced finger movement and combined finger and wrist movement, the combined finger and forearm movement; and sometimes a whole arm movement is united with one or more of the others. It is exceedingly difficult for a person habitually writing by one movement to successfully imitate writing executed by another movement. In addition, original and highly eccentric persons develop equally original and eccentric handwriting. There is another case of eccentric writing consisting of well-nigh unintelligible hieroglyphics of some great men ; some essentially bad writing is the result more of an attempt to force an unskilled hand to perform the utterly impossible task of keeping pace with the rushing torrent of thoughts than of any other eccentricity of character. When a hand capable of writing well 30 words per minute endeavours to record the thoughts of a man that can furnish 200 words in the same time, it often descends to dots, dashes and slurs legible only from the context.

Though, as already pointed out, every man's handwriting has a definite and distinguishing character so much so that those familiar with it are at all times able to distinguish it from all others, few persons constantly keep the very same character of their handwriting. Signatures and writings are frequently much altered by time, hurry in writing, temporary nervousness or unsteadiness of the hand or even by the kind of pen used, steel or fountain pen or the pattern of a pen.

A person's handwriting may be affected by his health, mood of mind at the time he writes, his haste or leisure in writing, the character of the pen, ink or paper or other fortuitous circumstances, the slightest peculiarities of circumstance or position, as for instance, the writer sitting up or reclining or the paper being placed upon a harder or softer substance or on a plane more or less inclined ; all these are enough to account for the same letters being transcribed differently at different times by the same individual. A person's writing may be more constrained and closer and perhaps may differ in other respects from his ordinary writing because of the limited space available to him or because of an inclination to fill in an extra space such as space made by erasure. A man overwhelmed with grief or furious with anger or under the effect of stimulants may write an altered hand. Age and infirmity, infirmity of sight, hand benumbed with cold, muscular difficulty, tremor, writing resumed after a long vacation, writing at beginning and end, filling up of

blank spaces in documents, writing with left hand, writing by a guided hand, writing under hypnotism or hysteria, writing by a disguised hand, writing with different instruments, pencil or pen and ink—all account for normal and abnormal variations in the handwriting and signature of the same person. But the variations are generally less in the case of one's signature than the general writing on account of the fact that the formation of the signatures on account of the thought and care normally exercised in the choice of the types and letters of the signature and in frequently trying to produce an artistic effect and by more frequent repetitions and the thought and care bestowed on signing become, to use the jargon of the handwriting experts "more or less monogramic in its character and come ultimately to be more personified and to stand in a more significant manner as the representation of its author. It palpitates as it were with his very life and character—it is his *alter ego*."

But notwithstanding these variations, normal and abnormal, there can be no gainsaying that in every man's writing there are peculiar prevailing characteristics which distinguish it from the handwriting of every other person and it is, therefore, that an expert by studying characteristics as they appear in the genuine handwriting may be able to determine with some degree of certainty whether a disputed writing of the same person exhibits the same or other characteristics. This will enable the expert, notwithstanding the fact that the same person never writes twice exactly alike, to pronounce upon the genuineness or otherwise by a comparison of the standard and disputed writing, because in its general habitual characteristics the handwriting of an individual is the same.

These general characteristics formulated in all the standard text-books on handwriting and detection of forgery have been collected in an *aide-memoire* subjoined below. Our sources consulted mention the expert treatises to which we are indebted and acknowledging our gratitude to these sources we venture to express the hope that these brief commentaries will serve as sign-post guiding the reader from these pages to those sources, so that an adequate knowledge of admittedly difficult but fascinating subjects can be acquired. These brief comments are only intended to be appetisers for the rich feasts provided by the sources consulted by us and indicated in all appropriate places.

That is why in all ages in different countries the handwriting expert in some form or other has been in existence and been assisting Court.

The Indian Evidence Act contemplates two sets of persons for assisting courts in the comparison of disputed and standard writings and drawing of correct conclusions, namely, experts (Section 45) and lay witnesses (Section 47). See *post* for lay witnesses.

Admissibility of expert opinion in evidence rests on the ground that known or proved facts may have meaning which cannot be read except by persons specially qualified by skill, experience, training and study, to interpret them. In our country several persons put themselves forward as handwriting experts and there are no standard qualifications. Therefore in each case where the expert appears this has got to be established.

There are two general methods of perpetrating forgeries, one by the aid of tracing, the other by freehand writing. These methods differ widely in details, according to the circumstances of each case. Traced forgeries almost invariably fail in movement, pen-presentation, pen-pressure and execution or

speed. They consequently afford means of detection in various ways: (i) They are formal, slow and nervous. (ii) The even flow of the ink which is the result of the slow and evenly drawn lines. (iii) There is absence of natural shading caused by the slow drawing of the pen with regular even pressure; where, as is often done, an attempt is made to rectify this there are the evidences of retouching. (iv) There are also evidence of abnormal pressure at various parts caused by the forger stopping to see whether he is guiding his pen correctly over the lines. (v) There may also be evidence, that while tracing, the person would have to keep his pen upon and press on the paper, thus causing pen-pauses at various places or it may be that instead of pen-pauses there are pen-lifts (in many cases both) caused by the writer. The abnormal pressure caused by pen-pauses or pen-lifts observed in unlikely places, such as in the course of a continuous up or down stroke or curve, where there should be no stoppage or break is one of the surest tests of forgery by tracing. (vi) If tracings are made first in pencil and then inked over, the pencil outlines would be visible in some places. This is due to the latter not being properly covered with ink. In such cases there may also be erasures, marks and abrasions noticeable on the paper; caused by the rubbing out of the pencil lines which in some cases affect the ink lines as well. (vii) Indentations on the paper may also be visible caused by undue pressure of the pencil in the first act of tracing. Such cases occur where the tracing had been gone over first with some blunt instrument and the marks subsequently inked over. In such cases the document shows deep indentations on the paper which fact alone may render the questioned signature extremely suspicious. Referring to this subject Ames says: "Where pencil or carbon guidelines are used, which must necessarily be removed by rubber, there are liable to remain some slight fragments of the tracing lines, while the mill finish of the paper will be impaired and its fibre more or less torn out, so as to lie loose upon the surface.....Also the ink will be more or less ground off from the paper, thus giving the lines a gray and lifeless appearance. And as retouchings are usually more after the guide lines have been removed, the ink, wherever they occur, will have a more blank and fresh appearance than elsewhere. All these phenomena are plainly manifest under the microscope. Where the tracing is made directly with pen and ink over a transparency, as it is often done, no rubbing is necessary, and of course the phenomena from rubbing do not appear." Another point to be noticed is that the very delicate features of the original writing are more or less obscured by the opaqueness of two sheets of paper, and are therefore changed or omitted from the forged simulation, and their absence is usually supplied, through force of habit, by equally delicate unconscious characteristics from the writing of the forger. The direction of the pen also affords a valuable guide in the detection of forgery by tracing.

So, if it be found that two signatures measure precisely, and when superimposed one over the other they exactly coincide, such a fact is conclusive proof that one or both signatures have been traced. The firmness of the line, quality, execution or speed, and movement, combined with other details, will show which one of the signatures is genuine and so distinguish the one which served as a pattern for the other. Courts have uniformly concluded that where two or more supposed signatures, especially if there are more than two, are found to be counterparts, it is certain either that all are spurious and traced from a common original or that one is genuine and the others traced from it.

Traced forgeries, however, are not as is usually supposed, necessarily exact duplicates of their originals, since it is very easy to move the paper by acci-

dent or design while the tracing is being made, or while making the transfer copy from it; so that while it serves as a guide to the general features of the original it will not, when tested, be an exact duplication. The danger of an exact duplication is quite generally understood by forgers and is therefore generally avoided.

Where signatures or other writings have been forged by previously making a study and practice of the writing to be copied, until it has been to a greater or less degree idealised, the hand must be trained to its imitation so that it can be written with a more or less approximation as to form and with natural freedom. Forgeries thus made by skilful imitators are the most difficult of detection, as the internal evidence of forgery by tracing is mostly absent. The evidence of freehand forgery is chiefly in the greater liability of the forger to inject into the writing his own unconscious habit, and to fail to reproduce with sufficient accuracy that of the original writing, so that when subjected to rigid analysis and microscopic inspection, the spuriousness is made manifest and demonstrable. Specific attention should be given to any hesitancy in form or movement manifest in angularity or change of direction of lines, changed relations and proportions of letters, slant of the writing, its mechanical arrangement, disconnected lines, retouched shades, etc. Photographs, greatly enlarged of both the signatures in question and the exemplars placed side by side for comparison will greatly aid in making plain any evidence of forgery. If practicable, use may be made for comparison as standards of both the imitated writing and that of the imitator. These methods, employed by skilled and experienced examiners, will rarely fail in establishing the true relationship between any two disputed handwritings. Traced forgeries are usually confined to mere signatures. If a document of some length has to be forged the freehand method is the one more generally adopted. Sometimes, entire documents such as letters, pronotes and receipts are found to be freehand forgeries or simulations of other people's handwriting. In any case, where an entire document is the subject of examination, there would be less difficulty in detecting the forgery in it than in mere signatures, as the materials are more abundant and it is not possible as shown already, for a man to produce an entire document or any lengthy piece of writing without betraying signs of his own individual writing habit.

For the detection of freehand forgery the methods of comparison by characteristics should be observed, and the movement, penscope, pen-presentation, pen-pressure, direction, execution, alignment, arrangement, comparative sizing and the makes of the curves and angles must also be tested. In the cases of questioned signatures, close attention must be paid to writings alleged to be forged or simulated, as well as the handwriting of the person or persons suspected of committing the forgery. Such examination will help to disclose whether the questioned signatures or writings are actual forgeries committed by some other person or merely the disguised handwriting of the writer himself. In freehand forgeries, special attention is also to be paid to the concluding portion which, as a rule, affords an easier clue than the commencing portion. This is due to the writer being less able to maintain the disguise as he proceeds in his writing, and consequently he reverts more and more to his natural or individual style.

Again and again have judges and experienced lawyers declared the danger of attaching too much weight to the testimony of experts. Doctor Lawson on Law of Expert and Opinion Evidence has pointed out that the evidence of the

handwriting expert, it must be confessed, is of the lowest order of the evidence or of the most unsatisfactory character and that it is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence. Indian judges and writers have also taken similar views. In *Kishore Chand v. Ganesh Prasad*,<sup>14</sup> the Supreme Court has held that conclusions based upon mere comparison of handwriting must at best be indecisive and yield to the positive evidence in the case. *Onnamalai Ammal v. Sithapathi Reddiar*,<sup>15</sup> lays down that in evaluating the evidence of a handwriting expert on the question of the genuineness of the signature alleged to be that of the testator, the Court must keep in view the facts : (i) very few people sign in the same manner on all occasions, (ii) the opinion of an expert as to the genuineness of a signature should be received with great caution especially in a case where there is positive evidence of persons who saw the testator sign the will, (iii) all the tests evolved by the experts in the matter of comparison of handwriting and signature are merely tentative in character, and (iv) opinion evidence is weak evidence. The fallibilities of handwriting expert's evidence are the subject-matter of several decisions.<sup>16</sup> But notwithstanding the fallibilities the handwriting expert's evidence has become as has been put in some decisions a necessary evil. In cases of disputed signatures and writings oral evidence is often partisan and unreliable. Secondly, it has been rightly enjoined in a long line of decisions<sup>17</sup> that the Court should not act as an expert and pronounce judgment upon the genuineness or otherwise of a writing. And especially so when the judge is not conversant with the language of the document.<sup>18</sup> This does not mean that there may not be cases in which the peculiarities in the handwriting of a person are so numerous, pronounced and striking that the Court may well reach a safe conclusion on its own comparison of the disputed writing and standard writing.<sup>19</sup> But the disputation arises only in cases where there is a close resemblance between the two which is the hallmark of passable forgery. Besides an opinion formed by the judge in the privacy of his chambers is subject to no cross-examination and there are grave dangers of miscarriage of justice. On the other hand, to put it at the lowest, the great value of the expert evidence as to handwriting is that the expert brings out the essential traits and the noticed by the untrained ordinary judge. By constant study it is but

14. A.I.R. 1954 S.C. 316.
15. (1961) 1 M.L.J. 33 : A.I.R. 1961 M. 90.
16. *Abhayanand Misra v. State of Bihar*, A.I.R. 1959 Pat. 328 : 1959 Cr.L.J. 898; *Subodh Kumar Banerjee v. Subodh Kumar Banerjee*, A.I.R. 1959 Cal. 668; *Ramchandra v. State of Uttar Pradesh*, A.I.R. 1957 S.C. 381 : 1957 Cr.L.J. 559; *Celestine Silva Bai v. Josephine Noronha Bai*, A.I.R. 1956 Mad. 566; *Govardhan Das v. Ahmadi Begam*, A.I.R. 1953 Hyd. 181 : I.L.R. 1953 Hyd. 140.
17. *Major Barker v. Mrs. Barker*, A.I.R. 1955 M.B. 103 : 1954 M.B.L.J. 918 (F.B.); *Amar Singh v. Gangoo*, A.I.R. 1956 Bhopal 6; *Narsimha Rao v. Someswar Joshi*, (1956) 2 M.L.J. 399; *Bhagwan Din v. Gouri*

- Shankar*, A.I.R. 1957, All. 119; *Fazaldin v. Panchanan*, A.I.R. 1957 Cal. 92; *Vadrevu Annapurnamma v. Vadredu Bhima Sankararao*, A.I.R. 1960 A.P. 359; *Vazir Begam v. Tholaram*, 73 M.L.W. 19 : (1960) 1 M.L.J. 142; *Nagappa v. Nannibu*, A.I.R. 1960 Mys. 220.
18. *Celestine Silva Bai v. Josephine Noronha Bai*, A.I.R. 1956 Mad. 566, per Ramaswami, J.
19. *Biseswar Poddar v. Nabadwip*, A.I.R. 1961 Cal. 300 : 644 C.W.N. 1067 (per Mukherji, J.) (I.L.R. 37 Cal. 467 and A.I.R. 1954 S.C. 316 dist.; A.I.R. 1922 Cal. 12; A.I.R. 1957 Cal. 92; A.I.R. 1928 P.C. 277; A.I.R. 1949 P.C. 325 and A.I.R. 1945 P.C. 105 relied on).

characteristics of a persons handwriting which might not otherwise be natural to expect that an expert may readily discover many peculiarities—many distinctive features—of the handwriting by the aid of a published test. The pointing out of such discrepancies in the shape, size, inclination or shading of particular letters or words in an instrument with the aid of photography, charts, diagrams will afford subject to cross-examination safe material for a conclusion. It is not the similarities, but the dissimilarities that expose the true character of the document in question.<sup>20</sup> This assistance to the court is not in any way lessened by the fact that experts may appear on opposite sides and demolish each other's submissions. On the other hand, this would only enable the Court to test the submissions of each expert by the evidence of the other and appraise the soundness and cogency of the reasoning. It is only when experts fall out that impartial men come by their own. It must not be overlooked that the role of an expert is to assist the Court to arrive at a safe conclusion and not to substitute his judgment for the Court's judgment. The Court has to come to an independent finding in the light of assistance available in the shape of expert evidence. In short, the handwriting expert must be treated as a good servant and not as a master of the Court.

It is not demanded of an expert witness that he shall be so confident as to affirm that he cannot make any mistake in his conclusions from comparison of handwritings. A reading of the cases upon the subject of expert testimony must reveal the fact that the criticisms of the courts upon it are justified, not on account of any inherent danger in such testimony, or because of its necessarily unsatisfactory character, but rather because of the frequent failure of counsel to conduct the examination of experts in accordance with the rules governing the admission of opinion evidence and a lack of appreciation, or, at all events, a forgetfulness, in many cases, by both counsel and expert that the function of the latter is quasi-judicial. In his enthusiasm for his client, the trial lawyer steps beyond the bounds, and he finds a second in expert who has become imbued with the spirit of the advocate. The result is error which prompts caustic comments by the reviewing court, not always upon the course of counsel or the attitude of the witness, but frequently upon the general worthlessness and danger of expert testimony. That, within his proper field, the expert is a necessary factor in the administration of justice, cannot admit of doubt. In many cases, without his aid, courts and juries would be helpless. That expert testimony, if the case demands it, and it is properly and logically developed, is safe and helpful as the verdict of reason and experience. In the absence of a reform that would make the expert the appointed officer of the Court, instead of the paid employee of the party, he can escape disparagement only through the care of counsel in the conducting of the examination and his own care in preserving the judicial attitude.

[An *aide-memoire* of the characteristics on which an expert bases his conclusion whether the disputed and the standard or exemplar handwritings or signatures are by the same person or the disputed one is a forgery prepared from the sources expounding the art of detection of forgery, viz., Ames : Forgery. Its Detection and Illustration (1901) ; Hagan : Disputed Handwriting (1894) ; Hardless : Handwriting and Detection of Forgery (1912) ; and Faults and Fallacies on Handwriting, Identification and Expert Evidence in

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20. Raviappa v. Nilkanta Rao, A.I.R. 1962 Mys. 53 : (1962) 1 Cr.L.J. 441.

India (1919); Ramanatha Iyer: 'The Detection of Forgery (1927)' and Justice Ramaswami's Magisterial and Police Guide (M. L. J. Vol. I, p. 641 and foll); Aiyar & Aiyar: 'Art of Cross-Examination (1961)' Ed., Law Book Co., Allahabad, Ch. 26, p. 504—Characteristics of Handwriting; and the works on handwriting of the eminent authors like Messrs. Blackburn and Caddle and Messrs. Lee and Abbev which have also been consulted]

(b) *Style or forms of letters: as fixed after the deviations from the model.* This has to be fixed according to the nature by (i) Eyed forms, (ii) rotundity, and (iii) angularity.

(c) *Skill.* The skill of the writer has to be determined from the legibility, symmetry and the pictorial appearance. When all the three elements are present in a writing, it is called a good writing. When none of the three elements appears in a writing it is a bad one lacking in skill.

(d) *Connections.* This is the third habit. The way how letters are connected or two or more letters are linked is called connections. These differ and form into three variations: (i) Rods, that is to say, straight strokes. (ii) Arches, that is to say, being like arches with concavity downwards. (iii) Garlands, from their appearance like garlands with concavity upwards. This feature is sub-divided further into three divisions, namely, top connections, middle connections and bottom connections. These connections are the result of a long and constant exercise and thus forms the habit of a writer with individuality exhibited.

(e) *Shading.* The individuality of the writer called 'shading' is the difference between the heaviest and lightest stroke. This is the difference in degree of gradation of strokes which forms an individual writing habit of a person. The habit of shading varies in different writers. Some writers shade down strokes, some later strokes and curves, some writers are used to shade initial strokes and some final strokes, etc. This being a feature dependent or being the result of the muscular organization of the hand is a physiological feature and hence an important individual writing habit which helps the document investigator to a great extent. This habit can be divided into three main classes, namely, light, medium and heavy and further classified into initial shading, medium shading and terminal shading. This characteristic feature will not vary in the same writer with whatever pen the person writes or under what circumstances the person writes.

(f) *Movement.* See above.

(g) *Embellishments.* Embellishments which constitute a characteristic of individuality are parts which are not at all necessary for all completeness, or for the clearness of any letter. Strokes or parts are purely for ornamenting the letters. This feature forms a peculiar writing habit with some writers. A person who is not accustomed to produce embellished writing cannot produce such a writing. This feature falls into two main classes, namely, initial embellishments and terminal embellishments. This has to be determined after a study of several letters and then only it can be said that this is the habit of a writer or only accidental.

(h) *Terminals.* This is the habit of terminating or finishing a stroke or a curve and forms an individuality with a writer both, rapid exercise and

the result of muscular organization of the hand. Some writers are in the habit of stopping and lifting the pen abruptly and causing the stroke to appear blunt or wide. Some writers stop a stroke with a dot and some writers lift the pen from the paper while it is in motion thereby giving the stroke a fine or tapering appearance. This can be further classified into three classes from the tendency of the stroke, namely, upward, horizontal and downward. Inasmuch as it is practically impossible to imitate or disguise this on account of force of habit, this constitutes an important point of investigation.

(i) *Slant*. This is the slope the down strokes make with the line of writing or alignment, which varies widely with different writers. But this can be imitated to some extent or disguised. This feature falls into three classes, namely, slant to the right, vertical and slant to the left. In determining the slant of a writing, one must take a number of readings and take the average and then determine the habitual slant of the writer. To determine the slant of curves and ovals we must take the axis and draw a line through it and determine the slant.

(j) *Width*. This is an individual trait determined by the condition and position of the hand muscles and is a physiological feature. This feature can be determined after a study of all the letters and the width of the main letter, or oral and the width of the letter with combinations should be considered in oriental languages. The width can be classified under three heads, namely, narrow, square and wide.

(k) *Spacing*. This is the space left between lines in a piece of writing or the space left between the words in a line or the space left between the letters of a word. It is an automatic action of the hand muscles acquired by long and repeated exercise. This feature can be altered or disguised but cannot be imitated. But this is not to say that there will not be variations in the writing or signatures of a person as the human hand is a biological entity and not a machine. In fact no two signatures of a person will be exactly alike. This will be proportionate to the heights and widths of letters and every writing will have its standard for spacing. Spacing falls into three classes, namely, narrow normal and wide.

(l) *Speed*. This is the basic principle of the whole science of identification of handwriting with different writers. The rate at which a piece of writing or signature is produced is called the speed writing. This characteristic depends upon the movement employed in producing the writing. Speed falls into three classes, namely, slow, where the strokes will be short, curves will be wide and disproportionate and letters and connections will be round and the line quality will be poor. There will be repeated interrupted movements of the pen. Medium in which both the features of the slow and rapid writing in a smaller degree will be found, are rapid writing which gives life and grace to the writing, where we find less shading, angular letters and connections, letters of big size, light pressure of the pen, less number of pen lifts and changes of writing rest, smooth line quality, a slanting writing and liberal spacing. Lengthy connections and stroke and dots placed far away from the letter are also signs of rapid writing. There are always sharp commencing and terminal strokes.

(m) *Proportions*. This is an acquired individual habit and can neither be disguised nor imitated, resulting as it does from muscular organization of

the hand exercised for a long time. The proportionate sizing of the parts of letters in relation to other parts and the size of the letters in relation to the size of the other letters or the initial letter is called proportion. It falls into three classes, namely, regular, medium and irregular.

(n) *Alignment.* It is an imaginary or actual line on which or from which letters stand or hang. It is a physiological feature and it falls into six classes, namely, uniform, irregular, curve, upward, downward and freakish. The term 'freakish' is applied when the writing does not come under the other five classes. Alignment can also be classified as even, arched and freakish.

(o) *Penhold.* This is an important physiological feature and the entire act of writing depends on this and varies from individual to individual and cannot be changed at will or imitated. Penhold is so called from the position it takes in the hand—how it is held while writing. It falls under three classes, namely, the angle the pen makes to the surface of the paper, the angle the pen makes with the line or the direction of the writing and uniformity of the pressure on the two prongs of the nib. The pen is held by different writers at an angle with the surface of the paper varying from almost vertical down to fifteen degrees from the horizontal. It falls under three heads: vertical or at 90 degrees with the surface of the paper, which produces a writing with a slight difference in width and shading between the up and down strokes, left to right and right to left strokes and curves. There will be no shading in the writing produced with this hold and the strokes exhibit a broken and scratchy appearance. This hold does not permit any movement other than the finger movement. The second is the one held parallel to the line of writing. It produces shading in the left to right strokes and curves. The third is the one held parallel to the down strokes. This produces down strokes with consequential heavy shading and broader strokes and curves.

(p) *Pen presentation.* This is akin to penhold and varies from zero to 90 degrees. It is the manner in which the pen is put on the paper in the act of writing.

(q) *Pen pressure.* This is a very important characteristic in handwriting. It is the force applied to the writing instrument while writing. It falls into three classes, light, medium and heavy. This is a physiological feature which is a permanent one. Eminent authors like Mr. Ames, Hagan, Messrs. Blackburn and Caddle, Messrs. Lee and Abbey, Mr. Osborn, all are of the same opinion that the characteristic feature of pen pressure is a permanent one and it does not differ according to the pen used. It is judged by the quantity of the ink in the strokes. It also differs as to location.

(r) *Arrangement.* Apart from the writing characteristics the arrangement or general get-up of writing is often characteristic of a writer. In a letter, for example, the position of the address and the date at the top of the page; the distance of commencement of the letters from the top of the paper; the nature of the left and right hand margin; and the position of the signature at the end of the letter, may have great identifying values.

**12. Handwriting.** (a) *General.* Experts may give their opinions upon the genuineness of a disputed handwriting after having compared it

with specimens admitted or proved to the satisfaction of the Judge to be genuine.<sup>21</sup> Any comparison of a disputed signature will be only useful when it is done with an admitted signature otherwise it will be a case of blind leading the blind.<sup>22</sup> In a case of the Calcutta High Court, it has been held that while the writing with which the comparison is made must first be admitted or proved to be that of the person alleged, the comparison must be made in open Court and in the presence of such person. This decision was based on the ground that though these conditions are not expressly laid down in this section they are indicated by illus. (c).<sup>23</sup> But independent of all cases in which handwriting is sought to be proved by actual comparison, the testimony of skilled witness will be admissible for the purpose of throwing light upon the document in dispute, as upon the question whether a writing is in a feigned or natural hand, or the probable date of an ancient writing, or as to whether interlineations were written contemporaneously with the rest of a document, or whether the writing is cramped, or one document exhibits greater ease or facility than another, or whether a writing has been touched by the pen a second time as if done by someone attempting to imitate, or whether the writing has been made over pencil-marks, or whether a document could have been made with a pen, or whether two documents were written with the same pen and ink and at the same time, or whether two parts of a writing were written by the same person or the like.<sup>24</sup> But opinion as to handwriting is not confined to experts, but may be given by any person who is duly acquainted with it.<sup>25</sup> It is not necessary to examine a handwriting expert in every case of disputed writing. No adverse inference can be drawn against a party from the fact that the opinion of the handwriting expert has not been obtained.<sup>1</sup>

Both under sections 45 and 47 the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience. In either case the court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the court is to apply its own observations to the admitted or proved writings and to compare them with the disputed one, not to become an expert but to verify the premises of the expert in the one case and appraise the value of the opinion in the other case. This comparison depends on an analysis of the characteristics in the admitted or proved wri-

21. v. S. 73 post; for a case in which a Judge was held to have wrongly called expert testimony, see Bindes-suttee v. Doma, (1868) 9 W.R. 88.
22. Vembu Ammal v. Esakkia Pillai, A.I.R. 1949 Mad. 419: (1949) 1 M.L.J. 71: 1949 M.W.N. 47.
23. Suresh v. R., (1912) 39 C. 606 and see Phoodee v. Gobind, (1874) 22 W.R. 212 and Creswell v. Jackson, (1860) 2 F. & F. 24 and Cobbett v. Kilminster, (1860) 2 F. & F. 490.
24. Taylor, Ev., ss. 1877, 1417; Best, Ev., s. 246; see Notes to S. 47 post.
25. See Notes to S. 47 post and Surendra v. R., (1911) 39 C. 522. For the various methods of proving handwriting, see Barindra Kumar Ghose v. Emperor, 37 Cal. 467: 7 I.C.

- 359: 11 Cr.L.J. 453: 14 C.W.N. 1114; Ganpatrao Khandero v. Vasanta-rao Ganpatrao, A.I.R. 1932 Bom. 588: 34 Bom.L.R. 1371; Sarojini Dassi v. Haridas Ghose, A.I.R. 1922 Cal. 12: I.L.R. 49 Cal. 235: 66 I.C. 774: 34 C.L.J. 373: 26 C.W.N. 113.
1. Srichand v. State of Maharashtra, (1967) 1 S.C.R. 595: 1967 S.C.D. 1050: (1967) 2 S.C.J. 178: (1967) 1 S.C.W.R. 896: 69 Bom.L.R. 313: 1967 Cr.L.J. 414: 1967 M.P.L.J. 655: 1967 Mad.L.J. 747: 1967 M.L.J. (Cr.) 609: A.I.R. 1967 S.C. 450, 453; Basawarajawami, In re, 10 Law Rep. 309: (1967) 1 Mys.L.J. 548: 1967 Cr.L.J. 1536: A.I.R. 1967 Mys. 210 (212).

tings and the finding of the same characteristics in large measure in the disputed writing. In this way the opinion of the deponent whether expert or other is subjected to scrutiny and although relevant to start with becomes probative.<sup>2</sup> In the last cited case the Supreme Court in order to satisfy itself whether the testimony of the handwriting expert was admissible or not, sent for the record and compared the disputed writings with comparable materials. The sole evidence of a handwriting expert is not normally sufficient for recording a definite finding that the writing is of a certain person or not. It is, therefore, not essential that the handwriting expert must be examined in a case to prove or dispute the disputed writing.<sup>3</sup> The expert should put before the Court all materials which induced him to come to his conclusion so that the Court, although not an expert, may form its own judgment on those materials.<sup>4</sup> The comparison of the disputed handwriting with proved or admitted handwriting may be made by the Court, but comparison by the Court without guidance of an expert is hazardous and inconclusive.<sup>5</sup> But if the finding of the Court is based not only on a comparison of the handwriting but also on the surrounding circumstances, and by the positive evidence of a witness who had proved the handwriting, the finding is entitled to weight.<sup>6</sup> There is danger inherent in evidence relating to identity from similarities in writings only. There is need for care and caution in judging and utilising the testimony of handwriting experts. The worth and opinion by an expert can be tested by the reasons given by him in support of his opinion and not by the bare conclusions of the expert. It is not the apparent qualifications of a handwriting expert which ought to determine the value of the evidence given by him, but the soundness of the reasons advanced by him in support of the opinion expressed by him. Their soundness, can be tested by examining the disputed and the admitted writings in the light of the reasons given by him. The task of arriving at a sound opinion is always fraught with difficulties. Opinion evidence has to be utilised by Court in forming its own

2. Fakhruddin v. State of M.P., (1967) 2 S.C.A. 135 : 1967 S.C.D. 495 : (1967) 2 S.C.J. 885 : (1967) 1 S.C.W.R. 449 : 1967 A.L.J. 303 : (1967) 2 Andh.L.T. 38 : 1967 A.W.R. (H.C.) 322 : 1967 B.L.J.R. 318 : 1967 Cr.L.J. 1197 : 1967 J.L.J. 441 : 1967 M.P.L.J. 473 : 1967 M.P.W.R. 38 : 1967 M.L.J. (Cr.) 925 : 1967 Mah.L.J. 571 : A.I.R. 1967 S.C. 1326 (1328); Jogendra Prasad Singh v. Joy Kanta Roy, 1971 Assam L.R. 267 : A.I.R. 1971 Assam 168 (170).
3. State of Gujarat v. Vinaya Chandra, (1967) 1 S.C.R. 249 : 1967 S.C.D. 414 : (1967) 1 S.C.J. 821 : (1967) 1 S.C.W.R. 391 : 1967 A.W.R. (H.C.) 422 : 1967 Cr.L.J. 668 : 8 Guj.L.R. 140 : 1967 M.L.J. (Cr.) 442 : A.I.R. 1967 S.C. 778 (780); Sri-chand v. State of Maharashtra, (1967) 1 S.C.R. 595 : 1967 S.C.D. 1050 : (1967) 2 S.C.J. 178 : (1967) 1 S.C.W.R. 896 : 69 Bom.L.R. 313 : 1967 Cr.L.J. 414 : 1967 M.P.L.J. 655 : 1967 Mah.L.J. 747 : 1967 M.L.J. (Cr.) 609 : A.I.R. 1967 S.C. 450 (453).
4. Titli v. Alfred Robert Jones, A.I.R. 1954 All. 273 (280); Ajitai Shiv-prasad Mehta v. Bai Vasumati, 10 Guj.L.R. 253 : A.I.R. 1969 Guj. 48 (54).
5. Rudragouda v. Basangouda, 1938 Bom. 257: 175 I.C. 361 : 40 Bom. L.R. 202; Barindra Kumar Ghose v. Emperor, 37 Cal. 467 : 7 I.C. 359: 11 Cr.L.J. 453 : 14 C.W.N. 1114; Major Barker v. Mrs. Barker, A.I.R. (1955) M.B. 103 (F.B.); Bibi Kaniz Zainab v. Syed Mobarak Hussain, A.I.R. 1924 Pat. 284 : 72 I.C. 748; Gobindjee Madhawajee & Co., Ltd, v. C. J. Smith, A.I.R. 1928 Pat. 568 : Galstaun v. Sonatan Pal, A.I.R. 1925 Cal. 485 : 78 I.C. 668 : Latafat Hussain v. Onkar Mal, A.I.R. 1935 Oudh 41 : I.L.R. 10 Luck. 423 : 152 I.C. 1042 : 11 O.W.N. 1589; see also Balakram v. Muhammad Said, A.I.R. 1923 Lah. 695 : 77 I.C. 872.
6. The State of Bihar v. Kailash Prasad Sinha, A.I.R. 1961 Pat. 451.

opinion. It must use its own powers of observation well and study and use the recognised tests in a manner which satisfies its conscience. It is hazardous to rely upon expert evidence solely without any corroboration from other kinds of evidence in the case.<sup>7</sup> In a Calcutta case, Page, J., said :

"I am prepared to hold, in a case where the character of the signature is such that the Court is satisfied that the signature is not that of the alleged testator, that the Court ought not to act upon its conviction and pronounce against the document as a valid testamentary disposition, but in a case where witnesses have positively affirmed that the testator did in fact execute the will in their presence, the Court will be slow to hold the document to be a forgery unless evidence is to be found *aliunde* which tends to confirm the conclusion at which the Court has arrived independently and from a consideration of the nature of the signature by which the testator is alleged to have executed the will."<sup>8</sup>

By nature and habit, individuals contract a system of forming letters which give a character to their writing as distinct as that of the human face.<sup>9</sup> The general rule which admits of proof of handwriting of a party is founded on the reason that in every person's manner of handwriting there is a peculiar prevailing character which distinguishes it from the handwriting of every other person.<sup>10</sup> In the Tichborne trial, Cockburn, C. J., in his charge to the jury said :

"Manifold as are the parts of difference in the infinite variety of nature in which one man differs from another, there is nothing in which men differ more than in handwriting; and when a man comes forward and says, 'you believe that such a person is dead and gone; he is not, I am the man,' if I knew the handwriting of the man supposed to be dead, the first thing I would do would be to say 'Sit down and write' that I may judge whether your handwriting is of the man you assert yourself to be; if I had writing of the man with whom identity was claimed, I should proceed at once, to compare with it the handwriting of the party claiming it. For that reason I shall ask you carefully to look at and consider the handwriting of the defendant and to compare it with that of the undoubted Roger Tichborne and with that of Arthur Orton."<sup>11</sup>

"Calligraphic experts have for years asserted the possibility of investigating handwriting upon scientific principles, and the Court have con-

7. See Devi Prasad v. State, A.I.R. 1967 A. 64 : 1967 Cr.L.J. 184.
8. Lila Sinha v. Bijoy Pratap Deo Singh, A.I.R. 1925 Cal. 768 : 87 I.C. 534 ; 41 C.L.J. 300; see also Khijiruddin v. Emperor, A.I.R. 1926 Cal. 139 : I.L.R. 53 Cal. 372 : 92 I.C. 442 : 27 Cr.L.J. 266.
9. Lawson's Expert. Evidence, 277 : "Men are distinguished by their handwritings as well as by their faces; for it is seldom that the shape of their letters agrees any more than the shape of their bodies." Buller's Nisi Prius 236 : 2 Evans Pothier on Obligations, "The handwriting of every man has something peculiar and distinct from that of

- every other man and is easily known by those who have been accustomed to see it." Peak's Ev., 67 : "Almost everybody's usual handwriting possesses a peculiarity in it and distinguishing it from other people's writing." Ram on Facts, 68, see at p. 69 citation from Cowper's work (Letters). (Vol. V, p. 217, Ed., 1880; see Bisseswar Poddar v. Nabab-wip, A.I.R. 1961 Cal. 300.
10. Strong v. Brewer, 17 Ala. 706, 710 (Amer.) cited in Lawson, op. cit., 278.
11. R. v. Castro, (1874) L.R. 9 Q.B. 350; affirmed (1880) 5 Q.D. 490 : 49 L.J.Q.B. 747.

sequently admitted such persons to testify in cases of disputed handwriting. It is claimed that experiment and observation have disclosed the fact that there are certain general principles which may be relied upon in questions pertaining to the genuineness of handwriting. For instance, it is asserted that in every person's manner of writing, there is certain distinct prevailing characteristics which can be discovered by observation, and being once known, can be afterwards applied as a standard to try other specimens of writing, the genuineness of which is disputed. Handwriting, notwithstanding it may be artificial, is always, in some degree, the reflex of the nervous organisation of the writer. Hence there is in each person's handwriting some distinctive characteristic, which, as being the reflex of his nervous organisation, is necessarily independent of his own will, and unconsciously forces the writer to stamp the writing as his own. Those skilful in such matters affirm that it is impossible for a person to successfully disguise in a writing of any length this characteristic of his penmanship, that the tendencies to angles or curves developed in the analysis of this characteristic may be mechanically measured by placing a fine specimen within a coarser specimen, and that the strokes will be parallel if written by the same person, the nerves influencing the direction which he will give to the pen. So too it is claimed that no two autograph signatures will be perfect facsimiles. Experts, therefore, claim that if, upon super-imposition against the light, they find that two signatures perfectly coincide, that they are perfect facsimiles, then it is a probability amounting practically to a certainty that one of the signatures is a forgery."<sup>12</sup>

The real nature of a disputed writing in most cases must finally and legally be determined and shown by actually comparing it with other writings which are proved or admitted to be genuine. But the opinion will not become inadmissible simply on the ground that it was based on comparison with admitted writing as well as some unadmitted writing.<sup>12-1</sup>

It is obvious that the best standards of comparison are those of the same general class as the questioned writing and as nearly as possible of the same date. Such standards should, as a rule, include all between certain dates covering a period of time both before and after the date of the writing in dispute. The amount of writing necessary for comparison differs in different cases but, if possible, enough should always be obtained to show clearly the writing habits of the one whose writing is under investigation.

In order to reach the conclusion that two writings are by the same hand there must not only be present class characteristics but also individual characteristics or "dents and scratches", in sufficient quantity to exclude the theory of accidental coincidence; to reach the conclusion that writings are by different hands we may find numerous likenesses in class characteristics but diver-

12. Rogers, op. cit., 290, 292. With reference to the last observation it is stated that in the Howland Will's case (4 Am. Law Review, 625, 649). Prof. Pierce, Professor of Mathematics in Harvard University, testified that the odds were just exactly 2,866,000,000,000,000,00 to 1 that an individual could not write with a pen

write his name three times so exactly alike as were the three alleged signatures of Sylvia Ann Howland the testatrix to a will and two codicils; Hagan, op. cit., 91, 92; see Derhamji v. Rustomji, (1959) Jab. L.J. 673 : 1960 M.P.L.J. 746.

12-1. I. L. R. (1971) 1 Delhi 432.

gences in individual characteristics, or we may find divergences in both, but the divergence must be something more than mere superficial differences.

It is impossible<sup>13</sup> to illustrate and define all the thousands of actual and possible individual qualities and characteristics of writing and weigh and measure their comparative values.

But some general principles can be stated that apply in most cases. One of the first of those principles is that those identifying or differentiating characteristics are of the most force which are most divergent from the regular system or natural features of a particular handwriting under examination.

The second principle, perhaps more important than the first, is that those repeated characteristics which are inconspicuous should first be sought for and should be given the most weight, for these are likely to be so unconscious that they would not intentionally be omitted when the attempt is made to disguise and would not be successfully copied from the writing of another when simulation is attempted.

It also needs to be emphasized that two writings are identified as being by the same writer by the absence of fundamental divergences as well as by a combination of sufficient number of similarities. The process is always a double operation, positive and negative and if error is to be avoided, neither part of the process should be overlooked. In order to reach the conclusion of identity of two sets of writings there must not be present significant and unexplained divergences. These divergences must, however, be something more than mere trivial variations that can be found in almost any handwriting.<sup>13</sup>

In determining the question of authorship of a writing, the resemblance of characters is by no means the only test. The use of capitals, abbreviations, punctuation, mode of division into paragraphs, making erasures and interlineations, idiomatic expressions, orthography, underscoring,<sup>14</sup> style of composition and the like, are all elements upon which to form the judgment.<sup>15</sup> The general features of handwriting like slant, pen pressure etc. are not so reliable for establishing identity but the presence or otherwise of peculiar writing habits or idiosyncrasies are features which have decisive importance.<sup>15-1</sup> "Conclusions from dissimilitude between the disputed writing and authentic specimens are not always entitled to much consideration; such evidence is weak and deceptive, and is of little weight when opposed by evidence of similitude. The reason why dissimilitude is evidence inferior to similitude is that it requires great skill to imitate handwriting, especially for several lines, so as to

13. Osborn on Questioned Documents, 2nd Ed., 8th Printing (1950) 26, 27, 244, 249, 250 and 262.

14. See following passage from Cowper's work (*Letters.*) Vol. V. p. 217, 1826. Hours and hours have I spent in endeavours altogether fruitless to trace the writer of the letter that I send, by a minute examination of the character, and never did it strike me until this moment that your father wrote it. In the style "I dis-

cover him, in the scoring of the emphatic words—his never failing practice—in the formation of many of the letters, and in the adieu at the bottom so plainly that I could hardly be more convinced had I seen him write it." (cited in Ram on Facts, 69).

15. Lawson, op. cit., 277, 278; note. Jiwanprakash v. State of Maharashtra, I. L. R. 1974 Bom. 337; 1973 Mah. L. J. 855.

deceive persons well acquainted with the genuine character and who give the disputed writing a careful inspection while, on the other hand, dissimilitude may be occasioned by a variety of circumstances—by the state of health and spirit of the writer, by his position, by his hurry or care, by his material, by the presence of a hair in nib of the pen, or the more or less free discharge of ink from the pen which frequently varies the turn of the letters,—circumstances which deserve still more consideration when witnesses rest their opinion on a fancied dissimilarity of individual letters.”<sup>16</sup>

It being granted that there is such a thing as a science of handwriting, it follows that the opinions of witnesses who are skilled in the science, who by study, occupation and habit have been skilful in marking and distinguishing the characteristics of handwriting may be received in evidence. These may be experts in handwriting, strictly, so called, that is persons who have made the study of handwriting a speciality; or others whose avocations and business experience have been such as naturally qualify them to judge of handwriting, and so writing-engravers, lithographers, tellers, cashiers and other officers of banks,<sup>17</sup> post-office officials, book-keepers, and cashiers of commercial houses, writing-masters,<sup>18</sup> and a solicitor,<sup>19</sup> “who had for some years given considerable attention to the subject and had several times compared handwriting for purposes of evidence, though never before testified as an expert,” have been admitted to give evidence on this subject.<sup>20</sup>

(b) *Use of evidence of handwriting expert.* An opinion of handwriting expert is not the only mode of proving handwriting.<sup>20-1</sup> The court can form its opinion about genuineness of handwriting either on the evidence of the person familiar with the handwriting of person in question or on the opinion of handwriting expert.<sup>20-2</sup> The absolute necessity of evidence of handwriting expert arises when the disputed writing is challenged as forgery. Mere endorsement ‘not admitted’ made on the document by the party against whom it is sought to be proved does not throw such challenge. In such a case it can be proved in ordinary way.<sup>20-3</sup> Proper application giving grounds for doubting the genuineness of the document is necessary for making reference to an expert; mere casual request during the course of argument cannot be treated as sufficient.<sup>20-4</sup> It is not possible for the experts to say definitely that anybody wrote a particular thing. All that he can do is to point out the

16. Lawson, op. cit., 278, 279 n., citing Young v. Brown, 1 Hag. Ecc. R. 555, 569, 571; Constable v. Libel, 1 Hag. Ecc. R. 56, 60, 61; 2 Phillips, Ev., (Cow and Hill's Notes), 608 and 482, and American cases; see also Hagan, op. cit., 78.
17. As to the competency, however, of these, see remarks in Hagan, op. cit., 30.
18. Hagan, op. cit., 33, where it is stated that these as a class furnish experts of the least ability.
19. R. v. Silverlock, (1894) 2 Q.B. 766.
20. Rogers, op. cit., 297, 298; Phipson, Ev., 9th Ed., 405; Best, Ev., s. 246; see also Dahibai v. Soonderji Damji, I. L. R. (1907) 31 Bom. 430 where the solicitor for a party was allowed

special costs for studying the disputed handwriting and proving it to be forgery, and as to expert evidence of writing in Criminal cases, see Srikanth v. R., (1904) 2 A. L. J. 444; Panchu v. R., (1905) 1 C. L. J. 385 and see Vankata, in the matter of, (1913) 36 M. 159 (value of handwriting expert evidence discussed).

- 20-1. State v. Tribikram, (1971) 37 Cut. L. T. 714.
- 20-2. Jogendra Pratap v. J. K. Roy, A.I.R. 1971 Assam 168; Assam L. R. (1971) Assam 267.
- 20-3. Vijai Singh v. Siaram Singh, 1972 A. L. J. 692.
- 20-4. Shiv Ram v. Thakur Dutt, A. I. R. 1973 Him. Pra. 62; I. L. R. 1972 Him. Pra. 400; (1972) 2 Sim. L. J. (H.P.) 297.

similarities or dissimilarities. The court has to examine its opinion and to come to its own decision. Although the Court cannot play the role of a handwriting expert it is not open to it to accept blindly the statement of the handwriting expert. The correct principle of law is that the testimony of the handwriting expert should be taken as a guide and with its assistance the Court should apply its own observation to the disputed writing and come to its own conclusion as to whether the particular writing is to be assigned to a particular person.<sup>21</sup> The opinion of expert is only a piece of evidence.<sup>22</sup> The evidence of the handwriting expert may be relied upon, along with the other pieces of external and internal evidence relating to the documents in question.<sup>23</sup> It is, however, settled view that it will not be safe to base a conviction on the uncorroborated testimony of a handwriting expert.<sup>24</sup>

A signature made *post litem motam* ought not to be taken as a standard as it is likely to be simulated. It can at best be compared with the genuine writing.<sup>25</sup> A natural writing serves as a much better standard for comparison than the specimen obtained on request.<sup>1</sup> The value of the opinion of an expert engaged by a party suffers from the defect that it is given by a remunerated witness, who knows beforehand why he has been called and what the party calling him wishes him to prove. It is not improbable that he has an unconscious bias in favour of the party. This detracts from the weight to be attached to such witness's opinion.<sup>1-1</sup> At any rate, the Court cannot act like an automaton accepting without scrutiny an expert's opinion as infallible. His evidence has to be relied upon along with the other various items of evidence.<sup>2</sup> A handwriting expert needs plenty of material before he can reach a conclusion.<sup>3</sup> The general principle has been laid down by the Supreme Court in *Ramchandra v. State of U. P.*<sup>4</sup> as follows :

"Normally it is not safe to treat expert evidence as to handwriting as sufficient basis for a conviction. But it may, however, be relied upon along with other pieces of external and internal evidence relating to the document in question. Sections 45 to 47 lay down the method by which the signature in dispute could be proved. But even assuming that the signature of the person could legally be held to be proved, the principle which governs the appreciation of such circumstantial evidence in cases of this kind, cannot be ignored. It is only if the Court is satisfied that the circumstantial evidence would irresistibly lead to the inference that the person

21. Wakeford v. Lincoln Bishop, 1921 P. C. 168; In the matter of U., an Advocate, 1935 Rang. 178; I. L. R. 13 Rang. 518; 156 I.C. 582; 36 Cr. L. J. 961 (S.B.); Jitendra Nath Gupta v. Emperor, 1937 Cal. 99; 169 I. C. 977; 38 Cr. L. J. 818; Durga Prasad v. State, 1952 Nag. 289; I.L. R. 1952 Nag. 376; 1952 Cr. L. J. 1225; 1952 N. L. J. 545.
22. Guntaka Hussenaiah v. Busetti Yer-raiah, 1954 Andhra. 59 : (1954) 2 M. L. J. (Andh.) 39.
23. Ramachandra v. State of U. P., A. I. R. 1957 S. C. 381; Isar Nonia v. Karinan Pandey, A. I. R. 1958 Pat. 353.
24. Kameshwar v. State, 1957 Cr. L. J. 276; Shyam Kishorelal v. State, 1957 All. W. R. (H.C.) 558.
25. Bisseswar Poddar v. Nababwip, A. I. R. 1961 Cal. 300.
1. Jiwanprakash v. State of Maharashtra, I. L. R. 1974 Bom. 337; 1973 Mah. L. J. 855.
- 1-1. Abhayananand v. State of Bihar, A. I. R. 1959 Pat. 328; 1959 Cr. L. J. 893.
2. Ibid.
3. Chakrapani v. Chandoo, A. I. R. 1959 Madh. Pra. 84; 1958 Jab. L. J. 674.
4. 1957 S. C. 381; 1957 Cr. L. J. 559

must have signed the document in question that the Court could legitimately reach a conclusion.<sup>5</sup>

The opinion of the Judge is the decision in the case. A Judge has to be satisfied that he is entitled to take such assistance from evidence as is available in the circumstances of each case.<sup>6</sup> At the same time the practice of a Judge declaring whether a disputed signature agrees with the other signatures, of a certain person without the assistance of any evidence, but merely on his own inspection, has been disapproved by experienced Judges in many cases.<sup>7</sup> The least that a Judge should do is to seek the assistance of the lawyer concerned in comparing the disputed writing with the admitted or proved writing. The value of doing this work in the presence of the counsel has been emphasised in *Smt. Phoodee Bibee v. Govind Chunder Roy*.<sup>8</sup> Again in one of the leading cases on the point,<sup>9</sup> Sir Lawrence Jenkins observed<sup>10</sup>:

"It is true that the opinions of experts on handwriting meet with their full share of disparagement at times, but at any rate there is this use in their employment, that the appearances on which they rely are disclosed, and can thus be supported or criticised, whereas an opinion formed by a Judge in the privacy of his own room is subject to no such check. And that the aid of an expert may be of value was clearly the opinion of so distinguished a Judge as Blackburn, J., who in *Reg. v. Harvey*,<sup>11</sup> refused to allow a comparison to be made without the help of experts."

Since the evidence of a handwriting expert has been made admissible and relevant, a Court should not refuse to record it because it is not the duty or even the function of a Magistrate to decide beforehand whether relevant evidence if produced would influence his opinion one way or the other. That is a matter which should be settled only after the evidence has been recorded as read in the case.<sup>12</sup> On the other hand, his expert evidence would be of great use, since a comparison of the signatures without the help of an expert may not afford a conclusive test in the case of expert forgers; and this would be more so when the disputed signatures appear to belong to a class different from the group of admitted signatures.<sup>13</sup>

An opinion of the handwriting expert is only made admissible, it is not the only method of proving handwriting.<sup>13-1</sup> If the document is written in presence of witnesses it can be proved by those witnesses and the expert evidence is not required.<sup>13-2</sup> On the other hand where dissimilarity in the

- 5. See also *Baru Ram v. Smt. Prasannni, A. I. R. 1959 S. C. 93; 1959 S. C. J. 42.*
- 6. *Uchar Santra v. Emperor*, 65 I. C. 426; 23 Cr. L. J. 74; *Prasad Mahto v. Jasoda Koer*, 1937 Pat. 328; 169 I. C. 822; 1937 P. W. N. 309; 18 P. L. T. 491.
- 7. *J. C. Galstaun v. Sonatan Pal*, 1925 Cal. 485; 78 I. C. 668; *Azmatullah Khan v. Shamlal*, 1947 All. 411; 1947 A. L. J. 110; see also cases cited therein.
- 8. 22 W. R. 272.
- 9. *Barindra Kumar v. Emperor*, 37 Cal. 467; 7 I. C. 359.
- 10. at p. 503 of 37 Cal. 467.
- 11. (1869) 11 Cox. C.C. 456.
- 12. *Ram Narain Sharma v. Emperor*, 1932 Lah. 481; 139 I.C. 508; 33 Cr. L. J. 761; 33 P. L. R. 811.
- 13. *Venkataswami v. Lakshminarayana*, I. L. R. 1957 Andh. Pra. 399; A. I. R. 1959 A. P. 204.
- 13-1. *The State v. Tribikram*, (1971) 37 Cut. L. T. 714.
- 13-2. *State of Assam v. Upendra Nath*, 1975 Cr. L. J. 354 (Gau.).

handwritings is apparent it is not necessary to make reference to expert for opinion.<sup>18-2</sup>

**13. Anonymous letters.** "The writers of anonymous letters", writes Mr. Mitchell, the well-known expert on the subject, "occupy more than their appropriate share of the time of the courts, for it often takes a long time, as well as being difficult, to prove the offence and to establish beyond reasonable doubt that the accused person was responsible for the letters. The demonstration of definite similarities between the anonymous writing and that of the suspect is only one link in the chain of proof, although it may be a very strong one. When such similarities, both manifest and less obvious, have been established, there are three possible deductions that may be drawn. First, that the suspect is in fact responsible for the letters; secondly, that there are two persons with similar handwriting characteristics living in the same place, and connected with it; and thirdly, that the anonymous letter-writer has attempted to evade suspicion by imitating the writing of someone else. Anyone who has listened to the evidence in these cases will be familiar with the line of argument. Counsel for the accused person will try to prove that attempts to disguise the writing are really fundamental differences from the writing of his client, and that the similarities are such as would be found in the handwriting of many other persons. Thus much will depend on the number and nature of the similarities and to what extent they express individual peculiarities of which even the writer will not be aware, that is to say, not merely characteristics that will strike anyone on casual observation. For instance, if "b" is made in the form of a Greek beta, or "o" in the form of a heart, these will be observed by everyone glancing at the writing, and they would be features that any person attempting to imitate the writing would not fail to copy. On the other hand, such characteristics, as the relative heights of individual letters, shading of the lines, relative widths of spacing forms of loops and angles, penlifts and so forth, could not be satisfactorily reproduced by the average anonymous letter-writer. It is customary for points of resemblance and difference between the anonymous writing and standard accepted specimens of the writing of the suspect to be demonstrated to the Court by means of photographic enlargements. These are facts which can be seen and checked by a jury when put before them in the form of a comparative chart. It is often for the Court to decide to what extent it is probable that there should be two persons with close similarities in handwriting, who could have a knowledge of the persons and subjects referred to in the letters.

The effectiveness of disguise in writing varies greatly with the degree of education of the writer and with the number of letters written. It is a remarkable characteristic in the temperament of the anonymous letter-writer that he, or she, is seldom content with airing a grievance in a single letter, but must follow it up with a succession of effusions. Whatever the disguise has been adopted, a writer is unable to maintain it consistently over a long period without lapsing into features characteristic of his own writing. Thus, it may happen that one letter in a series may differ from the writer's normal writing in some respects, but agree in others, whilst another in the series will exhibit other points of resemblance and difference. Hence lapses into the writer's usual style tend to become cumulative in their evidential value.

The method of disguise sometimes adopted is to write with the left hand. Another method frequently adopted as disguise is to print some of the letters in capitals with the idea that printed characters cannot be connected with the writer. This again is a mistaken inference, for persons who turn instinctively to printing as a disguise often make use of some printed characters in their normal writing thus providing standards for comparison.

Another common feature in anonymous letters is the use of distinctive words and phrases, which are sometimes indicative of the feeling of the writer and tend to be repeated. The possible motives that could have led to the sending of anonymous letters are always taken into consideration and the contents of the letters may often provide an indication of the motive.

A court test, sometimes applied by counsel for the plaintiffs or the defence, is to ask the defendant to write out rapidly some two or three lines of anonymous letters as dictated, and without having recently seen the original. As each copy is written it is taken away and the witness is asked to repeat the writing. If guilty of the offence, he will write hesitatingly and attempt to make the writing as widely different as possible from the anonymous writing, but will at the same time produce copies which differ from one another. In particular, spelling mistakes, when not properly introduced as a disguise, will be found in the copies. On the other hand, if the defendant is innocent of the charge, he will write the copies rapidly and they will agree closely with the normal writing and with each other. The deliberate introduction of spelling mistakes and illiterate abbreviations, such as 'poss' for 'possible', will usually not occur consistently throughout a series of letters, and it is not uncommon to find several different spellings used for the same word.

Sometimes counsel try to extend such practical tests to witnesses giving expert evidence on the characteristics in the writing of anonymous letters, but one might as reasonably expect a doctor to diagnose a complaint in the witness-box. The proper course for the witness to take, in the event of such a request, is, with great respect to the Court, to decline to express any opinion on writing for the detailed examination of which with scientific instruments no opportunity has been given.<sup>14</sup>

It is to be hoped that an Indian expert, of the calibre of Mr. Mitchell, will specialise in Indian anonymous letters and bring out a comparable treatise as it will prove to be of great assistance in the administrative and judicial work in India.

Finally, in regard to the lines of investigation to be pursued, Mr. Leland Jones, another acknowledged authority, in the field of scientific criminal investigation, has the following to say :

"Anonymous letters should be photographed immediately, enclosed in cellophane envelopes and then submitted to a laboratory for finger-print tests. Comparison writings as standards in anonymous letter cases should contain many of the original words, numerals, question marks, or designs. Again, the writing should be made under conditions as identical as those found in the evidence, if it is possible to do so. The request writing should also include the

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14. C. A. Mitchell : A Scientist in the Criminal Court, p. 72 and foll.

recipient of the anonymous letter, as it is commonly known that anonymous letter writers frequently include themselves. At the same time, the investigator should make careful analysis of the contents of the letter. Frequently, some incident mentioned in an anonymous letters may be known only to certain individuals. This would decrease the field of possibilities. Also, it is sometimes possible to determine the author of a document by 'internal' style; although it is doubtful that such evidence would stand in court, it may give the investigator a 'lead'.<sup>15</sup>

**14. value or evidence of handwriting experts.** "The evidence of the genuineness of the signature based upon the comparison of handwriting and of the opinion of experts is entitled to proper consideration and weight. It must be confessed, however, that it is of the lowest order of evidence or of the most unsatisfactory character. We believe that in this opinion experienced laymen unite with the members of the legal profession. Of all kinds of evidence admitted in a Court this is the most unsatisfactory. It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence.<sup>16</sup> Too much weight should not be given to opinion of handwriting expert as the science unlike the science of finger print is not perfect.<sup>16-1</sup> In cases of detection of forgery the evidence of handwriting expert is a weak evidence and conviction cannot be based on it.<sup>16-2</sup> An opinion of handwriting expert cannot be taken as substantive evidence unless corroborated by some other evidence.<sup>16-3</sup> It is justiciable by court.<sup>16-4</sup> Such opinion is worthy of evidence if it is corroborated by internal or external evidence, relating to the handwriting in question.<sup>16-5</sup> The Courts have generally refused to act upon it unless it is corroborated by other evidence.<sup>17</sup> Evidence given by handwriting experts can never be conclusive because it is, after all, opinion evidence.<sup>18</sup> Therefore, it can rarely, if ever, take the place of substantive evidence. Before acting on such evidence, it is usual to see if it is corroborated either by

- 15. Leland Jones, Scientific Investigation and Physical Evidence, p. 118.
- 16. Lawson's work on the Law of Expert and Opinion Evidence quoted in Indar Datt v. Emperor, 1931 Lah. 408; 132 I. C. 185; 32 Cr. L. J. 818.
- 16-1. Bhagwan Kaur v. M. K. Sharma, A. I. R. 1973 S. C. 1346; 1973 S. C. Cr. R. 103; 1973 Cr. L. J. 1143; I. L. R. (1974) 2 Delhi (S.C.) 19; (1973) 2 S. C. R. 702; 1973 S.C.C. (Cr.) 687; (1973) 4 S.C.C. 46; 1974 M. L. J. (Cr.) 60; 1973 Cr. L. R. (S.C.) 19.
- 16-2. Sripada v. State, 1976 Cr. L. J. 145.
- 16-3. Siddheswar Prasad v. B. S. Pramanik, A. I. R. 1978 Cal. 4; Sharda Bai v. Syed Abdul Hai, (1971) 2 Mys. L. J. 407; Kanailal v. Calcutta Credit Corporation, I. L. R. (1971) 1 Cal. 103.
- 16-4. Chandreswar v. Ramchandra, A.I.R. 1973 Pat. 215.
- 16-5. Ram Narain v. State of U. P., A. I. R. 1973 S.C. 2200; 1973 Cr. L. J. 1187; 1973 (1) S. C. W. R. 675; 1973 S. C. D. 479; (1973) 2 S. C. C. 86; 1973 S. C. C. (Cr.) 752; (1974) 1 S. C. J. 534; (1973) 3 S. C. R. 911.
- 17. In re Venkata Rao, 36 Mad. 159; 14 I. C. 418; 18 Cr. L. J. 226; Sri Kant v. King-Emperor, 2 A. L. J. 444; 2 Cr. L. J. 353; Kali Charan Mukherji v. Emperor, 9 Cr. L. J. 490; 2 I.C. 154; Sudhindra Nath Dutt v. The King, 1952 Cal. 422; Govardhan Das v. Ahmad Begam, 1953 Hyd. 181; I. L. R. 1953 Hyd. 140; Sridhar Jena v. The State, (1970) 36 Cut. L. T. 1251 (1956); Mangar Naghanshi Munda v. State of Bihar, 1969 B. L. J. R. 658 (663).
- 18. Ishwari Prasad v. Mohammad Isa, (1963) 2 S. C. R. 722; 1963 B. L. J. R. 826; A. I. R. 1963 S.C. 1729 (1736).

clear direct evidence or by circumstantial evidence.<sup>19</sup> At best, the opinion of a handwriting expert that it is evidence of only general tendencies and the weakness consists in the fact that such tendencies are affected, or liable to be affected from a variety of causes.<sup>20</sup> But regarded purely as a question of law, there would be nothing to prevent a Court in a particular case from regarding the evidence of such a person as so completely reliable as to prove all that the witness stated, without the need of any further corroboration. So far as it is a question of law, there is nothing in the Evidence Act to require the evidence given by an expert in any particular case to be corroborated before it could be acted upon as sufficient proof of what the expert stated. Of course, the question as to how much reliance a Court would be entitled to place on the statements of any particular witness in any particular case must necessarily depend on the facts and circumstances of that particular case.<sup>21</sup> Expert opinion of nautical advisers on nautical science and skill must be accepted, and if it is to be rejected, reasons will have to be given. The decision of the case, however, rests entirely with the Court; and even in purely nautical matters, the Court is not bound to accept their advice.<sup>22</sup>

As pointed out by Beaumont, C. J. in *Fakir Mahomed v. Emperor*,<sup>23</sup> it is going too far to say that the Court must insist upon corroboration of the evidence of an expert. The Court must satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself of the value of other evidence. Conclusions based on mere comparison of handwriting must, at best, be indecisive, and yield to the positive evidence in the case.<sup>24</sup> The expert's evidence is only a piece of evidence. A judge of fact will have to consider that evidence along with the other pieces of evidence. Which is the main evidence and which is the corroborative one depends upon the facts of each case.<sup>25</sup> There can be no dispute about the proposition that the opinion of a handwriting expert is not conclusive. Still it cannot be brushed aside as useless. The opinion of an expert is entitled to some consideration and weight when it is corroborated by other evidence.<sup>1</sup> The opinion of a handwriting expert arrived at by magnifying the writings, superimposing the lines, measuring the angles, taperings, strokes, etc., cannot be lightly brushed aside.<sup>2</sup>

19. Shashi Kumar Banerjee v. Subodh Kumar Banerjee, A. I. R. 1964 S. C. 529 (537); Surjamoni Misra v. State, 34 Cut. L. T. 554 (559).

20. Sushila Devi v. Laxmibai, 1969 M. P. L. J. 910; 1969 M. P. W. R. 973; 1969 J. L. J. 972 (977, 978).

21. Ladha Ram Narshing Das v. Emperor, 1945 Sind 4, 8; I. L. R. 1944 Kar. 305; 218 I.C. 379; 46 Cr. L. J. 490; Gunamudayan Packianathan v. Sirkar Prosecutor, 1950 T. C. 5; 51 Cr. L. J. 569; see also Saqlain Ahmad v. Emperor, 1936 All. 165; 160 I. C. 264; 37 Cr. L. J. 263; 1936 A. L. J. 317; 1936 A. W. R. 119; In re Ch. Ram Singh, 1954 Pepsu 81; I. L. R. 1954 Pepsu 91.

22. Asiatic Steam Navigation Co. v.

Arabinda Chakravarthi, A. I. R. 1959 S. C. 597.

23. 1936 Bom. 151 at 153; I. L. R. 60 Bom. 187; 162 I.C. 231; 37 Cr. L. J. 539; 38 Bom. L. R. 160.

24. Kishore Chandra Singh Deo v. Ganesh Prasad Bhagat, 1954 S. C. 316; 1954 S. C. R. 919; I. L. R. 1954 Pat. 313; 1954 S. C. J. 395; (1954) 1 M. L. J. 622; see also Lal Singh Didarsingh v. Granth Sahib, 1951 Pepsu 101; Govardhan Das v. Ahmadi Begum, 1953 Hyd. 181; I. L. R. 1953 Hyd. 140.

25. Hussenaiah v. Yerraiah, 1954 Andh. 30; (1954) 2 M.L.J. 39 (Andh.).

1. K. Malaiyah v. State of Mysore, 1956 Mys. 9; I.L.R. 1955 Mys. 585.

2. Duttabari Mohapatra v. Republic of India, 36 Cut.L.T. 39 (45).

The opinion of a handwriting expert is seldom conclusive and no importance can be attached to it when there is an overwhelming documentary evidence to the contrary.<sup>3</sup> Expert evidence is of little help when handwriting experts have been produced by both the parties and each supports the case of the party who has called him and each gives technical reasons for his opinion.<sup>4</sup> It is not, however, necessary for an expert to give reasons at great length. It is sufficient if he gives them briefly.<sup>5</sup> But the Court may not place any reliance on an expert, who is unsupported by sound reasons.<sup>6</sup> His evidence may, however, be relied upon along with other various items of external and internal evidence in the case.<sup>7</sup> The fact that the expert cannot read or write the language in which the disputed signature is made must detract from the value which would be otherwise attached to his evidence.<sup>8</sup> The opinion of an expert cannot be rejected merely because it is based solely on a photograph.<sup>9</sup> It is true that photographs may be distorted and may be dishonest, and if they cannot be properly proved or verified by comparison with the original they should be excluded. If there is any doubt about the accuracy of photographs of documents they can easily be verified by comparison with the original document. There is not, therefore, the legitimate objection to photographs of a questioned document that may arise over photographs of a different nature which cannot be verified by the judge, jury and opposing counsel.

"Photographs can be made correctly, and this fact can be shown, and thus all objections are disposed of. Photographs are now merely excluded and in a number of States it is not necessary that the one who made the photographs should prove them. They can be proved by anyone competent to say that they are correct."<sup>10</sup>

**15. Typewritten documents.** (a) *General.* Mr. Mitchell in his work on *The Expert Witness*, pp. 130-31, cited at page 204 and following of Ramanatha Iyer's *Detection of Forgery* (1927), states : "With regard to typewriting, it may be mentioned briefly that each machine has its own idiosyncrasies by which it may be recognised, and observations made by the writer have proved that letters written upon the same typewriter at intervals of a year will exhibit corresponding peculiarities."

In matters involving typewriting, the procedure for obtaining exemplars is somewhat different from that of handwriting. If the identification of a particular typewriter is involved, specimens from all possible typewriters of the same make and model should be secured for comparison. Numerous exemplars should be made on each typewriter varying the pressure on the keys. Certain type characteristics will show up when the typist has a heavy touch ;

3. The Banarsi Stores v. The President of the Union of the Indian Republic, 1953 All. 318 : I.L.R. (1954) 1 All. 76.
4. Mohd. Zia Ullah Khan v. Rafiq Mohammad Khan, 1939 Oudh 213 : 182 I.C. 190 : 1939 O.W.N. 581; see also Mst. Sadiqa Begum v. Ata Ullah, 1933 Lah. 885 : 144 I.C. 497 : 34 P.L.R. 788.
5. Prem Shanker v. State, 1957 Cr.L.J. 108 (All.).
6. Haji Mohammad Ekramul Haq v.

- State of West Bengal, A.I.R. 1959 S.C. 488 : 1959 S.C.J. 443; Kishori Mohan v. State of Orissa, 1974 Cut. L.R. (Gr.) 527.
7. Ramachandra v. State of Uttar Pradesh, A.I.R. 1957 S.C. 381 : 1957 Cr.L.J. 559.
8. Ramsewak Sahu v. Emperor, 1933 Pat. 559.
9. Shrinivas v. The Crown, 1951 Nag. 226 : I.L.R. 1951 Nag. 104.
10. Osborn on *Questioned Documents*, 2nd Ed., 8th Printing, pp. 47, 48.

that will not be apparent if the typist uses a light touch and *vice versa*. If the original document is several years old, samples of comparison which are about of the same age should be obtained. Typewriters change their characteristics with age. The investigator should be certain that exemplar contains the same words as those which appear in the questioned documents.<sup>11</sup>

The Supreme Court has held in *Hanumanth v. State of M.P.*<sup>12</sup> that the opinion of an expert that a particular letter was typed on a particular type-writing machine does not fall within the ambit of Section 45 of the Evidence Act and it is not admissible. It is respectfully submitted that it may require reconsideration in the light of the modern knowledge indicated to some extent by the research materials which show that detection of forgeries of typewritten documents has become an integral part of the science of questioned documents.

(b) *Typewriter.* Referring to expert evidence on typewritten documents a learned Judge of the Allahabad High Court observed :

"It is true that Section 45 makes no reference to type writers but evidence as to the fact that the typewriters used in the typing of the various exhibits have certain defects which are clear from the typing of these exhibits is evidence of the fact which can be competently given by an expert who has had an opportunity of examining the documents. The Court is entitled to draw its own conclusion as to the source and authorship of the documents from the whole evidence in the case and is entitled to take into consideration the fact spoken to by an expert witness that there were certain peculiarities in the typing of the documents resulting from defects of the machines by which the documents were typed."<sup>13</sup>

But, in a subsequent Bench decision of the same High Court it has been held :

"The opinion of an expert to the effect that one document has been typewritten on the same machine as another document is not admissible under Section 45, Evidence Act. It is for the Legislature to consider whether the section should not be amended; but as it stands, it does not include such expert opinion. The Court may ask the witness to explain points in favour of the view whether the two documents have or have not been typewritten on the same machine, but must come to its own conclusion and not treat such assistance as an expert opinion—a relevant fact in itself.

"The identity of the machine on which two letters have been typewritten would not by itself show that the writer of the two is one and the same person. But such a conclusion may be drawn from additional evidence, i. e., internal evidence afforded by the document, or external circumstances, or the continuity of the correspondence passing between the sender and the addressee."<sup>14</sup>

11. Leyland Jones : Scientific Investigation and Physical Evidence, p. 118.

12. A.I.R. 1952 S.C. 343 ; 54 Cr.L.J. 129 ; 1952 S.C.R. 1091.

13. Mamabendra Nath Roy v. Emperor, A.I.R. 1933 All. 498 at 501.

11. S. H. Jhabwala v. Emperor, A.I.

R. 1933 All. 90 at 705 ; 145 I.C. 481 ; 34 Cr.L.J. 967 ; 1933 A.L.J. 799; followed in Bacha Babu v. Emperor, A.I.R. 1935 All. 162 at 169 ;

155 I.C. 369 ; 36 Cr.L.J. 684 ; 1935 A.W.R. 1.

In a case where evidence of certain experts was led to show that a letter of a particular date was not typed on the office typewriter that was in use in those days but that it had been typed on another typewriter which did not reach the office till a later date, it has been held by their Lordships of the Supreme Court that the opinion of experts was not admissible under this Act as it did not fall within the ambit of Section 45.<sup>15</sup> But Osborn, the leading American authority on Questioned Documents, points out :

"The increasing use of the typewriter for the production of fraudulent writings of many kinds has certainly created an urgent necessity for means that will lead to the correct identification of these documents, the determination of their dates, and the discovery of their authors ..... Without careful investigation it is of course usually impossible to say in advance what can be determined from the examination of any particular piece of typewriting. It is especially important, however, that those whose interests are attacked by documents of this kind should know first, that typewriting can sometimes be positively identified as being the work of a certain individual typewriting machine and second, that the date of a typewriting in many cases can be determined with certainty and positively proved. In many cases the discovery of these two facts gives information to those who try cases in Courts of Law which enable them to expose pretentious fraud and prevent miscarriages of justice....."

"Different habits of touch, spacing, speed, arrangement, punctuations, or incorrect use of any letters, figures, or other characters may also show that a document was not all written by one operator, or may show that a collection of documents was produced by several different operators. These facts often have a very important bearing on the genuineness of a document under investigation.

"Even the number of threads to the inch in the ribbon, as shown in the type impression, plainly seen and accurately measured by the use of proper instruments or in an enlarged photograph, 'typewriting individuality' in many cases is of the most unmistakable and convincing character and reaches a degree of certainty that can properly be described as almost absolute proof. The identification of a typewritten document in many cases is exactly parallel to the identification of an individual who exactly answers a general description as to features, complexion, size, etc. and in addition matches a detailed list of scars, birth-marks, deformities and individual peculiarities."<sup>16</sup>

**16. Finger-prints.** The basis of the science of finger-prints is that the palmar surface of the hand and the soles of the feet including toes are traversed by innumerable ridges forming many varieties of pattern and by creases. The skin bearing the ridges is known as the friction skin and the ridges are called friction ridges. These ridges are formed by the fusion of

15. Hanumanth Govind Nargandkar v. The State of Madhya Pradesh, A.I.R. 1952 S.C. 343 : 1952 S.C.R. 1091 : 1952 S.C.J. 509 ; 1953 Cr.L.J. 129 : (1952) 2 M.L.J. 631 : 1953

M.W.N. 347.  
16. Osborn on Questioned Documents, 2nd Ed., 8th Printing 1950, pp. 581, 582, 584 and 589.

epidermic units in rows of minute round or oval structures each having a sweat pore in its centre so that the sweat pores occurring along the ridges indicate the number of separate unit islands of which it is composed. Ridges are characterised by numerous minute peculiarities called minutiae, here dividing into two and there meeting with one or other or dividing and immediately reuniting enclosing a small circular or elliptical space etc. These peculiarities are known as Galton details. The minutiae are formed as the epidermic units have a tendency to combine in various ways. A break is caused where the original unit does not fuse a fork where the units belonging to two adjacent ridges fuse across the inter-space. Ridges appear on the digits before they are evident on the palm or sole. The order of arrangement of the ridges and ridge characteristics in their relative position on the finger, palm and sole of a person is for ever different and distinct from the rest of the world. Persistency of ridges and enormous variety in different individuals in the general characteristics of the pattern are the two bases of the identification and not the measured dimensions of any portion of the pattern.

No less important in the science of finger-print identification is the fact that illness, diseases,—barring perhaps advanced leprosy—wounds, superficial burnings, chemical action and accidental damages are all equally important in destroying the basic characteristic of the ridge patterns.

The illustrative cases are : In *In re Govinda Reddy*,<sup>17</sup> it was pointed out that the science of comparison of finger-prints has developed to a stage of exactitude, and it is quite possible for the Court to compare the impressions taken from finger-prints of individuals with disputed impressions, provided they are sufficiently clear and enlarged photographs are available. The identification of finger impressions with the aid of a magnifying glasss is not difficult, particularly when the photographs of the latent and patent impressions are pasted side by side. But Courts of law must not play the role of a finger-print expert when the point in issue is not the patent differences in pattern visible to the naked eye and which will rule out that the two impressions for comparison are by the same digit, but when by reason of detailed counting of similarities the identity or the non-identity of the two impressions for comparison has got to be established. In such cases the Court must insist upon clear evidence being led including that of an expert.<sup>18</sup> It is for the finger-print expert to say whether the disputed finger-prints are clear enough for the purpose of comparison and whether identity can be established therefrom on the basis of eight or less similar characteristics.<sup>18-1</sup> If ridge characteristics in large numbers are available for comparison, there is sufficient material for reliable identification of thumb-impression<sup>18-2</sup> The Court must apply its own mind and find out with the explanatory help of the expert and the counsel appearing on both sides whether the identity or the non-identity spoken to by the expert is based upon sound reasons.<sup>19</sup>

- 17. A.I.R. 1958 Mys. 150, 179; 1958 Cr.L.J. 1489.
- 18. Amar Singh v. Ganga, A.I.R. 1956 Bhopal 6.
- 18-1. Mohan Lal v. Ajit Singh, A.I.R. 1978 S.C. 1183; 1978 Cr.L.J. 1102.
- 18-2. Mandrup v. State of Rajasthan, 1975 Cr.L.J. 1277; 1975 Raj.L.W. 27.
- 19. In re Godavarthi, A.I.R. 1960 A.P. 164; 1960 Cr.L.J. 315; State v.

Karugope, A.I.R. 1954 Pat. 131; 1954 Cr.L.J. 201, is an authority for the proposition that there is no rule of law as to whether a conviction can be based upon the unsupported testimony of a finger-print expert. It is a matter depending upon the reasons given for the conclusion of the finger-print expert (case-law discussed).

In order to ascertain whether a finger-impression is that of the person of whom it is said to be, any finger-impression admitted or proved to the satisfaction of the Court to be the finger-impression of that person may be compared with the former impression, although that impression has not been produced or proved for any other purpose. The Court may also direct any person present in Court to make a finger-impression for the purpose of enabling the Court to compare the impression so made with any impression alleged to be the finger-impression of such person.<sup>20</sup> The Court may draw an adverse inference from a refusal to give thumb-impression.<sup>21</sup> Under Section 5 of Act XXXVIII of 1920, a thumb-impression taken of the accused at the time of the trial is admissible. The evidence of an expert who had an opportunity of comparing the thumb-impression of the accused which had been taken in Court with the thumb-impression on the deed and in the sub-registrar's impression book is evidence under this section.<sup>22</sup> Where photographs of finger-impressions are admitted in evidence the opinion of an expert as to points of similarity or dissimilarity is also admissible.<sup>23</sup>

The Act provides several modes of proving a thumb-impression, viz.:

- (i) by the opinion of a person specially skilled as to the identity of finger impressions, i. e. an expert under section 45;
- (ii) by the evidence of a person who has actually seen the person thumb-marking a document, which evidence is relevant under section 60;
- (iii) by the court comparing the thumb-impression of a person with his admitted or proved thumb-impressions under section 73.<sup>24</sup>

**17. Forged finger-prints.** From time to time a considerable attention has been directed towards the question of the so-called forged finger-prints, namely, making copies of finger-prints and planting them with unlawful purpose or intent. In fact this is a favourite theme in crime novels. There can be no doubt that simulation of finger-prints can be made in a number of ways by etching with transfer materials, rubber stamps, photography, etc. A forged finger-print may be likened to a personal signature made with a rubber stamp. But fortunately three circumstances militate against the effective use of forged finger-prints. First of all it is very difficult to formulate finger-prints and therefore a fact militating against the possibility of successful finger-print forgery is the would-be forger's probable lack of needful skill and necessary facilities. Secondly, normal finger-print is an impression from the living skin and made with a natural body secretions and exudations. It is of such a nature that any attempt to remove it from one surface and replace it upon another is certain to fail. Thirdly, the only alternative left, namely, for the would-be forger to produce a convincing simulation of a genuine finger-print

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| 20. S. 73 post. Even an accused person may be directed to give his finger-impression; see State v. Parameswaran Pillai, A.I.R. 1952 T.C. 482 : I.L.R. 1952 T.C. 447 ; 1953 Cr.L.J. 1 (F.B.) and the cases cited therein. | 22. King-Emperor v. Kiran, A.I.R. 1926 Cal. 531 : 93 I.C. 73 : 43 C.L.J. 79 : (1925) 30 C.W.N. 373.             |
| 21. Zahuri v. R., A.I.R. 1928 Pat. 103 : I.L.R. 6 Pat. 623 : 106 I.C. 212 ; 28 Cr.L.J. 1028 : 8 P.L.T. 847.  | 23. R. v. Babulal, A.I.R. 1928 Bom. 158 : I.L.R. 52 Bom. 223 : 108 I.C. 508 : 29 Cr.L.J. 410 : 30 Bom.L.R. 321. |
|  | 24. Raghbir Singh v. State, 71 P.L.R. (D) 387 (390).  |

by artificial means is to have a living finger as a model from which a negative impression might be made in wax or other plastic medium, then from the negative mould a positive casting could be made thus furnishing an artificial finger of rubber or similar resilient substances. Its surface would be skinlike, and from it could be made finger-prints of a sort. But, an artificial finger, no matter how carefully made to approximate the skin's true texture, certainly cannot include what is most necessary to the recording of a normal finger-print, namely, the sweat ducts. Therefore, though the false finger may be moistened with real body wax, any impression made with it will have little resemblance to a genuine finger-print. Under magnification, the moisture globules which in a normal finger-print appear in irregularly distributed ellipsoids, will be seen in extremely small spheroids distributed evenly, and in no way resembling the normal deposit of the human skin. Quite apart from their physical aspects, additional evidence of forged finger-prints' unnatural origin would certainly be seen in their placement; also their inevitable appearance upon the surface allegedly touched, the direction and degree of pressure indicated, their number, the plausibility and even possibility of their being there at all, together with many other conspicuous factors, would be highly informative. To sum up, finger-prints like anything else, can be forged, but the results attainable by any process could never be more than crude and obvious copies, easily recognised by the qualified investigator.<sup>25</sup>

**18. Value of evidence of finger-print experts.** "As to the probative value of the opinion of an expert on finger-prints, it must have the same value as the opinion of any other expert, such as a medical officer, etc. In each case, the evidence is only a guide to the Court to direct its attention to judge of its value. The Court is at liberty to use its own discretion and to come to a conclusion either in affirmance or differing from the view taken by the expert."<sup>1</sup> The chances of inseparable resemblance between two prints made by different fingers have been worked out by Galton in Chapter VII of his work on "Finger-prints". If his calculations are correct and there are no data upon which they can be demonstrated as incorrect then, for all judicial purposes, a reliable mode of practically certain identification has been obtained. There can remain no doubt that the evidential value of identity, afforded by the prints of two or three fingers which contain even a few points of resemblance in their minutiae and no points of disagreement, is so great as to render it superfluous to seek confirmation from other sources. While where a close correspondence exists in respect to all ten digits, the strength of the evidence rises to a level far above the point where probability, in the human judgment, begins to rank as certainty; and the thoroughness of the differentiation of the maker of the impression from all the rest of the human species, is multiplied to an extent absolutely beyond the capacity of the human imagination.<sup>2</sup> In some cases the opinion of a finger-print expert has been held to be more reliable than that of a handwriting expert.<sup>3</sup> Unlike the science of comparison of handwriting the science of comparison of finger-

25 Bridge's Practical Finger Prints, p. 293 and following.

1. Basgit Singh v. Emperor, A.I.R. 1928 Pat. 129 at 132; I.L.R. 6, Pat. 305; 104 I.C. 626; 28 Cr.L.J. 850.  
2. Emperor v. Sahdeo, 5 Cr.L.J. 220 at 229; 3 N.L.R. 1.

3. Golam Rahman v. The King, A.I.R. 1950 Cal. 66; 51 Cr.L.J. 376; 83 C.L.J. 397; Ahmada v. Emperor, 17 I.C. 203 (2); Ganga Sahai v. Molar, 1935 Lah. 147; Hukam Singh v. Uddham Kaur, (1969) 71 Punj. L.R. 908 (911).

prints is almost perfect.<sup>3-1</sup> In a Madras case it has been held that if the finger-prints are clear enough to sustain an argument, there is no reason why an argument by way of deduction should not be as sure foundation for a conclusion and it may be a better one than any based on direct evidence.<sup>4</sup> It cannot be laid down as a rule of law that it is unsafe to base a conviction on the uncorroborated testimony of a finger-print expert. The true rule seems to be one of caution, that is to say, the Court must not take the expert's opinion for granted, but it must examine his evidence in order to satisfy itself that there can be no mistake, and the responsibility is all the greater when there is no other evidence to corroborate the expert.<sup>5</sup> It is going too far to say that the Court must insist upon corroboration of the evidence of a finger-print expert. On the other hand, the Court must be careful not to delegate its authority to a third party. The Court has to be satisfied that the accused is guilty, and the Court cannot hold him guilty merely because an expert comes forward and says that in his opinion the accused must be guilty. The Court must satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself of the value of other evidence.<sup>6</sup> The Court, in a case of this sort, has to rely on the expert on two distinct points : first, on the question of similarity between the marks, which is a question of facts, and secondly on the point which is one for expert opinion, whether it is possible to find the finger-prints of two individuals corresponding in as many points of resemblance as are shown to exist between the impressions found in the case before the Court and those of the accused. The court cannot refuse to convict a person on the evidence of the expert, merely on the ground that it is unsafe to base a conviction on such evidence. If the finger-prints are clear enough, the Court must verify the evidence of the expert by examining them with a magnifying glass, if necessary, and apply its own mind to the similarities and dissimilarities afforded by the finger-prints before coming to a conclusion. The main thing to be scrutinized is whether the expert's examination is thorough, complete and scientific.<sup>7</sup> But it has been held that as the science of comparison of foot-prints has developed into an exact science, it is quite possible to compare the impression taken from finger-prints of the individuals with the disputed impressions.<sup>8</sup> In *Godavarthy Bhashyakaracharyulu, In re*,<sup>9</sup> however, it has been held that it is the duty of the Court to scrutinize his evidence by examining the reasons he adduces for his conclusion ; the *ipse dixit* of the expert should not be accepted and acted upon. Though the classification of finger-impressions is a science requiring study, and though it may require an expert in the first instance to say whether any two finger-impressions are identical, yet the reasons which guide him to this conclusion are such as may be weighed by any intelligent person with good

3-1. Nasib Singh v. State of Punjab, I.L.R. (1974) 1 Punj. 285 : (1972) 74 Punj.L.R. 585.

4. Public Prosecutor v. Virammal, A.I.R. 1923 Mad. 178 at 179 : I.L.R. 46 Mad. 715 : 69 I.C. 374 : 1922 M.W.N. 642 : 16 M.L.W. 663.

5. Havendra Nath Sen v. Emperor, A.I.R. 1931 Cal. 441 : 133 I.C. 111; 32 Cr.L.J. 1001 : 54 C.L.J. 107 : 35 C.W.N. 868; Golam Rahman v. The King, A.I.R. 1950 Cal. 66; Basgit Singh v. Emperor, 1928 Pat. 129 at 132; The State v. Karu Gope, 1954 Pat. 131 : 1954 Cr.L.J.

201; Sardara v. Emperor, 1930 Lah. 667; 125 I.C. 639 : 31 Cr.L.J. 877; State of M. P. v. Sitaram, 1978 Cr.

L.J. 1220 : 1978 M.P.L.J. 197. Fakir Mahomed Ramzan v. Emperor, A.I.R. 1936 Bom. 151 : I.L.R. 60 Bom. 187 : 162 I.C. 231 : 37 Cr.

L.J. 539 : 38 Bom. L.R. 160. See Bhaluka v. State, A.I.R. 1957 Orissa 172 : I.L.R. 1957 Cut. 200.

8. In re Govind Reddy, A.I.R. 1958 Mys. 150 : I.L.R. 1957 Mys. 177. 9. A.I.R. 1960 Andh. Pra. 164 : 1960 Cr.L.J. 315.

powers of eyesight.<sup>10</sup> A Court is not bound to accept the evidence of an expert though there are no special reasons for not accepting it.<sup>11</sup> There is nothing in the so-called science of the finger-prints or the qualifications of an expert in it, which need deter the Court from applying its own magnifying glass or its own eyes and its own mind to the evidence and verifying the results submitted to it by the witness. For the argument in finger-print cases rests on a simple deduction from a number of observations of the similarities and differences between the finger-prints in question, the probabilities approaching more or less closely to certainty as those similarities or differences are many or few.<sup>12</sup> Where the rival parties have produced experts in support of their respective cases, they are likely to support the case of their respective paymasters and as such the Court must take into account all the attending circumstances before accepting one of the opinions<sup>12-1</sup> In such a case, the Court cannot leave the matter merely by saying that it was difficult to prefer one of the reports. The Court should have examined the characteristics with magnifying glass.<sup>12-2</sup>

The Court should not allow a document on record to be taken out for comparison even by a Government expert. Only making of photographic copies should be allowed from which the finger-print expert can make his investigations unless of course it is impossible for some reason for the expert to form his opinion without taking out the document.<sup>12-3</sup> However, where the document is to be sent only to a Government expert there is no harm and the sending of the document out of court cannot be objected on the ground of risk.<sup>12-4</sup> It cannot be laid down as a rule that documents should in no case be sent to an expert, but the court may direct the examinations to be made in court premises.<sup>13</sup>

**19. Finger-prints of twins.** It is strange that the fallacy that the finger-prints of twins (particularly in the case of uniovular twins) are identical is so common even amongst the medical profession. This misconception arises through the superficial examination of the prints by persons who are not finger-print experts. It often happens that the finger-prints of twins are similar in pattern, but this is often the case with prints of other persons. Finger-print identification, however, does not end with similarity of pattern but is attendant upon the coincident sequence of the papillary ridge characteristics, and these have never been found to agree in points taken of different fingers of the same person, of twins, or any other person.<sup>14</sup> One of the clearest and most graceful expositions of the finger-prints of twins is that of

10. Emperor v. Abdul Hamid, I.L.R. 32 Cal. 759 : 2 Cr.L.J. 259 : 9 C. W.N. 520.
11. Crown Prosecutor v. Gopal, A.I.R. 1941 Mad. 551 : 195 I.C. 183 : 42 Cr.L.J. 696 : I.L.R. (1941) 1 Mys. 475 : 1941 M.W.N. 218 : 53 M.L.W. 396; Nagappa v. Nannibu, A.I.R. 1960 Mys. 220.
12. Public Prosecutor v. Virammal, 1923 Mad. 178, 179 : I.L.R. 46 Mad. 715 : 69 I.C. 374 : 23 Cr.L.J. 694 : 16 M.L.W. 663 : 1922 M.W.N. 642 : 31 M.L.T. 427.
- 12-1. Mohar Singh v. Din Dayal, A.I.R. 1974 Punj. 302.
- 12-2. (1974) 1 Cr.L.T. 65 (Punj.).
- 12-3. Doraiswamy v. Parayammal, A.I.R. 1976 Mad. 66 : (1976) 1 M.L.J. 11; Ramaswamy v. Karappa, (1971) 84 Mad.L.W. 348.
- 12-4. Nagarathinammal v. Rangasamy, (1975) 88 Mad.L.W. 71.
13. Balaram v. Achutanand, A. I. R. 1975 Orissa 125 : 41 Cut.L.J. 235 : (1975) Cut W.R. 110.
14. "Criminal investigation" by Dr. Hans Gros, adapted by Adam and Adam, 4th Ed. (1950), p. 135.

Mark Twain's Puddinhead Wilson in his speech in defence of the twins. Every human being carries with him from his cradle to his grave certain physical marks which do not change their character and by which he can always be identified, without shadow of doubt or question. These marks of his signature, his physiological autograph so to speak, and this autograph cannot be counterfeited, nor can he disguise it or hide it away nor can it become illegible by the wears and mutations of time. This signature is each man's very own—there is no duplicate of it among the swarming millions of the globe.

**20. Palm-impressions.** (a) *General.* Though special mention is made of finger-prints, the principles which hold true for them apply also to palms, soles and toes. Dermatoglyphics of these areas are equally permanent and individually variable.<sup>15</sup> The evidence of an expert as to the identity of palm-impressions is therefore admissible under this section.<sup>16</sup>

(b) *Palm-prints and toe-prints.* Impressions made by friction of papillary ridges of the palms and the bulbous joints of the toes are useful in identifying a person. Such ridges are unchanging from approximately three months prior to birth until decomposition sets in after death. These ridges are of a definite contour and appear in several general pattern types each with general and specific variation of not only the pattern but also the size and thickness of the ridges and the size and the spacing of pore impressions made with ink, blood, dirt or the greasy substance emitted by the sweat glands due to ducts or pores which constitute these outlets. The background or media may be paper, glass, porcelain, wood, cloth, wax, silverware or any smooth-pores metal. The other portions of the feet and the palmy surface of the hands also have definite contours but do not appear in pattern types sufficient for classification purposes and therefore different consideration will prevail in regard to evaluation of evidence of footprints.

In the case of *State v. Kuhl*,<sup>17</sup> cited at page 365 of Bridge's Practical Finger Printing, the Court had the following to say, after referring to decisions, text-books and other authorities :

"The lines of the palms of the human hand and the soles of the feet, which form the basis of individual identification, are the papillary ridges that serve the orifice of raising the mouths of the ducts, so as to facilitate the discharge of sweat, and perhaps perform the additional function of aiding the sense of touch and of giving elasticity to the skin of the hand; and, having a vacuumistic tendency, they assist in preventing against slipping. These papillary ridges form figures, patterns or designs which research, study, and science have divided into classes named after their particular forms to wit, arches, loops, whorls, and composites. These patterns, as they have been established and named by those who have become devotees to the science of finger-print identification, while they have been discussed principally in connection with finger-impressions, are not confined alone to human fingers but are found with

15. Finger-prints, Palms and Soles by Cummins & Midlo, p. 144.

923, 198 I.C. 508; 29 Cr.L.J. 410; 36 Bom. L.R. 321.

16. Emperor v. Babulal Behari, A.I.R. 1928 Bom. 158; I.L.R. 52 Bom.

17. 4<sup>th</sup> Nevada 185.

equal importance and equal persistency in the human palm and the sole of the human foot.....All of the learned authors, experts, and scientists on the subject of finger-print identification.... agree that these patterns, formed by the papillary ridges on the inner surface of the human hand and the sole of the foot, are persistent, continuous, and unchanging from a period in the existence of the individual extending from some months before birth until disintegration after death. While most of the experts on finger-print identification deal most extensively with impressions of the human fingers, we find that some of whom, Mr. Galton is first and foremost, have divided the palmar surface of the human hand into what they term well-marked systems of ridges.....We have gone at length into the subject of palm-print and finger-print identification, largely for the purpose of evolving the indisputable conclusion that there is but one physiological basis underlying this method of identification ; that the phenomenon by which identity is thus established exists, not only on the bulbs of the finger tips, but is continuous and co-existing on all parts and in all sections and sub-divisions of the palmar surface of the human hand."

Palm impressions are akin to finger impressions. The knowledge of both is a study for the same class of expert. They are a portion of the same science. Opinions of experts, as to identity of palm impressions, should be admitted rather than excluded, and weighed by the Court and the jury for whatever it is worth.<sup>18</sup>

(c) *Sweat pores or poroscopy.* There is another branch of the same science which is now being developed and it is based on the fact that besides ridge peculiarities every finger-print has its own characteristic sweat pores. Identification through the sweat pores on the ridge is called poroscopy. These sweat pores are not only individual in regard to shape, side, position, and number for each human being but also for each finger even of the same person. They also do not at all change in life and if the skin is injured, they reappear again in the identical fashion when the injury is healed up.<sup>19</sup>

**21(a). Footprints.** (i) *General.* It has been acknowledged by the criminologists and the jurists that footprint is one of the means of the identification of persons. Criminals leave behind footprints in and near the place of occurrence, and if proper endeavour be made to make use of such footprints in investigation, good results are often obtained.

(ii) *Observation of footprints.* Footprints are to be looked for in the following places : first, the scene of occurrence, secondly, around the place of occurrence, thirdly, along the route taken by the culprits both at the time of ingress and egress, fourthly, at the place where they had collected before the commission of the crime for making preparation and the place where they assembled for the division of the booty. It may sometimes happen that criminals on their way to the scene of crime go off the road to procure materials for the commission of the crime, e.g. a dacoit going to a bamboo clump to cut

18. Emperor v. Babulal Behari, A.I.R. 1908 Bom., 158 : 29 Cr.J. 410.

19. See "Finger-prints" by F. Brewster, Ch. VIII, pp. 140-147.

*lathis.* The Investigating Officer should, therefore, look for footprints in fields, courtyards, floors of rooms, tables, chairs, bed-sheets, books, papers, mosquito-curtains, door leaves, commodes, pipes along the wall, machinery, etc., in short, on all hard substances, as well as on dust, sand, soft soil, etc.

(iii) *Origin of footprints of different kinds.* Footprints are produced under the following circumstances :

- (1) If the surface be soft or loose, simply walking leaves footprints.
- (2) If the surface be hard, prints are formed under two circumstances, namely, (a) if the surface itself be coated with dust, dirt or any other powdered substance or liquid; (b) if the sole of the foot be covered with some foreign substances such as dust, mud, oil, blood, etc. The foot may carry the foreign substance either from a distance or it may receive it at the place of occurrence, as, for example, a dacoit may have mud on the sole of his foot which will produce a muddy footprint on a door-leaf, or a murderer may leave footprints of blood after the commission of the crime on the floor or on the beddings near the deceased.

If a footprint is found on a hard substance, it may be called a surface print, and if on soft or loose ground, it may be called a sunken footprint. Surface prints may therefore be dusty, oily, muddy, bloody, sandy, etc. They are generally more helpful in establishing the identity of criminals than deep or sunken prints, for hard surfaces do not distort the outlines of a footprint. If five or six persons walk on a dusty road or on a dusty floor, their footprints will be clearly visible on the surface and will present marked differences, but if these persons walk over mud, they will produce sunken impressions, the distinguishing characteristics of which it will not be so easy to detect.

A human being may have many defects either congenital or acquired, in the entire frame of his body, the foot also may share the fate of the other parts of the body. The footprints of such a man will consequently differ from those of a normal man. Abnormality in footprints, though not very common, are not very rare. In a family all the members were seen to have six toes on each foot. There are cases where all the toe of a foot were either burnt or cut by accident or lost as an effect of leprosy. Lame persons do not generally place their entire foot on the ground. People suffering from some disease drag on of their feet. In some cases people walk not by the sole of the feet but by the sides. People who have lost one of their legs and use crutches may leave behind mark of only one foot ; men who are crippled and who walk on all fours can only leave behind some indistinct toe-marks.

(iv) *The foot and its features.* In describing a bare-foot impression it is essential that a uniform and concise method should be followed and it is for this reason that the "Gayer" system has been adopted. The names of the various features are those used by "Trackers" (Khojis) and are well known.

(v) *Reproduction of footprints.* Having found a usable footprint at the scene of occurrence the question arises as to how it can be produced as evidence. Hans Gross suggests lifting it together with a portion of the earth upon which it has been made. The difficulties involved are too many to

make it worth considering, there are cases however when it can be done, e. g. impressions upon wood, linoleum, etc. Three simple and reliable methods of reproduction are: (a) by means of casts, (b) drawing the impression upon a sheet of glass or celluloid, and (c) photography. A combination of all three methods is even better.

(vi) *Casts.* These can be made with plaster of paris, wax and resin and various other materials. Experience has shown that the plaster of paris method is the simplest and best.

(vii) *Taking prints of suspects for comparison.* One of the easiest methods is to ink the suspect's foot with finger-print ink and take his impression on paper. (Cyclostyle paper is good as it is porous). Three copies might be taken—standing, sitting, and walking. The advantage with the inked impression is that you can control the printing until you get a clear impression which not only shows the characteristics of the foot but of the friction skin as well. If comparable friction skin markings are reproduced in the cast the expert is able to give a very definite opinion and the identification becomes absolute as in finger-prints.

If you find it difficult to ink the foot properly, soak a piece of felt in ink and make the suspect stand on this and then step on to various pieces of paper fastened to the floor until you get a clear impression.

As regards comparing impression, Mr. Gayer explains: "When two impressions are being compared with each other with the object of finding out if both have been made by the same foot, one thing must be clearly understood: if they are impressions of the same foot, they will agree in all essential points and there will be no points for disagreement. If there are points for disagreement, and these have not obviously been caused by some peculiarity or irregularity of the ground, or by some accident, it should at once be admitted that the impressions are those of different feet. If the soil is soft and the walk is energetic, the probabilities are that the impression will appear slightly shorter (as well as broader) than the foot which made it, because the heel, after having dug in deep, will rise while the toes dig in deep, and the sole will present, as it were, a concave surface to the soil. The impression caused by the foot of a man standing can never look just like that of a man walking, and this is an important point to remember when the footprint of a criminal walking towards or away from the scene of the crime has been found; if he is subsequently traced, and it is wished to compare his footprint with that found on the scene, he must be made to walk unconsciously in much the same manner, over much the same kind of ground, which must be in the same condition; the word 'unconsciously' is specifically emphasised as a man can materially change the look of his track if he is thinking of what he is doing.

"It is quite useless to try and identify a track as the impression of any particular person's foot by measuring that foot. The only practical way is to compare the impression supposed to have been made by him with one known to have been 'so made'."

(viii). *Measurement test.* Eye may make mistakes. Therefore, when eyes fail to detect any difference, different parts should be measured to find out the identity.

(ix) *Superimposition test.* This is the best and the easiest test if the original footprint is near you. Tracing of the suspect's inked footprint on celluloid should be taken and placed over the original footprint or the tracing of the original footprint should be taken and placed over the suspect's inked footprint. If any small difference in size or breadth or in the outline is found, experiments should be made with a view to obtain the suspect's prints under circumstances in every respect similar to those which produced the original footprints, and then to compare the suspected and the original footprints.

(x) *Second case.* When the original surface footprints cannot be brought for comparison, i.e. when they are on floors, walls, big furniture, etc., tracings of the original footprints should be compared with the suspect's footprints on paper or tracings of suspect's footprints on celluloid plate.

(xi) *Third case—Sunken prints—Mould and casts.* First test: Moulds of all suspects need not be taken, inked footprints of all would do at the preliminary test. Keeping in view the mould of the original footprint, the suspected prints should be compared with it (the mould) one by one. The general appearance of the mould gives to a trained eye sufficient basis for comparing the mould with the inked footprints. Footprints of one or two persons would seem to the eye to tally with the mould and the footprints of the remaining suspects should be rejected. The measurement of the different parts of the mould and the footprints of the likely suspects should be taken.

A little difference in the length and breadth would not matter much, for, in a mould, footprint looks a little larger than a footprint on paper. Definite opinion should not be given in such cases by this test alone.

(xii) *Final Test.* The mould of the suspect's footprint should then be compared with the mould taken of the footprint found in the place of occurrence. The two moulds (the original and the suspected) are to be measured lengthwise, breadthwise and part by part. If they tally in all material points, definite opinion can safely be given.

If instead of mould tracing of the sunken footprints were taken, then tracings of the suspect's footprint instead of his inked footprint should be taken and compared with the tracing of the original sunken footprints, and if no material difference be found definite opinion can be given.

Comparison of partial footprint will be done as in the case of complete footprints, but except where there are no abnormalities in the incomplete footprint found in the place of occurrence, it will not be possible to give definite opinion as to the identity of the suspect. Negative opinion can, however, be always given with sufficient reason.

The similarities, if any, observed by comparison will help the Investigating Officer to pick up the right man for investigation.

Definite positive opinion of identity can be given in cases of clear surface footprints and in deep sunken footprints when there are some peculiarities or where the prints are not at a great depth from the surface, but in cases of all surface and sunken footprints negative opinion can be given without any reasonable doubt.

In *Pritam Singh v. The State of Punjab*,<sup>20</sup> the Supreme Court has held that the opinion of expert trackers as to the identity of the shoe-prints found at the scene of offence is relevant and admissible though it may not amount to much by itself.<sup>21</sup> But even the tracker evidence is of no value if it is belated.<sup>22</sup>

The expert should be asked to explain why and how he came to form certain conclusions.<sup>23</sup>

*Sources consulted:* Gayer-Footprints, Main Waring, Personal Identification of Footprints (printed by the Ceylon Government, 1926); United Provinces Finger and Footprint Manual (1940); Wharton, Criminal Evidence, 12th Ed., Vol. II; Underhill, Criminal Evidence, 5th Ed., Vol. I; L. C. Nicolls (Director, Police Laboratory, New Scotland Yard). The Scientific Investigation of Crime (Butterworth), Ch. 7, p. 186 and foll.; Justice Rama-swami's Magisterial and Police Guide, Vol. I, p. 665 (M. L. J.); P. L. Sharma, I. P. S., Crime Detection, p. 97 and foll.; S. K. Lahiri, Criminal Science and Detection of Crime, Ch. XIV, p. 161 and foll.; Aiyer and Aiyer, Art of Cross-examination, 3rd. Ed. (1961), p. 860.

(xiii) *Footprints as evidence.* This section does not include footprints within its ambit as it does the finger-impressions. Notwithstanding this omission, the evidence of footprint expert has been admitted with the qualification that there should be other evidence to bring home the charge to the accused.<sup>24</sup> The science, if it could be so called, of footprints has not yet progressed very far.<sup>25</sup> It is not an exact science.<sup>1</sup> There is no doubt, however, that evidence of similarity of the impression of the foot, shod or unshod, is admitted by the Courts in India and in Great Britain, and in every other country, though there is no science of such impressions.<sup>2</sup> The fact is that such evidence comes under the head of circumstantial evidence.<sup>3</sup> It is not the opinion of the ex-

- 20. A.I.R. 1956 S.C. 415; 1956 Cr.L.J. 805.
- 21. See also Basudeo Gir v. The State, A.I.R. 1959 Pat. 534; 1959 Cr.L.J. 1355; Sidik Sumar v. Emperor, A.I.R. 1942 Sind 11; I.L.R. 1941 Kar. 525; 198 I.C. 110; 43 Cr.L.J. 308. (Act of Tracker recommended).
- 22. Chanan v. Emperor, A.I.R. 1938 Lah. 299; 35 Cr.L.J. 610; Shangara v. Emperor, A.I.R. 1932 Lah. 557; 33 Cr.L.J. 935.
- 23. Fakir Chand v. State, A.I.R. 1955 M.B. 119; 56 Cr.L.J. 1073 (F.B.).
- 24. Ganesh Gogoi v. The State, A.I.R. 1955 Assam 51; Sidik Sumar v. Emperor, A.I.R. 1942 Sind 11; I.L.R. 1941 Kar. 525; 198 I.C. 110; 43 Cr.L.J. 308; Emperor v. Babu Lal Bihari, A. I. R. 1928 Bom. 158; I.L.R. 52 Bom. 223; 108 I.C. 508; 29 Cr.L.J. 410; 30 Bom.L.R. 321; In re Mylaswami Goundan, A.I.R. 1937 Mad. 951; I.L.R. 1938 Mad. 262; 172 I.C. 485; 39 Cr.L.J. 149; 1937 M.W.N. 874; 46 M.L.W. 477. See also Pritam Singh v. State of Punjab, A.I.R. 1956 S.C. 415, 428.

- 25. In re Mylaswami Goundan, A.I.R. 1937 Mad. 951; I.L.R. 1938 Mad. 262; 172 I.C. 485; 39 Cr.L.J. 149; 1937 M.W.N. 874; 46 M.L.W. 477. See also Pritam Singh v. State of Punjab, A.I.R. 1956 S.C. 415, 428.
- 1. Chandrama Prasad v. State, (1951) 1 Cal. 539.
- 2. Emperor v. Babulal Behari, A.I.R. 1928 Bom. 158; 29 Cr.L.J. 410; 30 Bom.L.R. 321.
- 3. Vide Wills on Circumstantial Evidence, page 285.

pert that is of any importance, but the facts that the expert has noticed. It is quite clear that a person who has made a study of the prints made by the human foot is better qualified to notice points of similarity or dissimilarity than one who has made no such study. He is able to lay these points before the Court and from his evidence the Court draws its own conclusions.<sup>4</sup> Experts in footprints are not recognised by the Evidence Act; but there can be no doubt that a Magistrate is entitled to take into consideration the evidence of a person who has seen a footprint and taken the footprints of the accused and found that they are very similar. That evidence is not, however, sufficient to bring home the offence to the accused in the absence of further knowledge regarding the differences between one foot and another.<sup>5</sup> Evidence that there were footprints at or near a scene of offence or that these footprints came from a particular place or led to a particular place, is relevant evidence under Section 7 of this Act, and there is no reason why statements as to these facts made by persons skilled in identifying footprints, as undoubtedly many trackers in Sind are so skilled, should be held to be excluded by this section.<sup>6</sup> In a murder case, before relying on the opinion of the expert as to footprints, found near the corpse of the deceased, as conclusive evidence against the accused, the Judge should form his opinion with regard to the identity of the footprints found near the corpse with the footprints of the accused.<sup>7</sup> The fact that some foot-marks were found and that they tallied with the accused's means no more than these marks were made by shoes of a size corresponding to the size of the accused's shoes. That is not enough. There may be a large number of shoes in the village of the size of the accused's shoe. The evidence must go further and show that the marks had some peculiarity which was found in the shoes of the accused and would not be found in most other shoes.<sup>8</sup> As regards the value of evidence with regard to footprints, the following observations have been made in a Madras case :

"If the Court is to make any use at all of footprint impressions, it must be satisfied from a comparison of the various footprints that they are those of the persons whom the expert says they are. The value of evidence with regard to footprints is obviously very much less trustworthy than evidence with regard to finger-prints. In a fairly good impression of a finger or even in an impression where only a portion of the finger is shown, there is a wealth of detail available to the expert and to the Court for comparison. One sees in a finger-print a number of ridges and sweat pores situated along them. In examining a finger-print, therefore, one not merely compares the general configuration of the finger and all the lines on it, but one is able to study such minute details as the bifurcations and junctions of the ridges and the relative positions of those ridges of the sweat pores. With regard to the footprints, on the other hand, it would seem from the evidence and from what we have been able

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| 4. | In re Mylaswami Goundan, A.I.R. 1937 Mad. 951: I. L. R. 1938 Mad. 262 : 172 I.C. 485 : 39 Cr. L. J. 169; 1937 M. W.N. 874; 46 M. L.W. 477. | 7. | Fakirchand v. State, A.I.R. 1955 M.B. 119, 121 (F.B.); see also Fakirchand v. State, 1950 M.B. 76 (F.B.); In re Balija Pullaya, A. I.R. 1941 Mad. 88: 192 I.C. 704: 42 Cr.L.J. 316: 1940 M.W.N. 761 : 52 M.L.W. 198; Kodur Thimmayya, In re, A.I.R. 1957 Andh. Pra. 758: 1957 Cr.L.J. 1091. |
| 5. | In re Oomayyan, A.I.R. 1942 Mad. 452 (2), 453 : 200 I.C. 594 : 43 Cr. L.J. 702 : 1942 M.W.N. 293 : 55 L.W. 231.                            | 8. | Bhika Gobar v. Emperor, A.I.R. 1943 Bom. 458 : 210 I.C. 362 : 45 Bom.L.R. 884.  |
| 6. | Sidik Sumar v. Emperor, A. I. R. 1942 Sind 11 : I.I.R. 1941 Kar. 525.  |    |   |

to read from Dr. Hans Gross's book on Criminal Investigations that one can only compare with the general shape of footprints found with the shape of impressions taken from the feet of the person suspected. Even in this limited comparison, one has not the same certainty as one would have in comparing finger-prints; because foot-impressions vary considerably according to the circumstances under which they are made. Footprints made when a person is walking slowly or fast, or running slowly or fast or jumping, all create differences, which are material. Moreover, a footprint taken after a person has walked a considerable distance ..... is larger than a footprint taken when a person has been at rest."<sup>9</sup>

Where footprints of both feet was found in blood going towards bathroom from near the dead body and were compared with the specimen footprints of the accused taken in printers ink, the expert found 9 points of similarity in right footprints and 10 points in left footprints. He also found 3 points of dissimilarity in each foot and explained them as due to difference in density of blood and ink. It was held that the comparison was reliable and the expert evidence indicated incriminating circumstance against the accused.<sup>9-1</sup>

Whatever may be the evidentiary value of footprints, they are often of decisive importance in the investigation of crime.<sup>10</sup>

(xiv) *Tyre marks.* The identification of the marks of the tyres of motor vehicles is of much help where traces are left at the scene of an offence.

The identification of the marks of the tyres of motor vehicles may occasionally be of assistance in the prosecution of an enquiry. As a means of evidence it may not be of much value except in those instances where a combination of different tyre patterns occur on two or more wheels of the vehicle, because, with their widely extended and ever increasing use a very large number of tyres of the same make and pattern are in constant use.

Under these circumstances it may be that the only occasion when a tyre mark left upon the scene of an offence is of value as evidence is when it discloses some distinctive peculiarity—for instance, the position and extent of scars relative to specific portions of the tyre pattern.

Taking into consideration the uncertainty of the evidential aspect of the subject, the identification of tyre patterns is of use mainly as an aid to enquiry where other means are not available or as merely supplementary to other evidence.<sup>11</sup>

(b) *Forensic Ballistic Expert.* Modern firearms can be divided into two main classes : (1) smooth-bore arms, and (2) rifled arms. An example of the first class is the shot-gun with a barrel of about one foot in length and

9. In re Paramban Mammadu, A.I.R. 1951 Mad. 737 at 740 : 52 Cr.L.J. 580 : (1949) 2 M.L.J. 544 : 1949 M.W.N. 634.

9-1. Surajpal Singh v. State of M. P., 1972 Cr.L.J. 1668 : 1972 Jab.L.J. 1008 : 1972 M.P.W.R. 894 : 1972

M.P.L.J. 1029.  
10. As how to observe, preserve and use footprints, see Gross's Criminal Investigations by Adam and Adam, 4th Ed., pp. 207 to 242.

11. Else and Garrow : The Detection of Crime' p. 75.

is thus extremely portable. Examples of the second class are rifles, revolvers, pistols and machine-guns. Shots discharged from a smooth-bore arm, such as a shot-gun, scatter over an area that increases roughly with the distance of the target from the gun. On the other hand, bullets from rifled arms travel accurately without divergence to their objective. The barrels of a rifled arm contain shallow spiral grooves. The raised spaces between them are known as lands. Both in smooth-bores and rifle-arms classification is by calibre or gauge, that is, by the internal dimension of the bore. The measurement is the smallest and actual diameter of the bore across the lands in rifled arms. It is measured in decimals of an inch or in millimetres. The firearm barrel consists of the chamber which accommodates the cartridge. Cartridge cases are usually made of brass, copper or paper and brass. The cartridge has a percussions cap on its base which holds a small amount of explosive which is struck by the part of the weapon called the firing pin. The bore is the inside of the barrel between the top end of the lead and the muzzle of the weapon. The lead is the inside of the barrel leading from the chamber to the bore. The breech face is the breech end of the chamber which is sealed by a flat block of metal against which the barrel comes into position when the weapon is closed for the purposes of firing.<sup>12</sup>

In criminal cases the main purpose of the science of firearms is to establish the distance from where the shot was fired, the direction from which it was fired, the approximate time since when the weapon was last fired and whether the wound or wounds caused were accidental or suicidal or homicidal and whether a given bullet or cartridge was used in a particular weapon.

The range from which a shot has been fired is often of the utmost value to the investigating officer and to the courts. It may assist in verifying a statement made by the accused or a witness or may be of value in deciding whether a wound could be self-inflicted. When a shot has been fired at close quarters there is usually some definite evidence of this revealed on the target. It is often possible to determine, with a fair degree of accuracy, the distance from the muzzle of the gun to the target at the time of the firing. The firing at close quarters is indicated by (a) presence of wad in the wound, (b) if small shots had been fired they would have entered the body target and not in a scattered manner, (c) skin and hair around the entrance wound is singed and blackened by powder, unburnt bits of which are ingrained in the tissue locally, (d) wound of entrance is large. If the explosive used is gunpowder then it may cause blackening provided the flames of explosion have touched the body; the permanence of the blackening will depend upon the distance from which it is fired and the depth of the skin penetrated. If the explosion is derived from guncotton then it would be smokeless and therefore would not be blackened. The greatest distance of powder blackening range is two feet from the victim's body. The absence of blackening may be due to gunpowder having been used from at least half a yard's distance and guncotton explosives having been used from near or from a distance and wearing heavy clothing and artificial removal of gunpowder smoke stains

When the range is increased from contact to a few inches the nature of the damage consists of a punched out hole which is surrounded by a blackening association with a pattern of partly burnt or unburnt powder grains.

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12. Nigel Morland.

There may still be some signs of scorching. Blackening results from the deposit on the target of solid matter from the powder gases and the range at which the blackening can be effected is affected by several factors in the same way as scorching. Scorching results from the combustion products and the flame of the burning gases and varies in the same manner as blackening with different classes of firearms and ammunition.

With the increase of range the area of blackening and powdering becomes correspondingly greater. The intensity of the blackening decreases so that only the powdering remains. Powder grains may be found in the target at a range up to six feet depending upon the types of weapon and ammunition used. However, it is usual at ranges greater than three feet to find that little or no traces of powder can be observed.

Various methods are employed to detect these traces when they are not readily visible to naked eye. These include microscopic methods, chemical tests and examination by infra-red light.

Because the scorching, blackening and powdering are influenced by many factors such as type and condition of weapon, barrel length, type and condition of the ammunition and the nature of the target, it is necessary in order to obtain comparable results to use the actual crime weapon and the same type of ammunition as that used in the commission of the crime. It is also desirable that the test target should be of a similar nature to that connected with the crime.

The direction from which a shot has been fired can often be deduced from an examination of the gunshot damage. The position of the wound of entrance marks the part of the body which was at the moment of discharge nearest to the muzzle of the weapon or rather in a straight line with the muzzle; it therefore indicates with mathematical precision whether the victim was facing the muzzle or his back or side to it. Similarly, if a person be shot in a standing position and a wound be found nearly traverse to the chest, it may be deduced that the firearm was certainly fired from about the level of the shoulder, a position which may have important bearing on intent. But at the same time, while attempting to deduce the position of the assailant from the direction of the wounds the possibility must be kept in mind of the body having been in an abnormal position at the time of fire. Thus a person stooping may be shot in the back with the direction of the wound from above downwards by a person standing in front of him. Various deflections also create distortions. A bullet which entered at the ankle has been known to make its exit at the knee.

Various methods are employed to obtain some indication when a weapon was last fired. In examining a barrel for signs of recent discharge, say, in about two hours after firing, look for odour of  $H_2S$ , blackening of the inside of barrel ( $CK_2S$ ), alkaline reaction, solution of black residue which turns lead black. In a case of discharge between two and twenty-four hours after firing look for presence of  $H_2SO_4$  and traces of rust; there will be no blackening, no alkalinity, no turning of lead into black colour. The results, however, must be accepted with reserve and no conclusive evidence is usually obtainable on ballistical investigation alone. At the same time, examination of the weapon may give a strong pointer which other data may prove.<sup>13</sup>

13. See Mansuri v. State, A.I.R. 1955 Pat. 330 : 1955 Cr.L.J. 1092.

Whether the gunshot wounds were accidental, suicidal or homicidal the pointers are gathered from the situation of the wound or wounds, from the design, from the distance from which the weapon was fired, from the position of the weapon found after death, from the direction of the wound, from the nature of the projectile, powder, wadding, etc. In case of suicide one must look for signs of firing at close quarters, blackening of the index finger that pulled the trigger, presence of firearms close by and absence of bullets, the posture and grip of the deceased and the portion of the body struck, namely, its easy accessibility, e. g. inside mouth, over right temple or heart; whereas homicides usually hit unusual parts of the body.

"The position and direction of the wound and the position of the weapon and signs of struggle are the circumstances to be considered."<sup>14</sup>

Like other wounds, a gunshot wound undergoes no change for eight or ten hours after its infliction. If it is not rapidly fired the victim may survive for several days or even recover. If the wound be ten or twelve hours old then the time of infliction will be judged on general surgical principles, but exact determination of age of a wound is impossible.<sup>15</sup>

Finally it will be helpful if we give a brief summary of the methods used by the expert when proceeding to the identification of the firearm used, by (a) the markings on the cap of any cartridge found on the scene of a crime, and (b) the markings on the projectile caused by the rifling and any imperfections in the barrel of the firearm. These are two of the more important factors of which police officer should have some knowledge.

In the first instance it will be the commonplace knowledge to many investigators that when a cartridge is exploded in the breech of a firearm a tremendous pressure is generated, causing a recoil of the cartridge, the soft metal of the cap of which is forced against the surface of breech plate of the weapon, and in this way any irregularities, such as machine or file markings on the breech plate, are imprinted on the soft metal of the cartridge cap.

So characteristic and varied are the number, lengths, widths and angles of the markings on almost every breech plate that, provided one or more cartridge cases are found at the scene of a crime and that the weapon responsible for the discharge is submitted amongst any number of weapons, the expert will have little difficulty in indicating the one used in committing the offence.

The characteristic markings on the breech plate of any firearm may be indicated in numerical order in the manner used in describing the characteristics of a finger-print, and the sum total of their probative value as proof could, if necessary, be taken to show the certainty of the identification of the firearm.

In the second instance, dealing with projectiles discharged from firearms, no doubt all are acquainted with the purpose for which the barrels of all arms of precision are rifled, and know that when a bullet is fired from such a weapon it is forced with great power against the rifling, with the result that the bullet is caused to rotate at great speed. The result of this is that

11. Major Cox, Medico-Legal Court Companion, Third Ed., p. 49.

15. Major Cox, Medico-Legal Court Companion, Third Ed., p. 51.

the rifling marks the bullet in sloping grooves and these markings are sometimes supplemented by others caused by imperfections in the barrel of the weapon. In some instances the markings of the rifling on the bullet may indicate to the expert the make of the weapon responsible for the discharge, because of his knowledge of the spacings of the rifling in the firearms of various makes.

Firearms identification or the science of 'forensic ballistics' is now a well-recognised subject of expert testimony. It is the proving that a certain rifled bullet was fired from a certain rifled gun by means of the minute markings left on the bullet by the gun. Such testimony is based on the established scientific fact that each gun leaves its own pattern on the bullet. Bullets are fired from the same gun and compared with the bullet in question, and the testimony of the expert describes the experiment and its results. The term 'forensic ballistics' is generally used to designate that group of data furnished by the science of chemistry and physics with the aid of accurate photographic and metric apparatus in the observation of marks left by the use of firearms. Firearms identification has become a subject of scientific research which is recognized and accepted as valuable by the courts of the country, and as a proper field of expert testimony.

There are no prescribed standards for such qualifications, other than that the witness must have a certain measure of special experience with the subject-matter. Courts regard ballistic experts as they do any other expert, and where the qualifications of a ballistic expert meet with the court's approval, his evidence is admissible if stated as his opinion and not fact, and the qualified expert witness may range from the local gunsmithy, or even one who has made guns his 'hobby' to a highly trained specialist in ballistics.<sup>16</sup>

The technique of photomicrography of bullets and cartridge cases is described in Radley's Photography in Crime Detection at p. 124. The striations left by the bullets by their passage through the rifle of the barrel are characteristic of the weapon used so that a crime bullet may be readily identified as having come from a particular weapon provided this weapon is available. It need not be added that bullet identification is only practicable if the bullets are from a rifled arm since shotgun bullets can obviously carry no marks linking them to a specific firearm. Secondly, the identification marks are more significant in the case of best class weapon made to rigid specifications, apart from the purely individual marks due to the weapon itself.

On identification of weapons by the Forensic Ballistic Expert, see *Kalua v. State of Punjab*,<sup>17</sup> *Tahsildar Singh v. The State*<sup>18</sup> and *In re K. Timma Reddi*.<sup>19</sup> On the determination of the range of a shot, see *Khalak Singh v. The State*,<sup>20</sup> *Mohd. Rafi v. Empror*<sup>21</sup> and *Sheo Shankar v. State*.<sup>22</sup> On

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| <p>16. Else and Garrow: <i>The Detection of Crime</i>, pp. 35-38 and Underhill, <i>Criminal Evidence</i>, pp. 802-803.</p> <p>17. A.I.R. 1958 S.C. 180 : 1958 Cr.L.J. 300 : I.L.R. (1957) 1 All. 15.</p> <p>18. A.I.R. 1958 All. 255 : 1958 Cr.L.J. 424.</p> | <p>19. A.I.R. 1957 A.P. 758 : 1957 Cr.L.J. 1091 : 1957 (1) M.L.J.(Cr.) 421.</p> <p>20. A.I.R. 1957 M.P. 155 : 1957 Cr.L.J. 1138.</p> <p>21. A.I.R. 1947 Lah. 375.</p> <p>22. A.I.R. 1953 All. 652 : 1953 Cr.L.J. 1400 ; 1953 A.L.J. 720.</p> |
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direction from which a shot was fired, see *Ramaswami v. State*,<sup>23</sup> *In re T. Muniratnam Reddi*<sup>24</sup> and *State of M. P. v. Babulal*.<sup>25</sup>

Where the ballistic expert has not seen the wound himself but on the basis of dimensions of the wound recorded by doctor or on the basis of photograph of wound he hazards an opinion that the wound was caused probably by one gunfire only, no reliance could be placed on his expert opinion.<sup>1</sup>

Though evidence of a ballistic expert may prove helpful in many cases, it is not necessary that in every case where firearm has been used the ballistic expert must be examined; conviction can be based on direct evidence.<sup>1-1</sup>

Delay in sending articles for examination to a ballistic expert may diminish the value of his opinion.<sup>1-2</sup> It is the duty of a ballistic expert to state that he carefully carried out the tests after taking all necessary steps. If he does not do so, his opinion can be impeached even in argument though he was not cross-examined in this respect, but if competency of the expert is to be challenged it should be done by cross-examination and not in the argument.<sup>1-3</sup>

*Sources consulted :* Gerald Barrad, Identification and Investigation of Firearms ; Taylor, Principles and Practice of Medical Jurisprudence ; Wharton, Criminal Evidence ; Underhill, Criminal Evidence ; Else and Garraw, The Detection of Crime ; Churchill, Examination of Firearms and Ammunition ; Lucas, Forensic Chemistry and Criminal Investigation ; Mitchell, The Scientific Detective and Expert Witness ; Russel A. Gregory, Identification of Disputed Documents, Finger-Prints and Ballistics ; Radley, Photography in Crime Detection ; Rao, Expert Evidence and the Instructive Expositions in Criminal Law Review by Detective Chief Inspector George Price, (1) Classification and Identification of Firearms and Ammunition ; (2) the Microscopical Examination and Comparison of Bullet and Cartridge Cases ; (3) the Determination of the Range of a Shot ; and (4) the Examination of the Firearm and Ammunition ; Mitter, Law of Identification and Discovery (Law Book Co., Allahabad) ; Major Cox, Medico-Legal Court Companion.

(c) *Anthracene powder and ultra-violet lamp.* In recent years anthracene powder has been used for detection in corruption cases in conjunction with ultra-violet lamp. The *modus operandi* is set out in two cases by Raju, J., in *Ramsingh v. State*<sup>1-4</sup> and *Ambalal v. State*.<sup>2</sup> In the presence of panchayatdars the marked currency notes are treated with anthracene powder. Then the

23. 1951 M.W.N. 85 : A.I.R. 1952 Mad. 411 : 1951 (2) M.L.J. 630 : 53 Cr.L.J. 858.

24. A.I.R. 1955 A.P. 118 : 1955 Cr.L.J. 917.

25. A.I.R. 1958 M.P. 55 : 1958 Cr.L.J. 190.

1. Mohan Singh v. State of Punjab, A.I.R. 1975 S.C. 2161 : 1975 All. Cr.C. 249 : 1975 S.C.C. (Cr.) 512 : 1975 Cr.L.R. (S.C.) 279 : 1975 Cr.L.J. 1865 : (1975) 4 S.C.C. 254 : 1975 Cur.L.J. 292 : 1975 Cr.Ap.R. (S.C.) 160 : 1975 Chand.

L.R. (Cr.) 629 : 1975 B.B.C.J. 394.

1-1. State v. Jawan Singh, 1971 Cr.L.J. 1656 (Raj.).

1-2. State of Rajasthan v. Manphool, 1975 Raj.L.W. 322 : 1975 W.L.N. 281 (Raj.); State of Bihar v. Hanuman, 1971 Cr.L.J. 187 (Pat.).

1-3. State of Bihar v. Hanuman, 1971 Cr.L.J. 187 (Pat.).

1-4. A.I.R. 1960 Guj. 7 : 1960 Cr.L.J. 1207.

2. A.I.R. 1961 Guj. 1 : (1961) 1 Cr.L.J. 50.

trap witness pays them into the hands of the briber direct. Then by means of pre-arranged signal the investigating officer rushes to the trapped person and examines his hands using an ultra-violet lamp. Now anthracene powder is one of many fluorescent substances which emit a light of a particular hue excited by the ultra-violet light. The ultra-violet light is the exciting agent. In other words, as laid down by Raju, J., the true tests required to be satisfied by the prosecution to prove the presence of anthracene powder, are (1) that no powder was detected on the hands, etc., of the trapped person with the naked eye, and (2) that when ultra-violet light was focussed there was an emission of light blue fluorescent light. If evidence proved positive results of both these tests, it would be right to infer that anthracene powder was present.

(d) *Photographic Expert.* The role of photography in both civil and criminal cases has come to assume increasing importance. This is due to the fact that although a witness may have every desire and intention of being truthful and helpful in giving evidence, his testimony may not be as truthful or as accurate as desirable, for the witness may lack the power of observation, may remember details incorrectly or may fall into errors of perception. The age, upbringing, health, sex, degree of literacy or culture and one of the important influences, excitement of the moment, will all play an important part as to how and how accurately the witness observes the matter on which his testimony is required.

It is very rare indeed that an identical description of the same event is given by two people who may be standing together at the time, for it will be found that one will emphasise some points and the other will lay stress on entirely dissimilar points. In observing an event suggestion also often plays a large part in what the brain of the witness records, and it is probable that no object is recognised by two people by exactly the same distinguishing features. Therefore, infirmities of oral evidence are that memories have to function in a twofold manner, namely, to produce an impression from the fact observed to recall the impression and to recognise the impression recalled as identical with the fact observed. The camera is not subject to such infirmities and by means of photography accurate records can be made which will enable Judges and Jurors to appreciate the evidence better than verbal descriptions, because every one of us still has a lot-of-seeing-is-believing attitude in our make-up. Thus, the camera is not only a candid supplement to verbal evidence but is indispensable in regard to questioned documents. In criminal cases, the use of photography as an aid to crime detection and exposition of evidence in Court has literally become unlimited, and falls under the heads of photography of crime scenes, and identification of persons. In regard to identification of crime scenes, they are especially important, breaking and entering, sexual offences, counterfeit coins, betting offences, gems and precious stones and firearms identification. In the case of identification of persons, they include photography of persons, post-mortem photography, finger-prints, foot-prints, palm and sole-prints, and sweat-pores. In the case of documentary evidence, photography is essential for comparison of handwriting, identification inks, alterations, erasures and additions, typescripts, stamps, embossing marks and seals, deciphering charred documents, obliterated writings, etc.

In recent years there have been great developments under three heads of photography, namely, use of ultra-violet light in Police work and the applica-

tion of photography in infra-red light. The former is extensively used for fluorescence analysis of documents, blood-stains, photographing of finger-prints by the fluorescence method and in arson and pilfering. In the case of the latter, the applications are for the examination of documents and finding mechanical or chemical erasures, unauthorised addition to script, deciphering obliterated writings, charred documents, marking inks, printing inks, blood-stains, photographing gems for identification and examination of textiles, for stains, powder marks, etc., and identification of the person and in case of gun-shot wound cases. Infra-red photography is excellent for bringing out deleted pen and ink writing. It may also be used with advantage for identifying the signatures on painting and handwork of old masters or on other objects where a colour separation is of importance.

The third development is X-ray photography. Finger-prints of a decomposed body, or a body that has been in a fire, have been identified through X-ray photography. Loaded dice may be photographed by means of the X-ray, and may show small deposits of metal beneath the spots on the dice. In a certain Los Angles case a burglar was hit with a load of birdshot as he fled through the door of burglarized establishment. He was not arrested until month or two later. At the time of his arrest he would not permit any of the shots to be removed from his body for examination and comparison with the shot found embedded in the door-sill. An X-ray photograph of the shoulder pad of his coat disclosed six shots; these were removed and compared microscopically and spectrographically with the shot recovered from the door-sill. This aided in obtaining a conviction.

X-ray photographs taken through walls, davenports, upholstered chairs, infernal devices, etc., may establish the working mechanism inside and thus aid the expert in being able to safely dismantle the object.

X-ray photographs taken through walls, davenports, upholstered chairs, or other places in which bullets have been embedded may greatly aid in the recovery of the bullet.

Photomicrography is another modern development. Photomicrography is a combination of the use of the microscope and the camera. They may consist of photographs taken of objects magnified anywhere from two or three diameters to 500 or more and are made to show to some extent that which the expert was able to see as he studied the object microscopically. Photomicrography will be useful for magnification of the marks caused by tools, etc., stains, vegetable stains and mineral stains, stomach contents, occupational and other dusts, various debris and of textiles. Photomicrography in colour may be taken with a Contax or other camera of similar make and are an excellent means of portraying the true appearances of certain types of evidence—paint consisting of many layers, a minute spurt of blood, various coloured fibres, or other pieces of physical evidence, where colour comparison of the objects is important.

Stereoscopic photography is another development and is important where indentations, ridges, perforations, or other irregularities of the surface of an object are of evidential value. As an example, it may enable the Court to see why a certain portion of a heel print is missing; the missing portion may be due to some slight depression of the surface on which the heel print is found. To the naked eye this is not always discernible but when stereoscopic enlargements are made, it may be obvious.

To conclude, these developments of photography have come to involve the mastering of an elaborate laboratory technique (enlarging, printing, photo-stats, etc.), and consequently the photography expert has emerged and his evidence has to be evaluated on the same principles as those of the other experts.

*Sources consulted:* C. C. Scott, Photographic Evidence (Kansas Law Book Co.) (1942); J. A. Radley, Photography in Crime Detection (Chapman and Hall); Clark, Photography by Infra-red (Chapman and Hall); Radley and Grant, Fluorescence Analysis in Ultra Violet Light (Chapman and Hall), 3rd Ed. (1939); C. A. Mitchell, Documents and their Scientific Examination (Charles Griffin and Company), London (1935); Leland Jones, Scientific Investigation and Physical Evidence [Charles Thomas Springfield, Illinois, U.S. A. (1959), Ch. V].

(e) *Anthropologist.* It is possible to identify a dead body by superimposition of face photographs over photographs of skull and scientific comparison and anthropometric measurements made by a skilled person.<sup>2-1</sup>

(f) *Expert in Psychiatry (Psychiatrist).* In recent years the role of psychiatrist as an expert has come to assume increasing importance in the administration of justice.

The term "psychiatrist" can properly be claimed only by a fully qualified medical man who has taken an additional specialised course in psychology and has generally secured a diploma therein.

Sir Leo Page, who combines in himself great experience, sympathetic understanding, and an analytical outlook, observes: "...skilled psychiatrists have one much to relieve human suffering, to bring to light dark places in the mind and heart. But it would be insincere not to add that the large number of psychologists and psychiatrists practising at the present time, a considerable proportion in matter of criminology and penology, are false guides. Such men are most mischievous not only because they give individual cases mistaken and misleading advice but also propagate false principles. Their approach towards crime is built upon rotten moral foundations." The greatest need of this country today, concludes Sir Leo Page, is its general recognition of the difference between right and wrong and an acceptance of the self-discipline and effort required if that recognition is to be enforced. But how many such psychologists themselves regard the observance of normal moral standards as essential? One instance of their outlook is sufficient to throw a flood of light on their perverted moral approach towards problems of crime. In one case a leading psychiatrist pointed out that many girls in Borstal institutions had committed crimes because of their association with criminal young men; that they associate with these young men in order to satisfy their strong sexual desires rather than in order to commit crimes; and he proposed that in order to avoid the necessity for their meeting criminal young men they should be furnished with an ample supply of contraceptives at the public expense, giving instructions of their use and encouraged to satisfy their sexual impulses with young men who are not criminals. This kind of advice can be multiplied *ad nauseam*. In fact the psychiatrist considers that the first essential in dealing with criminals is to remove all ideas of shame or guilt from their mind in order to prevent any feeling of embarrassment on

2-1. State of Assam v. U. N. Rajkhowa, 1975 Cr.L.J. 354 (Gau.).

their part. Removal of the sense of guilt or guilty sense is considered as the first step towards rehabilitation. They invariably point out that we must outgrow the foolish idea that wickedness and vice are the cause of crime and use of unintelligible words as psychopathic states, paranoid states, neuroses for which the offender is not responsible, emotional maladjustments, etc. They do not however seem to think that crimes are due to the vices of bad-men who should be punished, because they commit crimes deliberately when they are quite capable of refraining from that commission. On the whole, crime is not a disease and crimes are not mere symptoms of emotional illness. It is this attitude of the psychologist and psychiatrist that is deplorable and makes him a weak link in the chain of justice out of consideration for the welfare of the individual at the best as against the community. The psychiatrist should ask himself, even if a psychiatric disorder exists, whether punishment may not be effective to deter the offender from repeating his offence. That is why most of the psychiatrists can be described to be false guides. The psychiatrist is also responsible for another aspect of doing harm to the criminal himself. The psychiatrist having successfully convinced the offenders that they need not feel ashamed and that they have nothing to regret and that they are clinical and not anti-social elements, make them complacent, self-satisfied, righteous criminals—a debit and menace to society. In fact an experienced magistrate writes; that one can always tell the boys who have interviewed the psychiatrist from their attitude. They become cocky, self-important and self-justified. They cease to fell guilty or ashamed. Offenders come wrongfully to believe that they have nothing to regret and cease to try to reform.

Psychiatry is a good servant for limited services but verily a bad master.

(g) *The Psychiatric Report for the Court.* The evaluation of the psychiatrist report for the Court as to physical and mental state of prisoners remanded for this purpose which has become an ever-increasing task is dealt with in an instructive article by Dr. Bartholomew in 1962, *Criminal Law Review*, page 19 and following. In this article he considers the value of these reports, what they state and what they should state and how they can be made more valuable with greater co-operation between medical authorities and the Bench.

There can be no doubt, if we follow Dr. Bartholomew, that these psychiatric reports are at present of very limited value.

The question which naturally arises in our mind is why are crimes committed? The human mind always loves to trace everything to a single well-defined and understandable cause. This frailty is common to the criminologist also. Various schools of criminologist with different fads have been flourishing. The Italian school of criminologists headed by Dr. Lombroso held that the criminal was a reversion to atavism possessing certain physical peculiarities which distinguish him from the non-criminal. The socialist criminologist attributes all crimes to unequal division of property; the French criminologist school of environment to the milieu in which they are produced. The microbe of crimes according to the latter flourishes only in the cultural medium of societies which have the criminals they deserve.

Those desirous of acquainting themselves with the various theories of criminality may consult the following sources:

(1) Bonger—Criminality and Economic Conditions; (2) De Quiros—Modern Theories of Criminality; (3) Lombroso—Crime, Its Causes and Re-

medies; (4) Saleisles—Individualisation of Punishment; (5) Trade—Penal Philosophy; (6) Garofalo—Criminology—Modern Criminal Science Series—Edited and translated by H. C. Horton and published by Little Brown & Co., Boston; (7) Wyndham—Criminology; (8) Herbert Spencer—Essays, Scientific, Political and Speculative, Vol. II (Prison-Ethics); (9) Havelock Ellis—The Criminal; (10) Branham and Kutash—Encyclopaedia of Criminology.

But unfortunately for humanity as pointed out in the chapter on Principles of Criminology and Penology, Justice Ramaswami's Magisterial and Police Guide, Vol. I, Chapter 13, crime which is widespread, deep-seated and extensive is not attributable to any one well-defined cause. If it were so, the problem of eradicating it would have been much simpler than what it is now. If we ponder for a moment bearing in mind the definition of a crime, that it is conduct, injurious to society for which a society has provided punitive punishment, it would seem that crime is the product of biological, social, religious or political influences which put the criminal out of harmony with conventional morality and cause or to disturb the recognised aims of community existence. In other words, we have to abandon the idea of tracing crimes to one single well-defined cause.

(h) *Polygraphic Expert*.—In Lying and Its Detection, Dr. J. A. Larson, Assistant Criminologist of the State of Illinois, is chiefly concerned with deception attempted by law-breakers in their efforts to evade justice, and with modern 'scientific' methods of detecting it. He deals also with deception as a biological phenomenon common to the whole animal kingdom. To describe exhaustively the nature of lies would involve, as the author says, "the writing of natural history of mankind"; and though, in law, Dr. Larson can think of no single case in which there is "ground for lying", he admits that our civilization is largely dependent on its cautious employment.

Throughout the ages, various methods have been resorted to for the determination of the guilt or innocence of a suspected person, when external evidence is unconvincing. Trial by combat, by ordeal, or by torture, is now thought ridiculous and unjust; though if reports are to be believed, what is known as the "third degree" represents out a very modest advance on these primitive methods. Apart from humanitarian considerations, we have plenty of evidence that third degree methods have, again and again, led men to confess to crimes of which they were in fact innocent. Indeed, false confession often is made as a result not of externally imposed torture, mental or physical, but of individual obsessions. This fact needs to be borne in mind in considering any proposal calculated to induce a suspected person to "own up". This applies to examinations by scientists no less than to examinations by relatively illiterate policemen. Various discoveries and speculations of modern science have been exploited by criminal investigators. The new psychology, in particular, has made loud claims to have elucidatory value; but the results so far are not very convincing.<sup>3</sup>

A degree of understanding as to what the polygraph constitutes in terms of equipment is a desirable foundation for handling the polygraph subject. A polygraph is a piece of apparatus consisting of various sensitive units designed to record on movable graph paper or on a master, or

<sup>3</sup> Magisterial and Police Guide, Vol. I, p. 524 (M.L.J.).

sometimes on both, certain internal patterns. These patterns are usually of the breathing, the pulse-rate, the blood oscillation (roughly correlated with blood pressure), and changes in the conductivity factor of the skin. All these changes are presumably accompaniments of emotion. Emotion is regarded as a state of mind or an "awareness" accompanied by motor responses. The motor responses are many and varied; they involve the adrenal glands, the circulation, gastric juices, etc., but of the various physical accompaniments of emotion, the polygraph usually attempts to pick up the three or four most susceptible to recording. The breathing pattern is easily established by the simple expedient of attaching to the chest some type of band or cuff by which the inhalation-exhalation tracing is achieved. The pulse-rate and the so-called blood pressure tracing is accomplished by a "cuff" identical to that found on ordinary blood pressure testing equipment. The changes in skin conductivity are recorded by attaching small electrodes to the finger tips, or to the hand, and then establishing a norm for that specific subject, using a low, consistent output from a dry cell battery. The output is measurable and practically constant, so that after the original balance or norm is reached any changes which are produced by modifications in the "conductivity" of the skin are recorded. This conductivity is affected by perspiration of the minute glands beneath the skin surface.<sup>4</sup>

In order to obtain tolerably accurate results, the polygraph operator has to eliminate all extraneous sources of the emotion other than those produced by the key questions and so must eliminate emotions resulting from fear, anxiety, guilt and other conditions which might cloud the picture and perhaps disqualify the subject for a polygraph interview. Secondly, the time factor for questioning is generally from one to several minutes because though the polygraph can be run continuously, blood pressure cuff interferes with circulations and relief has to be given every few minutes. Therefore, the polygraph interview consists of a series of short question periods. Thirdly, physical surroundings play a very large part and noticeable external movements will alter the physical connection of the equipment as well as change pressure relationships. Finally, the operation will depend upon factors like health, personality, nervousness or temperament.<sup>5</sup> Thus, it has been asserted by science that lying and attempts to deceive are accompanied by certain physiological changes, such as variations in blood pressure, rate of breathing, pulse-rate, and skin's electrical resistance due to activity of the sweat glands. Measurement and recordation of these bodily changes is accomplished through use of the "lie detector", or polygraph. Once the lie detector is attached to the person who is examined, interrogation consists of asking key questions relating to the offence under investigation while interspersing such line of questioning with irrelevant questions, so that the bodily reactions accompanying each type of question may be compared. However, under the most favourable circumstances the lie detectors are only 75% to 80% accurate.<sup>6</sup>

But the successful use of the lie detector depends upon three factors. First of all, preparation must be made prior to the interview and interrogation. This preparation consists of acquisition of (a) knowledge of the case, and (b) background information concerning the history of the subject of

4. Leland Jones, *Scientific Investigation and Physical Evidence*, p. 244.

5. Leland Jones, *Scientific Investigation*

and *Physical Evidence*, p. 245.

6. Underhill's *Criminal Evidence*, 5th edition, Vol. I, p. 272, S. 150.

interrogation. The questioner must be familiar with the case and have knowledge of all the information developed pertaining to the crime. In familiarising himself with the case the questioner determines what information he wants to obtain from that person. By gaining a knowledge of the facts of the case the questioner will get some idea of how to conduct the questioning and secondly will be in a better position to recognise omissions, discrepancies, inconsistencies and contradictions and finally will be able more accurately to evaluate the information extracted in the questioning. Then the background information of the subject is required because that gives the interrogator a distinct psychological advantage over the suspect. It will impress the suspect very much. When a suspect realises that the questioner is well informed and prepared he is immediately placed on the defensive and he begins to wonder just how extensive is the knowledge of the interrogator. The result of this advantage is to make the subject less inclined to lie. This background information also gets the subject into a proper frame of mind where he will talk freely. It helps to establish a common chain of thought from which the interrogator can branch out into other subjects gradually and finally get the reluctant subject to reveal pertinent information. Such background information might include place and date of birth, educational background, character and education of the subject or relatives or associates, occupational preferences and habits, previous criminal record, attitude personality traits, etc. In short, it is stated that an investigator must spend days and days developing certain angle in a case before talking to the suspect. Then the time and interview of interrogation has to be conducted as soon after the crime has been committed as possible. Otherwise, the suspect tends to forget details and secondly, the longer a suspect has to think about the offence, the better the story or alibi he thinks he can manufacture. The suspect if he is apprehended at the scene of the crime should be interrogated then and there on the spot. There is a great deal of technique in regard to the place to be chosen for the interrogation, like the scene of crime, the place of apprehension or a private room or office over which the investigator has control with facilities for recording and taking stenographic notes. In the U.S.A. a good deal of care is spent in the furnishing of the room where the interrogation takes place and excepting the interrogator and the suspect, the others are excluded and full use is made of available oneway mirrors and/or electronic listening and recording service for other authorised persons interested in the interrogation. These preliminary preparations will be found fully described in Inbau and Reid's Lie Detection and Criminal Interrogation, Third Ed. (1953), Part II, p. 142 and foll.

This necessitates good training for the interrogators which is the second and most important requisite. The polygraph is not a magic-box nor is it an automatic lie detector. It is a scientific instrument and like any scientific devices, it requires humans to operate it. Therefore a basic training a person receives greatly determines whether he would be able to put the polygraph to effective service.

Much like the proponents of the so-called "truth-serum", certain scientists have claimed that hypnotic sleep is a condition in which the subject will make truthful answers to questions. But as in the case of the "truth-serum" it has been stated that hypnosis has not yet been adequately tested for judicial purposes. It is the opinion of one commentator that if there is a chance

of getting truth from the hypnotized as well as from the drunken man, there is also a very good chance of getting a large admixture of mistake and falsehood. For hypnotic subjects, like alcoholic subjects, can lie consciously; they even invent subtle webs of falsehood as well as those who are in the normal state of waking. Indeed, in certain cases the disposition to prevaricate, and ascertain low but effective form of animal cunning, are developed by the hypnosis itself; while an increased suggestibility for all kinds of illusions and hallucinations is as much an essential feature of the dreamlife of the hypnotic, as it is of normal sleep.

(i) *Charmed rice*.—The charmed rice ordeal in India is simple and the proceeding straightforward. On the occurrence of a theft in a locality, the likely culprits are assembled in one place. A quantity of rice is taken and a man learned in the Holy Quran (it really does not matter if the text cited be a Hindu scripture either) utters incantations over it. Sometimes by way of creating a psychological receptivity among the suspects, a short but forceful lecture is given. It is urged in the manner of hypnotic suggestions that the really guilty person will be unable to munch the rice to powder. Each of the men assembled is then given a handful of the magic rice and asked to chew. After a minute or so, the suspects are asked to spit out on the ground the contents of their mouth. It is found that the guilty person or persons had failed to chew the rice, or even if he or they had chewed the rice, it is strangely dry. The people then set about them and very often one or two of them confess.

The device sometimes succeeds and the principle behind it is not so obscure. The reputation of the divine, the superstitious belief of the village people in the mystic powers of the scriptures, all work on the mind of the suspects and the really guilty person is impressed even against his will that he will not be able to chew the rice. The usual psychological reactions follow. His throat gets choked and the glands fail to secrete.

The dangers of the test are obvious. A highly strung person can be so worked up that he may fail to come out unscathed in the test. The margin of error is dangerously large, but the principle is sound. The modern 'Lie-detector' stands on it.<sup>7</sup>

*Sources consulted.* Inbau and Reid, Lie Detection and Criminal Interrogation; J. A. Larson, Lying and Its Detection; Leland and Jones, Scientific Investigation and Physical Evidence, Ch. XIV; Wharton's Criminal Evidence, Vol. II, p. 592 etc., Underhill's Criminal Evidence, Vol. I, S. 150, etc.

(j) *Dog tracking evidence*: It is not sound to liken the tracker dog's evidence to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. But dogs are intelligent animals with many thought processes similar to those of human beings and wherever you have thought processes there is always the risk of error, deception and even self-deception. In the present state of scientific knowledge evidence of dog track-

ing, even if admissible, is not ordinarily of much weight.<sup>8</sup> Having regard to the statutory definition of 'expert' a dog is not a 'person' within the meaning of section 3(42) of the General Clauses Act, 1897 (10 of 1897) and it is therefore apprehended that a tracker dog's evidence is not evidence of an 'expert'.

**22. Hypothetical questions.** The opinion of experts are admissible in evidence, not only where they rest on the personal observation of the witness himself, and on facts within his own knowledge, but even when they are merely founded on the case as proved by other witnesses at the trial. An expert may give his opinion upon facts proved either by himself<sup>9</sup> or by other witnesses at the trial<sup>10</sup> or upon hypothesis based upon the evidence, that is, the expert may give his opinion on facts put before him in the form of a hypothetical case.<sup>11</sup> But this opinion is not admissible as to facts stated out

- 8. *Obiter in Abdul Rajak Murtaza Dafedar v. State of Maharashtra*, (1970) 1 S. C. R. 551; (1970) 1 S. C. A. 535; (1969) 2 S. C. C. 234; (1969) 2 S. C. J. 870; 1970 A. W. R. (H.C.) 43; 72 Bom. L. R. 646; 1970 Cr. L. J. 373; 1970 M. P. L. J. 931; 1969 M. L. J. (Cr.) 862; A. I. R. 1970 S.C. 283 (287) referring to Am. Juris., 2nd Edn., Vol. 29, Para. 378, p. 209 and R. Montgomery, 1866 N. I. 160. See also Phipson, 11th Edn., p. 168 citing, *inter alia*, R. v. Webb, (1954) Crim. L. R. 49.
- 9. *Bellefontaine Ry. Co. v. Bailey*, 11 Ohio St. 33 (Amer.) cited in Lawson's Expert Ev., 221. In this case the question was whether a certain railroad train could have been stopped in time to avoid running over a team at a crossing. The opinion of the engineer of the train was held admissible; the Court saying that if an expert may give his opinion on facts testified to by others there was no reason why he might not do so on facts presumably with his own personal knowledge; if his knowledge was defective the parties could show it by cross-examination or by testimony *aliunde*.
- 10. e.g., the question is as to the value of a clock. A is a dealer in clocks but has never seen the clock in question, which is described to him by other witnesses. His opinion is admissible; *Whitton v. Synder*, (1882) 88 N. Y. 299 cited in Lawson, op. cit., 221.
- 11. Lawson's Expert Evidence Rule 42, p. 221. The following is an example of a hypothetical question which was propounded by the defence to the experts in the trial of Guiteau charged with shooting President

Farfield (cited in Rogers' Expert Testimony, 73) "Assuming it to be a fact that there was a strong hereditary taint of insanity in the blood of the prisoner at the bar; also that at or about the age of thirty-four years his own mind was so much deranged that he was a fit subject to an insane asylum; also that at different times after that date during the next succeeding five years, he manifested such decided symptoms of insanity without simulation, that many different persons conversing with him and observing his conduct, believed him to be insane; also that in or about the month of June, 1881 at or about the expiration of said term of five years, he became demented by the idea that he was inspired of God to remove by death the President of the United States; also that he acted on what he believed to be such inspiration and as he believed to be in accordance with the divine will in the preparation for and in the accomplishment of such a purpose; also that he committed the act of shooting the President under what he believed to be a divine command which he was not at liberty to disobey, and which belief made out a conviction which controlled his conscience and overpowered his will as to that act, so that he could not resist the mental pressure upon him; also that immediately after shooting he appeared calm and as if relieved by the performance of a great duty; also that there was no other adequate motive for the act than the conviction that he was executing the divine will for the good of his country—assuming all of these propositions to be true, state, whether in your opinion the

of Court which are not before the Court or jury<sup>12</sup> or which have merely been reported to him by hearsay<sup>13</sup> and purely speculative hypothetical questions having no foundation in the evidence are excluded.<sup>14</sup> The meaning of the last-mentioned rule is this: In examination-in-chief it would tend to confusion if facts were assumed in hypothetical questions which did not bear upon the matters under inquiry or which were not fairly within the scope of any of the evidence. The testimony must tend to establish the facts embraced in the question. The Court should not, however, reject a question which Counsel claims embraces facts which the evidence tends to prove, simply because in its opinion the facts assumed are not established by a preponderance of the evidence. The question is properly allowable if there is any evidence tending to prove the facts assumed; it will not be allowed if the evidence does not prove or tend to prove the facts assumed. So, in a case involving the value to the plaintiff of a contract which the defendant had broken, a question which did not accurately state the terms of the contract was held inadmissible.<sup>15</sup> A question may,

prisoner was sane or insane at the time of shooting President Farfield." The question propounded by the prosecution was too long to permit of its reproduction. In *Woodbury v. Obear*, 7 Gray 467 (Amer.), Shaw, C. J., said that the proper form of question was this: "If certain facts assumed by the question to be established should be found true by the jury what would be your opinion upon the facts thus found true as to, etc." But in a subsequent case it was said that this form was not to be regarded as exclusive formula. *Lawson's Expert Ev.*, p. 223, where at p. 222 another instance of the hypothetical question is given. The question may be put in a great variety of forms. *Rogers op. cit.*, 62.

- 12. Wharton. Ev., S. 452; *Phipson*, Ev., 11th Ed., 518.
- 13. *Phipson*, Ev., 11th Ed., 518, citing R. v. Staunton, "The Times" Sept. 26th 1877; *Tidv's Legal Medicine*, 8. 17, 25; *Gardner Peerage*. Le Marchant, 85-90.
- 14. Wharton, Ev., s. 452; Best, Ev., American Notes heading (f) Form of question to S. 511; *Phipson*, Ev., 11th Ed., 518; *Rogers' Expert Testimony*, 67; *Government of Bombay v. Mervanji Muncherji, Cama*, 10 Bom. L. R. 907.
- 15. *Lawson's Expert Ev.*, 222; *Rogers' Expert Testimony*, 64-68. A hypothetical question is a question which assumes, as a hypothesis, the truth of the facts given in evidence by a particular party and embraced in the question. Such a question may be asked either simply as to facts given in evidence or as to relevant hypothesis arising on these facts, i.e.

facts given in evidence had shown that a steam vessel was lying at anchor in the month of September at the Sandheads at the mouth of the River Hooghly without a rudder which she had lost in a previous gale; that the weather which had been bad prior to the anchoring of the vessel had calmed down at the time of the salvage service; that cyclonic storms were likely to occur at that time of year and that the shore of which the vessel was anchored was a dangerous one; a nautical expert was after objection allowed to be asked a question which after assuming the abovementioned facts, proceeded, "what would have been the condition of such a vessel lying rudderless at that time of year at the Sandheads in the event of a cyclonic storm coming on before assistance could be procured?" If closely examined the objection here appears fundamentally to have been not so much to the form of the question or the admissibility of expert testimony but to the relevancy of the evidence having regard to the facts of the case, and the salvage law applicable; it being contended by the objectors, but unsuccessfully that to earn salvage reward the danger from which a vessel has been rescued must have been in actual present peril, and that it was not sufficient that the ship was in a dangerous position in the sense that in certain events which did not actually happen she must have been in actual peril. It was, however, held that the term "danger" was not so limited; see "The Charlotte," 3 W&S Rob. 71; "the Albion," Lush 282 and that the hypothetical question which was

however, be allowed which assumes facts which the evidence already in the case neither proves nor tends to prove, provided Counsel in putting the question declares that they will, by subsequent testimony, supply, the necessary evidence to warrant the facts so assumed. When this course is pursued, if such testimony is not afterwards given, it would be the duty of the Court to strike out the answer to the question.<sup>16</sup>

Questions should be so framed as not to call on the witness for a critical review of the testimony given by the other witnesses, compelling the expert to draw inferences or conclusions of facts from the testimony or to judge of the credibility of witnesses. A question which requires the witnesses to draw a conclusion of fact should be excluded. Such a witness is called not to determine the truth of the facts, giving his opinion as to the effect of the evidence in establishing controverted facts, but to obtain his opinion on matters of science or skill in controversy.<sup>17</sup>

"In dealing with the evidence of medical witnesses, it must always be remembered that their function is to assist, not to supersede, the Judge. The medical witness states the existence, character and extent of the mental disease. The Judge has to decide, or to guide the jury in deciding, whether the disease made out comes within the legal conditions which justify an acquittal on the ground of insanity."<sup>18</sup> So, if the question be whether a particular act for which a prisoner is tried, were an act of insanity, a medical man conversant with that disease, who knows nothing of the prisoner, but has simply heard the trial, cannot be broadly asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime because such a question involves the determination of the truth of the facts deposed to as well as the scientific inference from those facts. He may, however, be asked what judgment he can form on the subject, assuming the facts stated in evidence to be true.<sup>19</sup> In *R. v. Frances*,<sup>20</sup> the counsel for the prosecution put the following question to a physician who had been present in Court during the examination of other witnesses :

"Whether from all the evidence he had heard, both for the prosecution and defence he was of opinion that the prisoner, at the time he did the act, was of unsound mind?"

The answer to the fifth question in the M'Naghten's case<sup>21</sup> was cited in support of this question. Alderson, B, and Creswell, J., disallowed the question. Discussing this case Russell<sup>22</sup> says : "The proper mode is to ask what are the symptoms of insanity, or to take particular facts and assuming them to be true, to ask whether they indicate insanity. To take the course suggested is really to substitute the witness for the jury, and to allow him to decide

relevant and based on the evidence was admissible in. In the matter of the German Steamship "Drachenfels"; Retriever v. Drachenfels : Hugli v. Drachenfels, 27 C. 860 (31st January, 1900).

16. Rogers' Expert Testimony, 68.  
17. Rogers' Expert Testimony, 60-64.  
18. Mayne's Criminal Law of India, 4th Ed., p. 131.

19. Taylor, Ev., s. 1421; Roghuni Singh, v. R., (1882) 9 C. 455, 461; R. v. Meher Ali, (1888) 15 C. 589; M'Naghten's Case, 10 Cl. & F. 200; In re Sankarappa, 1941 Mad. 326: 42 Cr. L. J. 558.

20. (1849)) 4 Cox C. C. 57.

21. (1843) 10 Cl. & F. 200.

22. In his book 'On Crimes', Vol. I (11th Ed.), p. 121.

upon the whole case. The jury have the facts before them, and they alone must interpret them by the general opinions of scientific men."

"A question should not be so framed as to permit the witness to roam through the evidence for himself, and gather the facts as he may consider them to be proved, and then state his conclusions concerning them."<sup>23</sup> Inasmuch as an expert is not allowed to draw inference or conclusions of fact from the evidence, his opinion should generally be asked upon a hypothetical statement of facts. The question need not be hypothetical in two cases: (a) where the issue is substantially one of science or skill merely, the expert may, if he has himself observed the facts, be asked the very question which the Court or jury have to decide;<sup>24</sup> (b) possibly also according to the dictum in the celebrated M'Naghten's case<sup>25</sup> where the issue is substantially one of science or skill, such a question may be put, if no conflict of evidence exists upon the material facts, even in cases where the expert's opinion is based merely upon facts proved by others. In this case, however, the question can only be put as a matter of convenience and not of right, the correct course being to put the facts to the witness hypothetically, asking him to assume one or more of them to be true and to state his opinion upon them. In a case a medical witness was asked in his evidence-in-chief the following question: "Supposing an individual 5 ft. 3½ inches tall was standing near a window the height of the sill whereof was 3 ft. 1½ inches from the floor level and there was a parapet and the combined width of the sill and the parapet was one foot ten inches, what are the chances of the man falling out of the window?" The question was disallowed because it was not for an expert to tell the Court what would be the chances of a man falling out of the window from which the assured was said to have fallen out.<sup>1</sup>

It is always, however, improper where the facts are in dispute, and the opinion of the expert is based merely on facts proved by others, to put to the witness the very question which the Court or jury have to decide<sup>2</sup> since such a question practically asks him to determine the truth of the testimony as well as to give an opinion on it.<sup>3</sup> So, it was held that the evidence of a medical man who has seen, and has made a post-mortem examination of the corpse of the person touching whose death the inquiry is, is admissible, first, to prove the nature of injuries which he observed; and, secondly, as evidence of the opinion of an expert as to the manner in which those injuries were inflicted,

- 23. Dolz v. Morris, 17 N. Y. Sup. Ct. 202 (Amer.) cited, ib., 61.
- 24. So where a medical expert had made a personal examination of the uterus of a deceased woman, it was held proper to ask him, "What is your opinion caused the death of the person from whom the uterus was taken"; State v. Glass, 5 Oreg 73 (Amer.); See Rogers, op cit., 75, 76. 10 Cl. & F. 200.
- 1. Ranjanibai Jamnadas Champsey v. New India Assurance Co., Ltd. 1956 Bom. 633, 636.
- 2. So on a question whether a particular act for which a prisoner is on his trial were an act of insanity a medical man conversant with that disease

who knows nothing of the facts, but has simply heard the trial, cannot be broadly asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime. The proper and usual form of question is to ask him whether, assuming such and such facts, the prisoner was sane or insane. The Court or jury are then left to say whether the assumed facts exist or not. M'Naghten's case, 10 Cl. & F. 200; Taylor, Ev., s. 1421. Philpion, Ev., 11th Ed., 518, and case there cited; Rogers, op. cit., 31; Taylor, Ev., s. 1421; Wharton, Ev.; s. 452.

and as to the cause of death. A medical man who has not seen the corpse is only in a position to give evidence of his opinion as an expert. The proper mode of eliciting such evidence is to put to the witness hypothetically the facts which the evidence of the other witnesses attempts to prove and to ask the witness's opinions on those facts.<sup>4</sup> So also, a medical man who has not seen a corpse which has been subjected to a post-mortem examination, and who is called to corroborate the opinion of the medical man who has made such post-mortem examination, and who has stated what he considered was the cause of death, is in a position to give evidence of his opinion as an expert. The proper mode of eliciting such opinion is to put the signs observed at the post-mortem to the witness, and to ask what in his opinion was the cause of death, on the hypothesis that those signs were really present and observed.<sup>5</sup> An expert is entitled to answer all hypothetical questions put to him. The only safeguard which the Court must apply is that the hypothesis is correctly put to the expert.<sup>6</sup>

In order to obtain the opinion of the witness on matters not depending upon general knowledge, but on facts not testified to by himself one of two modes is pursued, either the witness is present and hears all the testimony, or the testimony is summed up in the question put to him; and in either case the question put to him hypothetically, whether if certain facts testified to are true he can form an opinion and what that opinion is. The question may be based on the hypothesis of the truth of all the evidence, or on an hypothesis especially framed on certain facts assumed to be proved for the purpose of the inquiry. Inasmuch as it is no part of the expert to determine the truth of the evidence, care must be taken in framing the questions not to involve so much or so many facts in them, that the witness will be obliged in his own mind to settle other disputed facts in order to give his answer.<sup>7</sup> The witness should ordinarily not be left to form an opinion on such facts as he can recollect where the evidence is at all voluminous, and where it is not entirely harmonious, it is improper to permit a question to be put which requires the expert to give an opinion upon his memory of what the evidence was and upon his conclusions to what the evidence proved.<sup>8</sup> Where the testimony of a medical witness was given not after hearing the evidence, but on a copy of the deposition, it was held that the testimony was not inadmissible though the better course to follow where expert testimony is given is that the expert should hear the evidence as to which he is asked his opinion.<sup>9</sup> Though in examination-in-chief the general rule is that it is an error to include in the hypothetical question an assumed state of facts which the evidence in the case does not prove or tends to prove Counsel on the cross-examination of the witness are not similarly restricted. Any question may be put which tests the skill and accuracy of the witness, whether the facts assumed in such questions have been testified to by the witness or not.<sup>10</sup>

**23. American views and suggested reforms.** It is proper to ask the expert his opinion upon a hypothetical statement of facts and to ask him

4. Roghuni Singh v. R., (1882) 9 C. 455, 461.

5. R. v. Meher Ali, (1888) 15 C. 589.

6. Bai Diva v. S. C. Mills, 1956 Bom. 424; (1956) 1 Lab. L. J. 740.

7. Rogers, op. cit., 61–69.

8. ib., 70-71. [So is in the matter of the Drachenfels 27 C. 860 (31st Jan. 1900), in which the evidence

was very voluminous, the court required Counsel to read to the expert specific portions of the evidence in which their opinion was required, even though they had heard the evidence being given].

9. Jarat Kumari v. Bissessur Dutt, I. L. R. 39 Cal. 245 at 262.

10. Rogers' op. cit., 79.

whether certain testimony if true, warrants the making of certain conclusions, or deductions. A hypothetical question put to an expert on direct examination must be based on facts in evidence, or conform to tendencies of the evidence. An expert cannot be asked as to a hypothesis having no foundations in the evidence in the case or resting on statements made to him by persons out of court or based on inadmissible evidence which has been excluded by the Court.

The question must be based on facts which it would be possible for the jury to find were true, otherwise the conclusion or opinion of the expert would be irrelevant. Thus, it is irrelevant to inquire of the expert as to the effects of poison when the deceased died from bullet wounds.

The principle that a hypothetical question must be based on the evidence does not require that each hypothetical question contains or be based on all the facts in evidence, since each party may ask questions based on the theory for which he contends. The adverse party may then on cross-examination submit to the expert questions based on the theories for which he contends, and the case is then submitted to the jury to determine what theory if any, is warranted by the evidence.

It is not necessary that the questions be limited to those facts which are not in dispute.

While the hypothetical question must be based upon evidence in the case, it is not necessary that the examiner should repeat the evidence word for word. In general, the form of the hypothetical question is left to the discretion of the Court.

The subject-matter of a hypothetical question must be within the area in which the witness is qualified as an expert. An expert cannot answer a hypothetical question which calls for his opinion as to the powers of observation and recollection of other witnesses upon the matter of identification of the accused whom they had not seen prior to the commission of the crime.

The limitation that hypothetical questions must be restricted to matters in evidence does not apply to the use of such questions on cross-examination when the purpose is to test the value and accuracy of the opinions expressed. The range of such examinations is left largely to the discretion of the trial Court.<sup>11</sup>

The opinion of an expert witness is best presented to the jury by means of a hypothetical question, but such questions are not necessary when the opinion is based on facts revealed from the expert's personal investigation. Each party to an issue may submit hypothetical questions to expert witnesses, assuming facts therein reasonably consistent with the facts in evidence, and which accord with his theory of the case. It is not imperative that hypothetical questions cover all the undisputed facts in evidence; but a hypothetical question may be asked from a medical expert embracing practically all the evidence on the question of homicide. The form of the hypothetical question is a matter within the discretion of the Court. Hypothetical questions should

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11. Wharton's Criminal Evidence, 12th Ed., Vol. II, S. 523, pp. 350 to 353.

be based on facts disclosed by the evidence, or facts fairly inferable from the evidence or which the evidence tends to prove. Hypothetical questions are improper when there is no evidence to sustain the facts assumed. Hypothetical questions based on ordinary facts which the jury are qualified to weigh without the aid of experts are also improper. But whether the assumed facts recited in a hypothetical question are true is a question for the jury and it is not material to their admissibility. Facts should be found to be correctly stated in a hypothetical question before credit by the jury is given to the opinion of the expert based upon such facts.

Hypothetical questions should be based upon and include all the material facts essential to the issue. The opinion of an expert based both on assumed facts in evidence and his personal knowledge of the accused and his family has been excluded, but an opinion of an expert based both on assumed facts in evidence and his own examination will be received. An expert may give an opinion based on facts within his own knowledge, and in such case he must state the facts upon which his opinion is based. Hypothetical questions based on facts in issue should not call for conclusions as to the facts directly in issue, though an expert may give his opinion whether a person is or is not insane. A hypothetical question given to an expert witness as to the cause of death is proper. Where a hypothetical question is properly submitted in detail with reference to a particular thing, subsequent questions relative to that thing may be submitted without repeating the minor details.<sup>12</sup>

Hypothetical questions should be used only when absolutely required. No matter how skilfully propounded, the answer to a hypothetical question may sound remote and removed from the act at issue. The impact of professional testimony based upon personal observation, rather than on a supposed set of facts, is invariably stronger and more readily received by fact-finder. In many instances, however, it is impossible for an expert to have become acquainted with the litigated facts by observation or personal knowledge. Thus, his opinion must be delivered in response to a hypothetical question. Each fact that the hypothetical question assumes to be true and upon which the expert is to base and express his opinion, must be made clear to the fact-finder. The expert may be asked to assume as true the testimony of a prior witness which was heard in full by the expert, and to express his opinion based thereon. However, this is generally an ineffective way of propounding a hypothetical question. Although the expert may have heard and understood the statements of a prior witness, the jury may not have. Also, the prior witness may, in part, have delivered conflicting or ambiguous testimony, with the consequence that the jury is not adequately informed of the exact facts which the expert, for the purpose of his testimony, is assuming to be true. Perhaps the most common and effective manner of stating a hypothetical question is for the interrogating attorney to state each fact which the expert is to take into account in forming his opinion. In order for the question to be free from objection, it must contain only those assumed facts which have been supported by evidence in the case, or with respect to which adequate assurance has been given that such evidence will be adduced later in the trial of the cause. The requirement of supporting evidence, of course, reflects the precept that if an expert's opinion is based upon supposed facts which the jury cannot, because

12. Underhill's Criminal Evidence, 5th Ed., Vol. 2, S. 312, pp. 785 to 789.  
L. E.-173

of the lack of evidence, find to be true, the jury similarly may not take into account the opinion. The hypothetical question should be as short and clear as possible under the particular circumstances presented.<sup>13</sup>

To conclude: That the hypothetical question is theoretically an effective device for presenting expert opinion where the facts are in dispute no one will deny. But in practice it has been so grossly abused as to be almost a scandal. It has been said to be the most horrific and grotesque upon the fair face of justice. Mr. Wigmore in 2 Wigmore Evidence, 3rd. Ed. (1940), section 686, has said: "Its abuses have become so obstructive and nauseous that no remedy short of extirpation will suffice. The hypothetical question misused by the clumsy and abused by the clever has in practice led to the intolerable obstruction of truth. In the first place it has artificially clamped the mouth of the expert witness so that his answer to a complex question may not express his actual opinion and the actual case. This is because the question may be so built up and contrived by counsel as to represent only a partisan conclusion. The limits of absurdity were reached in the well-known Tuckerman Will case where one of the hypothetical questions asked of the witness by the examining attorney contained not less than 20,000 words. The lawyer started this question at the opening of the court and closed only a few minutes prior to the noon adjournment. The point that the examining attorney was endeavouring to bring out related to the mental condition of the testator when he made his will. The answer of the well-known expert on insanity comprised four words 'I do not know'. In other words, a hypothetical question is a menace to the administration of justice unless it is an accurate synopsis of the testimony that has already been sworn to by the various witnesses who have preceded the appearance of the expert in the case and in regard to which the expert is then asked to assume the truth of every fact which counsel has included in his question and to give court his opinion and conclusion as an expert from these supposed facts."<sup>14</sup>

The problem of hypothetical question, as envisaged above, does not arise under this Act because our practice is in conformity with rule 409 of the Model Code of Evidence as adopted and promulgated by the American Law Institute. An expert witness may state his relevant information from matter perceived by him or from evidence introduced at the trial and seen or heard by him, or from his special knowledge, skill, experience or training, whether or not any such inference embraces an ultimate issue to be decided by the trier of fact, and he may state his reasons for such inferences, and need not, unless the Judge so orders, first specify as a hypothesis or otherwise, the data from which he draws them; but he may thereafter during his examination or cross-examination be required to specify those data.<sup>15</sup>

[For other authoritative American views fully case-noted, see "Hypothetical Question" in Aiyer and Aiyer : The Art of Cross-Examination (1976 Ed.) (Law Book Co., Allahabad) ].

There is no bar to hypothetical questions in cross-examinations for the first time and a wide latitude is generally permitted, the reason being that

13. Court-room Medicine by Marshall Houts.

14. 17 M. L. J. (Journal Section) 31.

15. Model Code of Evidence, p. 210.

such witnesses are amongst those to whom the most searching cross-examination should be administered.<sup>16</sup>

In jury cases, court should give proper instructions regarding hypothetical questions. If the question is objectionable, the jury should be asked to disregard it.<sup>17</sup>

Like other evidence counsel may be permitted to ask him hypothetical questions pertinent to the enquiry, whether the facts assumed in such questions have been testified to by witnesses or not. To test the knowledge and competency of the witness, counsel may ask purely imaginary or abstract questions, assuming facts or theories having no foundation in evidence. The opposing counsel may put to the witness hypothetical questions based on his theory. Questions irrelevant and collateral to the main issue are allowed in cross-examination. A wide latitude is usually permitted in cross-examination.<sup>18</sup>

On methods of cross-examination in relation to hypothetical questions, see F. X. Busch: Law and Tactics in Jury Trials, page 629 and following; Wellman, Art of Cross-examination, p. 104 and following; Rogers' Expert Testimony, page 73.

**24. Ground of, and corroboration and rebuttal of, opinion.** Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.<sup>19</sup> Thus, an expert may give an account of experiments performed by him for the purpose of forming his opinion.<sup>20</sup> When a skilled witness says that in the course of his duty he formed a particular opinion on certain facts, he may further be asked by examination-in-chief how he went on to act upon that opinion. For the acting on it is a strong corroboration of the truth of his opinion,<sup>21</sup> and what a person does is usually better evidence of his opinion than what he says.<sup>22</sup> Section 46 is but a round-about way of stating that the opinion of an expert is open to corroboration or rebuttal. The illustrations sufficiently exemplify the proposition that for this purpose evidence of *res inter alios actae* is receivable.<sup>23</sup> This section is in accordance with the rule of English law.<sup>24</sup>

16. Bricker v. Lightner, 40 Pa. 199; People v. Zito, 141 Ill. App. 534; Davis v. U.S., 165 U.S. 373; In re Higgins, 156 Cal. 257.
17. Opp. v. Pryor, 294 Ill. 538; 128 N. E. 580.
18. Dillebar v. Home Life, 87 N. Y. 79; People v. Angsbury, 97 N. Y. 501; Davis v. State, 35 Ind. 496; Stephen's Digest, Art. 129.
19. S. 51 post.
20. ib. illustration; see R. v. Heseltine, (1873) 12 Cox. 404 on a charge of arson, evidence of experiments made subsequently to the fire is admissible in order to show the way in which the building was set fire to. Not only may pre-existing objects be inspected, but the Court may order scientific experiments to be performed. [Bigs-

- by v. Dickinson, (1877) 4 Ch. D. 24], artistic tests undertaken (Belt v. Lawes, "The Times", 17th Nov. 1882) or specimens of handwriting executed in its presence, Phipson, Ev., 11th Ed., p. 13,
21. Stephenson v. River Tyne Commissioner, 71 W. R. (Eng.) 390.
22. The evidence would doubtless be admissible under S. 8, or under S. 11, ante.
23. Norton, Ev., 225, illus. (b) is the case of Folkes v. Chadd, (1782) 3 Doug. 157: illus. (a) is precisely like it in principle: ib. S. 46 is analogous to S. 11.
24. See Taylor, Ev., S. 337; Steph. Dig. Art. 50; see S. 51 post; see also Ss. 156, 157.

**25. Refreshing memory.** An expert who is called as a witness may refresh his memory by reference to professional treatises,<sup>25</sup> or to any other document made by himself at the time.<sup>1</sup> So, a medical man, in giving evidence, may refresh his memory by referring to a report which he has made of his post-mortem examination, but the report itself cannot be treated as evidence, and no facts can be taken therefrom.<sup>2</sup>

**26. Credit of experts.** An expert witness, like any other, may, on cross-examination, be asked questions to test his veracity, to discover his position, and to shake his credit by injuring his character.<sup>3</sup> Independent evidence

may be given to show his conviction of a criminal offence or to impeach his impartiality.<sup>4</sup> His credit may be impeached by the evidence of persons who testify that they believe him to be unworthy of credit and by proof that he has been corrupted or that he has expressed a different opinion at other times.<sup>5</sup>

**27. Opinion of expert not called as a witness.** The report of an expert is not admissible unless he had been examined as a witness and the party affected by it has had an opportunity of cross-examining him.<sup>6</sup> But where a party accepts the certificate of an expert without formal proof in the trial Court he cannot be allowed to object to it in appeal.<sup>7</sup>

The report of a finger-print expert showed conclusively that the finger-print on the Kunda of the cash-box was his and that clinched the case against the accused. The report was used by the prosecution without examining him in court. It was held that the court would have been bound to summon the expert if the accused would have so applied but that not having been done the grievances of the appellant apropos the report of the expert being used without his examination in court had no substance.<sup>7-1</sup>

**28. Medical certificate.** A certificate issued by a doctor is by itself wholly inadmissible in evidence.<sup>8</sup> It must be strictly proved by the doctor who issued it.<sup>9</sup>

25. S. 150 post.

1. Ib.

2. Roghuni Singh v. R., (1882) 9 C. 455.

3. Ss. 146—152 post.

4. S. 153 post.

5. S. 155 post; Taylor, Ev., S. 1445.

6. Parwat Vedu Patil v. Sukdev Shrivram Patil, 1956 Bom. 617; Raja Ram v. State, 1954 All. 214; Tasdug Hussain v. Basawan Rai, 1933 Pat. 159; 141 I.C. 767; Pitain v. Baboo Singh, 1924 Nag. 183; 79 I.C. 641; Kazim Husain v. Shambhoo Nath, 1931 Oudh 298; 132 I.C. 259; 8 O.W.N. 627; see also Raghunath Mody v. Kurseong Municipality, 1923 Cal. 561; 76 I.C. 394; 25 Cr. L.J. 170 and Peary Lal v. Kidar Nath, 1923 All. 601; 75 I.C. 148; 24 Cr. L.J. 900; 21 A.L.J. 329, where there was not even an affidavit in support of the report.

7. Dil Mohammad v. Sain Das, 1927

Lah. 396; 100 I.C. 922.

Phool Kumar v. Delhi Administration, A.I.R. 1975 S.C. 905: (1975) 2 S.C.J. 490; 1975 All. Cr. C. 219: (1975) 3 S.C.R. 917: 1975 Mad. L.J. (Cr.) 12; 1975 Cut. L.R. (Cr.) 377: 1975 Cr. L.J. 778: 1975 Rajdhani L.R. 279: 1975 S.C.Cr. R. 247: (1975) 2 A.P.L.J. (S.C.) 1; (1975) 1 S.C.C. 797: 1975 S.C.C. (Cr.) 336: 1975 Cr. L.R. (S.C.) 272: 1975 Cr. App. R. (S.C.) 148.

8. Sris Chandra Nandy v. Sm. Annapurna Roy, 1950 Cal. 173; Ali Akbar v. Java Bengal Line Calcutta, 1937 Cal. 697; I.L.R. (1937) 2 Cal. 714; see also Palaniappa Chettiar v. Bombay Life Assurance Co., Ltd., 1948 Mad. 298: (1947) 2 M.L.J. 535: 1947 M.W.N. 753: 60 M.L.W. 803.

9. Coral Indira Gounsalves v. Joseph Prabhakar Iswariah, 1953 Mad. 858:

The case of *Govindarajulu v. Lakshmi Ammal*<sup>10</sup> reiterates :

"There is nothing in the Evidence Act which makes a doctor's certificate relating to the illness of a witness by itself evidence at all. It is not a sworn statement and if it is to be relied on as evidence, I think it must be proved in the normal way by the testimony of the person giving it who will stand cross-examination. The statement of a doctor in his medical certificate or report, who is not himself called as a witness, is in the nature of hearsay evidence and as such it is not evidence of the truth of what is contained therein."

In *Sris Chandra Nandy v. Sm. Annapurna Roy*,<sup>11</sup> Harris and Sarkar, JJ., held that a medical certificate tendered in support of an application for the issue of a commission for the examination of a witness on the ground of illness was inadmissible in evidence being the worst form of hearsay evidence and that the doctor himself should be called in evidence.

In *Perumal Mudaliar v. South Indian Railway Co.*,<sup>12</sup> Beasley, C. J., observed that the evidence of experts may be given in the ordinary way and that subject to certain exceptions—those exceptions being, amongst others, the certificates of the Imperial Serologist, touching the matter of blood-stains and of the Chemical Examiner, which are made admissible in evidence by themselves—it was obvious that the opinion of an expert must be given orally and that a mere report or certificate by him could not possibly be evidence.<sup>13</sup>

In *State v. Bhaura Hanmantsa*,<sup>14</sup> it was said that, normally, in order that a certificate could be received in evidence, the person, who has issued the certificate, must be called and examined as a witness before the Court. For, a certificate is nothing more than a mere opinion of the person purporting to issue the certificate, and opinion is not evidence, until the person who has given a particular opinion is brought before the Court and is subjected to the test of cross-examination. Therefore, the certificate of a medical man, without more, not being evidence, cannot be relied upon and form the basis of a finding.

## 29. Forensic Science : Laboratory Expert (or Chemical Examiner).

(a) *General.* Forensic science has made immense progress in recent years and forensic science expert's evidence has come to occupy a prominent place in the adduction of evidence in criminal and civil Courts.

(1953) 1 M. L. J. 591; see also *Abila Manaji v. Emperor*, 1923 Bom. 183; I. L. R. 47 Bom. 74; 84 I. C. 643; 26 Cr. L. J. 389; 24 Bom. L. R. 803. As to the practice of medical men giving certificates without sufficient ground, see the remarks of Page, J. in *Lila Sinha v. Bijoy Pratap Deo Singh*, 1925 Cal. 768 at 776; 87 I. C. 534; 41 C. L. J. 300; *Ahmedabad Municipality v. Shantilal*, A. I. R. 1961 Guj. 196 (objection can be taken even in ap-

peal for the first time).  
 10. (1960) 73 L. W. 531 at p. 532.  
 11. A. I. R. 1950 Cal. 173.  
 12. A. I. R. 1937 Mad. 407; I. L. R. 1937 M. 764.  
 13. See also *Balaram v. Rukmannamma*, A. I. R. 1953 Hyd. 209; I. L. R. 1953 Hyd. 191; *Bava v. State of Kutch*, 1953 Kutch 7; *Hasan Ali v. Dara Shah*, A. I. R. 1949 Nag. 282; I. L. R. 1948 Nag. 922.  
 14. I. L. R. 1962 B. 472; A. I. R. 1962 B. 229; 64 Bom. L. R. 303.

The term "forensic science" comprises those branches of science which teach us how to discover and apply medical and cognate scientific facts for the needs of law and justice in unravelling crime and protecting individuals, society and State. This subject is equally important to lawyers, Magistrates and Police Officers. Though forensic medicine is largely connected with criminal jurisprudence and is one of the chief implements for the detection of crimes and ascertainment of criminal liability, it has also a great bearing upon the administration of civil justice which deals with the various rights and obligations of the individuals, society and the State. Science is of help, for instance, in paternity disputes. The subject is also of the utmost importance in matters of insurance and compensation cases.

The term "forensic expert" is more difficult to define because unfortunately there are no academic courses in forensic science and the only way of obtaining expertise in the matter is to work and study under forensic scientist and to examine under his direction as many cases as possible.

The subject of forensic science in so far as our Courts are concerned can be briefly classified :

(1) Dirt, dust and debris collected at the scene of offence which are often instrumental in associating the criminal with the scene of his crime.

(2) Inorganic matter like soil, glass and paint which cannot be characterised microscopically but which can be identified by spectrography and which often connect the accused with the crime.

(3) Biological material like grass, vegetation and wood fragments, which often connect the accused with the crime.

(4) Human hair, fibres and paper found at the scene often constitute confirmatory evidence of the connection of the accused with the crime.

(5) Any instrument which is forcibly applied to another object will leave a mark upon the surface. This mark is available for comparison of the instrument that is alleged to have made it and the forensic science expert connects the marks with the instruments and makes available valuable evidence.

(6) Footprints and tyre impressions.

(7) Erased identification marks : Identification of stolen property is often a necessary procedure either to return the properties to the owners or to identify the articles as the proceeds of theft or robbery. Of course, if the properties bear special peculiarities, there will be no difficulty in identification. But in cases concerning articles of common type which are not identifiable by their peculiarities of manufacture, the articles may normally be inscribed with a serial number or a monogram or other inscription which serves to identify them. In order to destroy this identification, a finder or thief will erase the identifying mark by some suitable method, mechanical or chemical. It becomes the job of the forensic scientist to reconstruct the erased identification marks in order that the articles may be identified as stolen properties.

(8) Blood-stains constitute a very important aspect of the work of forensic scientist and falls under two heads, namely, blood-grouping and establishment of paternity.

(9) Similarly, seminal stains constitute another important branch of forensic scientist's work.

(10) In cases of abortions and bringing about miscarriages, drugs and instruments used constitute the subject-matter of examination by the forensic scientist and his evidence is important to establish that noxious drugs and instruments have been used for procuring miscarriages and effecting abortions.

(11) Arson and spontaneous combustion constitute another important branch of forensic scientist's work, because fire raising which may be due to pyromania, fraud on Fire Insurance people, revenge and malice is increasing and it is forensic science expert at the scene who can give valuable help in determining whether the fire was due to arson or spontaneous combustion.<sup>15</sup>

(12) Firearms and cartridges constitute another important branch of work and in practice the Police in the course of investigation and Courts require information as to what type of weapon had been used in the commission of the offence and from what distance it has been fired and the identification of the alleged crime weapon as the actual weapon used. The forensic science expert furnishes by his expert knowledge the required information.

(13) Questioned documents constitute an important source of enquiry in Courts ever since writing has been used as a method of communication. Over the years the use of documents has increased enormously and the detection of falsification of documents is a problem always confronting Courts and the forensic scientist is examined to prove whether the document is wholly false or wholly genuine, partly false and partly genuine or incomplete or destroyed or disfigured. The forensic science expert has to examine and furnish information and material on which the document is inscribed, the ink or other material used in making the inscription itself and the marks or disfigurement of the document.

The age of a handwriting can sometimes be ascertained by the colour of the ink with which it was written. All manufacturers of ink do not use the same quality or proportion of ingredients in their product. The same manufacturer produces various qualities of ink.

Ink, because of the oxidation of some of its chemicals, changes its colour in time. Commercial ink has usually a blue colour and when written with, it changes in time to yellowish or purple. Sometimes the change of colour may be noticed with the naked eyes. When seen under a microscope the shades of colour can be more readily perceived : (*handwriting separately dealt with*).

(14) Blood and urine and alcohol determination which has become a matter of daily work in our Courts on account of drunkenness of automobile drivers and prohibition.

15. The authoritative expositions on the subject of arson from the Forensic Scientist's point of view are: Pathological Firesetting, (Pyromania), by Lewis and Yarnell; Arson by Battle and Western; and from the investiga-

tor's point of view Myren Richard's Investigation of Arson and other Burnings and Warner and Safdar Husain's Practical Methods in Police Work, Ch. 25, pp. 315-321. Allahabad Pioneer Press (now at Lucknow).

(15) Toxicology : This subject has made great advance in recent years and the difficulty of toxicological analysis has increased by the tremendous increase of the number of synthetic drugs having extremely powerful therapeutic actions, to singularly few chemical tests. It is probable that poisoning is still as successfully practised as it has been always in the past. It is forensic science expert who by constant investigation of all cases and routine examination of the organs can bring to light toxicological evidence for bringing home the offences to the prisoners.

(b) *Report of Chemical Examiner, etc.* Under Section 510, Criminal Procedure Code, 1898 (now sec. 293, Cr. P. C., 1973) any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government may be used as evidence in any inquiry, trial or other proceeding under the Code. But the report must be tendered in evidence before it can be used as such.<sup>16</sup> The Court has a discretion to call the Chemical Examiner so that he may be examined on oath and be subjected to cross-examination.<sup>17</sup> In ordinary circumstances there would be nothing wrong in taking the reports of the Chemical Examiners and the imperial Serologist on record as permitted by the Cr. P. Code. When, however, there is a difference of opinion in the reports, the duty to explain the difference is on the prosecution and the mere production of the report does not, under the circumstances, prove anything which can weigh against the accused.<sup>18</sup> Where the guilt or innocence of the accused turns entirely on the result of the chemical analysis as to the presence of certain ingredients in the articles before the Court, it is desirable that the Chemical Analyser should be examined in support of his report and the accused given an opportunity of cross-examining him.<sup>19</sup> If the Chemical Analyser's report alone is to be considered sufficient it should contain all the information which that officer himself would have been able to furnish if he had been examined as a witness.<sup>20</sup>

There is no hard and fast rule as to the weight to be attached to the report. A meagre and cryptic report is hardly of any value.<sup>21</sup> It is unsafe to rely on it in a murder case.<sup>22</sup> It cannot, however, in view of the provisions of Section 510, Cr. P. C., 1898 (now section 293, Cr. P. C., 1973) be said that the report has no value unless the Chemical Examiner is examined as a witness.<sup>23</sup> Section 60 enacts a proviso relating to the opinions of experts, to the general rule that oral evidence must be direct. The exception is that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the produc-

16. Wali Muhammad v. King-Emperor, A. I. R. 1924 All. 193; 83 I. C. 904; 26 Cr. L. J. 200; 21 A. L. J. 869.
17. Happu v. Emperor, A. I. R. 1933 All. 837; 146 I.C. 1089.
18. Tulsiram v. State, A. I. R. 1954 S. C. 1, 3; 1954 Cr. L. J. 255; 1953 S. C. J. 612.
19. Behram Sheriar Irani v. Emperor, A. I. R. 1944 Bom. 321, 324, Col. 1; 216 I. C. 288; 46 Bom. L. R. 481; see also Happu v. Emperor, supra.
20. ib. at p. 323, Col. 2 of A. I. R.
21. Mst. Gaya Kunwar v. Emperor, A. I.R. 1934 Oudh 62; 35 Cr.L.J. 700; 148 I.C. 600; 11 O.W.N. 312; Behram Sheriar Irani v. Emperor, 46 Bom.L.R. 481; 216 I.C. 288; A.I.R. 1944 Bom. 321, 324, Col. 1.
22. Happu v. Emperor, supra; Ujagar Singh v. Emperor, A.I.R. 1939 Lah. 149; I.L.R. 1939 Lah. 206; 181 I.C. 864; 40 Cr. J. 576.
23. Mst. Aishan Bibi v. Emperor, A.I.R. 1934 Lah. 150(2); I.L.R. 15 Lah. 310; 152 I.C. 206; 31 Cr.L.J. 14; 37 P.L.R. 67.

tion of such treatise, if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable.<sup>24</sup> But the decision of a case on isolated extracts from technical books is strongly deprecated.<sup>25</sup>

Though a Court is not bound to accept and act on a Chemical Examiner's report under section 510, Cr. P. C., 1898 (now Section 293, Gr. P. C., 1973), as conclusive evidence of its contents, the report may be used as evidence without the Chemical Examiner being examined in Court and it is not necessary that the report should state the method adopted by the Chemical Examiner for examination or analysis of the article or the material, on the basis of which the result was arrived at.<sup>1</sup>

In regard to the report of the Chemical Examiner it is of no use as evidence unless there is proof of the identity of the articles sent to the Chemical Examiner with the articles examined by him. This is not a mere formality and failure of the prosecution to adduce evidence is not a mere technical defect. There must be evidence connecting the incriminating articles seized, the exhibits sent with the articles examined by the Chemical Examiner and the report thereon sent by him to the Court.<sup>2</sup>

Section 510, Cr. P. C., 1898, before amendment, permitted the admission in evidence of the Chemical Examiner's report without requiring the officer concerned to be examined in Court to prove the report. After the amendment, the court was vested with discretion while the prosecution or accused was conferred a right to summon and examine the expert covered by Section 510. The old position has been reverted to in the new Cr. P. C., 1973. Section 293 of the new Cr. P. C. leaves it to the discretion of the court to summon the expert or not, the right of the parties has been taken away. The question of summoning the Chemical Examiner as a witness depends upon (a) the nature of the report; and (b) the circumstances of the case. If the report contains all the information required, including the reasons for the conclusion which the officer himself would have been able to furnish if he were examined as a witness, then there is no necessity to waste the time of this extremely busy public officer to the detriment of public administration. It is quite true that Chemical Examiners and Serologists are highly responsible officers and duly qualified scientists who would never venture to give any definite opinion on

24. S. 60 post as to the necessity of direct evidence v. post.
25. Rawat Sheo Bahadur Singh v. Beni Bahadur Singh, 51 I.C. 419; 6 O.L.J. 78; see also Sajid Ali v. Ibad Ali, 23 Cal. 1.
1. Bhaskaran v. State, I.L.R. (1967) 1 Ker. 467 : 1967 Ker.L.J. 372 : 1967 M.L.J. (Cr.) 293 : 1967 Ker.L.T. 165 (169); Mahadevayya Veerabhadrayya Hiremath v. The State of Mysore, A.I.R. 1966 Mys. 75 (a case under the Mysore Prohibition from Suleman Usman Memon v.

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- The State of Gujarat, A.I.R. 1961 Guj. 120; Madan Lal Arora v. The State, A.I.R. 1961 Cal. 240 (D.B.); State of Orissa v. Kaushalya Dei, A.I.R. 1965 Orissa 38; The State v. Uma Charan, A.I.R. 1966 Orissa 81 (report given by Public Analyst under section 18, Prevention of Food Adulteration Act, 1954).
2. Vijendrajit v. State of Bombay, A.I.R. 1953 S.C. 247 : 1953 Cr.L.J. 1097; State v. Motia, A.I.R. 1955 Raj. 82 : I.L.R. 1953 Raj. 655.

a question unless they had the fullest scientific data in support of their conclusion. Therefore, normally their opinions are entitled to great weight.<sup>3</sup> But there may be circumstances in which the examination of the expert in court might be necessary for the elucidation of obscurities. One such case was *In re Maruda*<sup>4</sup> where the High Court found a certain lacuna and this was rectified by examining the Professor of Forensic Medicine, Madras Medical College, in the High Court. It has been repeatedly laid down by all the High Courts that though no hard and fast rule can be laid down as regards the value to be attached to reports of Chemical Examiners, a meagre and cryptic report can hardly be of any value. It is not enough for the Chemical Examiner merely to state his opinion; he must state the grounds on which he arrives at that opinion. As the Chemical Examiner merely tenders a report and he does not normally appear and give evidence, it is extremely desirable that the report should be full and complete and take the place of evidence which he would give if he were called in court as a witness to give evidence.<sup>5</sup>

In many cases an opinion as to the cause of death can only be given after the result of the chemical analysis of the viscera is known. The examiner states in his report that he defers giving an opinion until hearing the result of the chemical analysis. When a report is received from the Chemical Examiner containing a quantitative analysis, it should be shown to the medical officer who conducted the post-mortem examination, so that he will be in a position to state before the Committing Magistrate what are the medico-legal inferences to be drawn from the report.<sup>6</sup>

Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under the Criminal Procedure Code, may be used as evidence in any inquiry, trial or other proceeding under that Code. The original report and not a copy of the report should be put in evidence.<sup>7</sup> A report of the Chemical Examiner made before the institution of proceedings is not admissible without his examination in person.<sup>8</sup>

The report of a Chemical Examiner is a piece of evidence that does not require any formal proof, but at the same time it must be tendered as evidence and used as such so that the accused may have a chance of questioning it.<sup>9</sup> It is the bounden duty of the Public Prosecutor to tender in evidence the reports of the Chemical Examiner and of the Serologist. The accused is perfectly right in requesting that these reports which really ought to be tendered on behalf of the prosecution should be tendered as evidence on his behalf.<sup>10</sup>

It is not enough for the Chemical Examiner to merely state his opinion. He must state the grounds on which he arrives at that opinion. In this con-

3. Ghirrao v. Emperor, A.I.R. 1933 Oudh 265 : 1934 Cr.L.J. 1009.
4. A.I.R. 1960 Mad. 370.
5. Gajrani v. Emperor, A.I.R. 1933 All. 394, 399 : 34 Cr.L.J. 754; H.P. Administration v. Shivdevi, A.I.R. 1959 H.P. 3 : 1959 Cr.L.J. 448; Ramprasad v. The State, A.I.R. 1953 Bhopal 17 : 1953 Cr.L.J. 702.
6. Happu v. Emperor, A.I.R. 1933 All. 837 (841) : 35 Cr.L.J. 280
7. The Queen v. Bishambhar Das, 15 W.R. 49.
8. Chauth Mull v. Emperor, 20 Cr.L.J. 266: 50 I.C. 26 (Pat.).
9. Wali Muhammad v. Emperor, A.I.R. 1924 All. 193 : 26 Cr.L.J. 200.
10. Ghirrao v. Emperor, A.I.R. 1933 Oudh 265 : 1934 Cr.L.J. 1009.

nection reference may be made to section 51 of this Act which states that whenever the opinion of an expert is relevant, the grounds on which such opinion is based are also relevant. The expert may give an account of experiments performed by him for the purpose of forming his opinion. In India, the Chemical Examiner merely tenders a report and he does not appear and give evidence. It is extremely desirable that his report should be full and complete and take the place of evidence which he would give, if he were called to Court as a witness.<sup>11</sup> It is to be expected that whenever a Magistrate or a Court of Session finds that the report of the Chemical Examiner is inadequate he should not admit it in evidence unless that officer concerned submits a full and satisfactory report or has been examined in support of it. A meagre and cryptic report is hardly of any value.<sup>12</sup>

The negative effect of the Chemical Examiner's report is not sufficient to rebut the strong direct evidence as to the place of occurrence, although no blood was detected in earth, leaves and grass taken from that place.<sup>13</sup>

*The Serologist.* The Serologist is a highly responsible officer and a duly qualified scientist who would never venture to give any definite opinion on a question unless he has the fullest scientific data in support of his conclusion. His opinion is entitled to great weight.<sup>14</sup>

*Professor of Anatomy.* The certificate of a Professor of Anatomy is not *per se* admissible in evidence apart from special authority like Section 510 of the Criminal Procedure Code, 1898 (now Section 293 of Cr. P. C., 1973).<sup>15</sup>

In addition to the Chemical Examiner, the medico-legal expert performing post-mortems, examining and reconstructing human remains, etc., and making scientific deductions of legal importance can lay bare crimes and be of the greatest assistance in crime detection. In recent years, in all advanced countries, great strides have been made and remarkable reconstructions of crimes based upon scientific data and of the utmost value to the police and the judiciary have come to be made. On account of the love of the public for criminal detection accounts, the works of these medico-legal experts have come to be publicised. In this country we are naturally best acquainted with remarkable medico-legal works of three outstanding British doctors, Sir Bernard Spilsbury, Dr. Sydney Smith and Dr. Keith Simpson. Dr. Sydney Smith has written a most fascinating account of his work in 'Mostly Murder'.

**30. Public Analyst.** The term 'public analyst' is not defined in the Prevention of Food Adulteration Act, 1954. The qualifications for appointment as public analyst are prescribed by rule 6 of the Prevention of Food Adulteration Rules, 1955. On samples of food being sent to the public analyst, the public analyst has to deliver a report of the result of the analysis (Section 13). Section 13 (5) provides that any document purporting to be a report signed by the public analyst may be used as evidence of the facts stated therein in any proceeding under this Act or under sections 272 to 276 of the Indian

- 11. Gajrani v. Emperor, A.I.R. 1933 All. 394 : 34 Cr.L.J. 754.
- 12. Mst. Gaya Kunwar v. Emperor, A.I.R. 1934 Oudh 62 : 35 Cr.L.J. 700 (702).
- 13. Hassenulla Sheikh v. King-Emperor,

- A.I.R. 1924 Cal. 625 : 26 Cr.L.J. 5.
- 14. Ghirrao v. Emperor, A.I.R. 1933 Oudh 265 : 1934 Cr.L.J. 1009.
- 15. Ahila Manaji v. Emperor, A.I.R. 1923 Bom. 183 : 26 Cr.L.J. 339.

Penal Code. There is provision for the institution of the Central Food Laboratory and the Act prescribes the circumstances under which recourse can be had for analysis by the Director of the Central Food Laboratory. The certificate issued by the Director will supersede the report given by the public analyst and it is provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory shall be final and conclusive evidence of the facts stated therein. What is relevant as evidence both in the report of the Public Analyst and the certificate of the Director of the Central Food Laboratory are only the facts stated therein, in other words, the data relating to the analysis, and not the opinion of the Analyst or the Director.<sup>16</sup> If the magistrate accepts the prosecution case, he cannot disregard the special rule of evidence contained in section 13 (5) of the Prevention of Food Adulteration Act, 1954, and hold that the Public Analyst ought to have been examined.<sup>17</sup>

**31. Government Analyst.** The expression "Government Analyst" is in cl. (c) of section 3 of the Drugs and Cosmetics Act, 1940 (23 of 1940). If his report cannot be made available under section 25 (3) of the Act, it is not conclusive evidence and cannot be read as evidence without the Government Analyst being examined.<sup>18</sup>

**32. Case-law.** Though the certificate of a person who is declared to be a public analyst can alone be held admissible, there is nothing in the Act to prevent a qualified person from examining the sample and being actually examined in the case and speak to the contents of a certificate issued by him and which can be treated as a contemporaneous document for the purpose of refreshing memory, etc.<sup>19</sup> That the weight as evidence to be attached to the written report of a public analyst will depend upon the data of the quantitative analysis furnished by the public analyst in his report, and that the mere *ipse dixit* of the public analyst which cannot be adequately tested must be rejected, has been laid down in *Dindayal v. The State*.<sup>20</sup> This was followed in *State v. Sahatiram*,<sup>21</sup> wherein it was held that the certificate of the public analyst should contain the factual data which the analysis should reveal, and not merely the opinion of the public analyst as to what the data indicate about the nature of the article of food. Otherwise, if the certificate merely gives the final opinion of the public analyst and if such an opinion be held to be conclusive evidence about the nature of the article of food, the merit of the case against the accused will be really decided by the public analyst and not by the Court.<sup>22</sup> Similarly, the Punjab High Court has condemned the practice of the analyst, in cases where food is analysed, of merely stating

- 16. M. A. Thomas v. P. J. Abraham, 1968 Ker.L.J. 943 : 1968 Ker.L.R. 677 : 1969 Cr.L.J. 615 : A.I.R. 1969 Ker. 146 (148); P. K. Ali v. Food Inspector, Tellicherry, 1967 Ker. L.T. 1095; Nagar Mahapalika, Kanpur v. Ram Niwas, A.I.R. 1964 All. 349; Mohanlal Chhaganlal Mithaiwala v. Vipanchandra R. Gandhi, A.I.R. 1962 Guj. 44; 1970 A.W.R. 657.
- 17. Public Prosecutor v. Malla Rama Rao, (1969) 1 Andh.W.R. 541 : 1969 M.L.J. (Cr.) 438 : 1970 Cr.L.J. 275.
- 18. Drugs Inspector, M.P. v. Chimnalal & Co., 1968 J.L.J. 448 : 1968 M.P. L.J. 489 : 1968 M.P.W.R. 468 : 1968 Cr.L.J. 1561 : A.I.R. 1968 M.P. 238 (247) (F.B.).
- 19. State v. Karson Zaveri, A.I.R. 1960 Guj. 34 : 1960 Cr.L.J. 1582.
- 20. A.I.R. 1956 All. 520 : 1956 Cr.L.J. 1031.
- 21. A.I.R. 1958 All. 34 : 1958 Cr.L.J. 8.
- 22. Municipal Council, Kanpur v. Badloo, A.I.R. 1960 All. 504 : 1960 Cr.L.J. 1056.

that it is highly adulterated with extraneous vegetable matter. On the other hand, the analyst should indicate what is the extent of the impurity and what the impurity is.<sup>23</sup> The procedure prescribed by the Prevention of Food Adulteration Act, 1954, should be strictly adhered to.<sup>24</sup>

**33. Mode of making expert opinion as evidence.** By section 60 post, oral evidence must in all cases be direct. To this rule the opinion of an expert is not an exception unless the statute so provides as, for instance, reports of Mint Officers, Chemical Examiners, Inspector of Explosives, Serologists and others enumerated in sections 292 and 293 of the Criminal Procedure Code, 1973. Therefore, the opinion of an expert should be given orally and a mere report or certificate by him cannot be evidence.<sup>25</sup> If a party does not object to the admission of such evidence, he can be said to have waived the proof of it but not its relevance.<sup>1</sup> Under this section an expert has to state his opinion in Court and must be examined and cross-examined like any other witness. The expert while giving evidence may refer to any professional treatise or any memorandum which he may have prepared at a time when the facts on which his opinion is based were fresh in his memory (Section 159). If the expert whose opinion is intended to be proved is dead, etc., his opinion may be proved by the production of any treatise commonly offered for sale (Section 60). In regard to the mode of using a text-book, see *Grande Venkataratnam v. Corporation of Calcutta*.<sup>2</sup> The Court itself on matters of science or art may resort for its aid to appropriate books or documents of reference and well-known scientific works may be read during the trial as evidence of experts (Section 57). An expert may be examined on commission under Chapter XXIII of the Cr. P. C., 1973, or Order XXVI of the Civil Procedure Code. The Court may authorise under O. XXXIX, R. 7, an expert to take samples or to make any observation or experiments for the detention, preservation or inspection of any property which is the subject-matter of the suit. The Court for its own guidance and information may order independent enquiries and reports to be made or experiments to be tried by experts of its own selection.

The deposition of a medical expert taken and attested by a magistrate in the presence of the accused or taken on commission and the report of a Chemical Examiner may be treated as evidence calling the medical expert or the Chemical Examiner as a witness (Sections 291 and 293, Cr. P. C., 1898 corresponding to Sections 291 and 293 of Cr. P. C., 1973). But apart from statutory provisions, a report, certificate or letter of an expert cannot be transmuted into evidence, if its author had not been produced in Court to prove it. However, if a party has accepted the report of an expert as evidence without the expert being examined in Court, he cannot be allowed to turn round and object to the admissibility of the report in appeal.<sup>3</sup> Thus, where the

- 23. State v. Shanti Prakash, A.I.R. 1957 Punj. 56 : 1957 Cr.L.J. 390.
- 24. Public Prosecutor v. Kuppam, A.I.R. 1960 Andh. Pra. 27 : 1960 Cr. L.J. 46; State v. Mool Chand, A.I.R. 1957 All. 343 (1) : 1957 Cr.L.J. 615; *In re Cannanore Milk Supply Co-operative Society*, (1956) 2 M.L.J. 465.
- 25. B. Poorvaiah v. Union of India, (1967) 2 Andh.L.T. 141 : A.I.R.

- 1967 A.P. 338 (348); *Palaniappa Chettiar v. Bombay Life Assurance Co., Ltd.*, A.I.R. 1948 Mad. 298 (299); *Perumal Mudaliar v. S. I. Ry. Co., Ltd.*, A.I.R. 1937 Mad. 407.
- 1. B. Poorvaiah v. Union of India, *supra*.
- 2. 19 Cr.L.J. 753.
- 3. *Coral v. Joseph*, A.I.R. 1953 Mad. 858 : (1953) 1 M.L.J. 591.

lower Court has based its decision on the opinion of an expert contained in a report, though he has not given sworn testimony in support of the report, no objection will be allowed to be taken for the first time in revision relating to its reception.<sup>4</sup>

That it is not satisfactory to examine an expert on commission has been fully discussed in *In re Srinivasalu Naicker*.<sup>5</sup> It was a suit in which it was contended that the material document was forged. The material document had been submitted privately to a handwriting expert at Nagpur. The expert had given his opinion that the endorsement on the material document was a forgery. So a commission was sought to be taken by the party in whose favour that opinion had been given to examine him at Nagpur as otherwise his evidence would be unavailable to the Court unless he was cross-examined. This was resisted on the ground that it was not a fit case for issuing a commission and this was upheld by the learned Subordinate Judge. The High Court came to the same conclusion in revision and dismissed the revision in the following terms :

"These deductions based upon the practical experience of these eminent writers of the well-known publications emphasise that the Handwriting Expert should as far as possible be examined in Court and his demeanour carefully watched because as has been repeatedly pointed out, the law provides<sup>6</sup> that the Courts do record a note of the demeanour of the witnesses while they are giving evidence in the witness-box, because the eye and manner of giving evidence betray a witness and a shrewd lawyer and Judge can always find out whether he is a truthful witness or a false witness. In fact, appellate Courts are enjoined not to ordinarily interfere with the trial Court's opinion as to the credibility of a witness as the trial Judge alone knows the demeanour of the witness.<sup>7</sup> Therefore, demeanour becomes a most important test in the credibility of the witness.<sup>8</sup> When the question is whether the witness is speaking the truth or not, light is thrown upon it by the demeanour of that witness in the box, by the manner in which he answers questions and by how he seems to be affected by the questions that are put to him and so on.<sup>9</sup> In connection with demeanour, it is very important to consider the ability of the witness as well as his intellectual perfection, judgment, memory and description."<sup>9-1</sup>

Then, assuming that even a commission can be issued, Courts must once again exercise a wise discretion under O. XXVI, R. 15, Civil Procedure Code which reads thus :

"Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses

4. Karam Din v. Atta Muhammad, A.I.R. 1934 Lah. 230 : 150 I.C. 357.
5. 68 L.W. 61 : A.I.R. 1955 M. 179.
6. Vide S. 138, C.P.C. and S. 280, Cr. P. C., 1973.
7. Valarshak Seth Apcar v. Standard Coal Co., Ltd., A.I.R. 1943 P.C. 159 : 209 I.C. 132.
8. Mauladad Khan v. Abdul Sattar, 39 All. 426; Bombay Cotton Manufacturing Co. v. Motilal Shivalal, 39 Bom. 386 : A.I.R. 1915 P.C. 1; Sitalakshmi v. Venkatasubrahmanian, A.I.R. 1930 P.C. 170 : 32 L.W. 51.
9. Palchur Sankarareddy v. Palchur Mahalakshamma, 27 C.W.N. 414 : A.I.R. 1922 P.C. 315.
- 9-1. Bentham on Evidence, p. 126; Wigmore, S. 783; Powell, 9th Ed., pp. 506-507; Starkie, p. 824.

of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued."

This rule is not exhaustive and does not prevent the Court from imposing any terms that it chooses as a condition precedent for issuing of a commission.<sup>10</sup> The "expenses of the commission" have been construed to include the expenses of the other parties to the litigation. In Madras, the expression "expenses of the commission" had been differently interpreted. In *Saboora Bivi Ammal v. Julaika Bivi Ammal*,<sup>11</sup> the expression "expenses of the commission" was held by Govinda Menon, J., to mean only what the commissioner had to spend for summoning witnesses and other incidental expenses relating to the examination of the witness before him. The expression was held by Mack, J., in *Abdurahiman Settu v. Muhammad Kasam Settu*,<sup>12</sup> to include the expenses of the other party to the litigation. The interpretation of Mack, J., which flows from the wording of Rule 15 and is in consonance with the principles of justice, equity and good conscience, seems to be sound. To hold otherwise would mean that a rich party would be able to defeat the poor party in the suit by the mere expedient of obtaining a commission for examining an expert in a far-off place and making it impossible for the other party to test that evidence by employing a lawyer in that far-off place. In fact, such a commission would result practically in *ex parte* untested reports being accepted as evidence. This is not a state of things which can be contemplated with equanimity because, as was pointed out by Lord Sankey, in the cross-currents of shifting sands of public life, the law is like a great rock upon which a man may set his foot and be safe while the inevitable inequalities of private life are not so dangerous in a country where every citizen knows that in the law courts, at any rate, he can get justice. It is quite true that even now the proverbial law's delays, troubles and expenses make it impossible for the poorer and weaker party to get justice and Courts of law are open to all only in the sense that great hotels like Connemara are open to all. The endeavour of the State and the Courts has always been to minimise these inequalities shutting out the Courts of justice to aggrieved persons and there is no reason why he should add, by an interpretation which does not flow from the plain language of O. XXVI, R. 15, Civil Procedure Code, to these inequalities. It seems, therefore, that the expression "expenses of the commission" can be construed to include the expenses of the other party to the litigation.

**34. Non-expert opinion.** An architect may be an expert for the purpose of designing and building houses but he is not an expert for the purpose of giving the opinion as to the cost of construction of a premises in a particular year without any data about the prices of materials and wages prevalent in that particular year.<sup>13</sup>

**47. Opinion as to handwriting, when relevant.** When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the

10. *Nripendra Bhusan v. Raja Pramatha Bhusan*, A.I.R. 1927 Cal. 907 : 104 I.C. 814.

11. A.I.R. 1950 Mad. 144 : 62 L.W. 759.

12. A.I.R. 1949 Mad. 490 : (1948) 2 M.L.J. 652.

13. *Dewanchand v. Tirath Ram*, A.I.R. 1972 Delhi 41 (44).

handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

*Explanation.* A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

### *Illustrations*

The question is, whether a given letter is in the handwriting of A, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C nor D ever saw A write.

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|--|---|
| s. 45 Illus. (c) (Opinion of experts as to identity of writing.) | s. 73 (Comparison of handwriting.)          |
| s. 3 (That a man holds a certain opinion is a fact.)             | s. 3 ("Document.")                          |
| s. 51 (Grounds of opinion.)                                      | s. 67 (Proof of signature and handwriting.) |
| s. 3 ("Court".)  | s. 3 ("Relevant.")                          |
|  | s. 3 ("Fact.")                              |

Taylor, Ev., ss. 1862–1868; Lawson's Expert and Opinion Ev., 277; Best, Ev., ss. 232–238; Rogers on Expert Testimony, 285; Steph. Dig. Art. 50; Phipson, Ev., 11th Ed., 527–528; Powell, Ev., 9th Ed., 54; Harris, Law of Identification, 231.

### SYNOPSIS

|  |                                      |
|--|--------------------------------------|
| 1. Scope and principle.                | 4. Mode of proof.                    |
| 2. Proof of handwriting and signature. | 5. Value of evidence of lay witness. |
| 3. Marks and seals.                    |                                      |

1. **Scope and principle.** Under this section, any writing may be proved by the opinion of any person who is acquainted with the handwriting of the man alleged to have written the document. This kind of opinion is, for various reasons, better than expert testimony. Indeed, the knowledge of the general character of any person's writing which a witness has acquired incidentally and unintentionally, under no circumstance of bias or suspicion, is far more satisfactory than the most elaborate comparison of even an expe-

rienced person, called by one side or the other with a particular object.<sup>14</sup> The opinion of evidence of a non-expert becomes good evidence to go by if the acquaintance of such witness with the signature of an executor within the meaning of the Explanation to the section is well proved.<sup>15</sup> One of the ways in which the knowledge of a person's handwriting may be acquired is by the witness having seen, in the ordinary course of business, documents which on evidence, direct or circumstantial, are proved to have been written by such person.<sup>16</sup> An immediate superior has occasion to see the handwriting and signature of his subordinate and if testifies in the examination-in-chief that he knows both the handwriting and signature aforesaid very well without being challenged in cross-examination, his identification of the handwriting and the signature on the disputed document should receive due weight.<sup>17</sup> The technical requirements of proof of handwriting are satisfied if a person alleges that he had seen another writing, and that, in his opinion, the writing to be proved is of that other person. This section deals only with the admissibility of a variety of opinion evidence and not with its value. In a case covered by this Section, the value of the opinion, unlike that of the expert, depends upon the familiarity which a witness has acquired with the writing of the person about which the opinion is expressed and not upon the reasons which he can advance in support of the opinion. The evidence given by a witness, who has insufficient familiarity with the handwriting of the person about which he states, should be discarded.<sup>18</sup> The opinion or the belief of a witness is here admissible, because all proof of handwriting, except when the witness either wrote the document himself, or saw it written, is in its nature a comparison; it being the belief which a witness entertains, upon comparing the writing in question with an exemplar formed in his mind from some previous knowledge.<sup>19</sup> The proof of the genuineness of a document is proof of the authorship of the document, and is proof of a fact like that of any other fact. The evidence relating thereto may be direct or circumstantial. It may consist of the direct evidence of a person who saw the document being written or the signature being affixed. It may be proof of the handwriting of the contents, or of the signature by one of the modes provided in sections 45 and 47. It may also be proved by the internal evidence afforded by the contents of the document. This last mode may be of value, where the disputed document forms part of a link in the chain of correspondence, some links of which have already been proved. In such a situation, the person, who is a recipient of the document, is in a position to speak to its authorship.<sup>20</sup>

An opinion as to handwriting is hearsay evidence and becomes admissible

14. Doe d. Mudd v. Suckermore, (1837) 5 Ad. & El. 703, per Patteson, J.
15. Dalim Kumar v. Nandrani Dassi, 73 C.W.N. 877: A.I.R. 1970 Cal. 292 (309).
16. Bhupen Narain v. Ek Narain Lal, A.I.R. 1965 Pat. 332.
17. Basarajswami, In re, 10 Law Rep. 309: (1967) 1 Mys.L.J. 548: 1967 M.L.J. (Cr.) 501: 1967 Cr.L.J. 1536 : A.I.R. 1967 Mys. 210 (212); The State v. Tribikram Bohidar, (1971) 37 Cut.L.T. 714 (720).
18. Devi Prasad v. States, A.I.R. 1967 A. 64: 1967 Cr.L.J. 64.
19. Taylor, Ev., s. 1869; Doe d. Mudd v. Suchermore, (1837) 5 Ad. & El. 703; and see Fryer v. Gathercole, (1849) 13 Jur. 542; Introd. to Ss. 45-51, Powell, Ev., 9th Ed., 54.
20. Mobarik Ali Ahmed v. State of Bombay, A.I.R. 1957 S.C. 857, 864; 1958 S.C.R. 328: 1957 Cr. L.J. 1346: 61 Bom.L.R. 49: 1958 All.W.R. (H.C.) - 112: 1958 M.L.J. (Cr.) 42: 1958 S.C.J. 111.

under this section only if the conditions required by this section are fulfilled.<sup>20-1</sup>

The section requires two things to be established :

- (i) that the witness is possessed of the qualification required by the section ;
- (ii) that in the opinion of such person the controversial handwriting was of a particular person.<sup>21</sup>

**2. Proof of handwriting and signature.** As to the general characteristics of handwriting, see commentary to Section 45 ante. The word "handwriting" in the sentence "any person acquainted with the handwriting, etc." presumably includes both handwriting in general and signature. One person's knowledge of the handwriting of another may be confined to his general style and may not extend to his signature. A signature may, and very often does, possess a great peculiarity. Although, therefore, a person can recognise general style, it may not follow that he can recognise his style of signature ; this he may have never seen. On the other hand, a person may be competent to recognise another's style of signature, although quite unable to recognise his general style of writing ; for, of his style beyond his signature he may be quite ignorant and the one may be very different from the other. Where the signature is in the ordinary style of writing, one not acquainted with that style except in the signature cannot recognise his style in any other writing unless he assumes or it be conceded that the style in his signature is the style of his usual writing, and, supposing that assumption or concession to be made, it is obvious that one or even a hundred signatures may lead to mistake, the number of small and capital letters in the signature being few, and many letters which occur in the general handwriting not occurring in the signature. On the contrary, if one is not acquainted with the style of another's writing except his signature, if that style be in the signature, he can as well recognise it in the signature as he can in any other words composed of the same letters.<sup>22</sup>

Evidence of contents of a document is hearsay evidence unless the writer thereof is examined in Court. An attempt to prove the contents of a document by proving the signature or the handwriting of its author is to set at naught the well-recognised rule that hearsay evidence cannot be admitted.<sup>23</sup> The only person competent to give evidence on the truthfulness of the contents of a document is its writer.<sup>24</sup> If the Court is satisfied that there is trick pho-

20-1. Rahim Khan v. Khurshid Ahmed, A.I.R. 1975 S.C. 290 : (1975) 1 S.C.R. 643 : (1975) 2 S.C.J. 178 : (1974) 2 S.C.C. 660.

21. Hardevi Malkani v. State, 1968 A.L.J. 466 (473) : 1967 All.Cr.R. 508 : 1967 A.W.R. (H.C.) 789 : 1969 Cr.L.J. 1089 : A.I.R. 1969 All. 423.

22. Ram on Facts, 72, 73. That one is not acquainted with another's general writing does not disqualify him from proving his signature. Lawson, op. cit., 298 and a witness may be acquainted with the signature of a firm without being able to iden-

tify the handwriting of either or any, partner, ib., and cases there cited.

23. Madholal Sindhu v. Asian Assurance Co., Ltd., A.I.R. 1954 Bom. 305; M. Yusuf v. D., I.L.R. 1966 Bom. 420 : 68 Bom.L.R. 228 : 1967 Mah.L.J. 65 : A.I.R. 1968 Bom. 112 (118, 119). See also Halsbury, 3rd Edn., Vol. 15, para 533 at p. 294.

24. M. Yusuf v. D., I.L.R. 1966 Bom. 420 : 68 Bom.L.R. 228 : 1967 Mah.L.J. 65 : A.I.R. 1968 Bom. 112 (118, 119).

tography and the photograph of a document can be received in evidence to prove the contents of the document but, subject to the safeguards indicated, to prove the authorship. But evidence of photographs of letters can only be received if the original cannot be obtained and the photographic reproduction is faithful and not faked, or false. In the instant case, as the originals of the letters were suppressed by the accused, the evidence of the photographs as to the contents and as to the handwriting was receivable.<sup>25</sup>

**3. Marks and seals.** In India, a great number of persons are marksmen. In England a witness has been allowed to express his opinion that a mark on the document is the mark of a particular person.<sup>1</sup> Handwriting ordinarily means whatever the party has written (i. e. formed into letters with his hand,<sup>2</sup> though Parke, B., in the case undermentioned<sup>3</sup> said : "I think you may prove the identity of the party by showing that this mark was made in the book and that mark is in his handwriting", thereby including the affixing of a mark in the term 'handwriting'. It may, however, reasonably be doubted whether the term should be so extended, and though the words 'signed' and 'signature' have been defined for the purposes of other Acts as including marks,<sup>4</sup> there is no such definition in this Section. Therefore, though proof or a mark may be given by calling the person who made it, or a person who saw it affixed; opinion evidence would not appear to be admissible under this section, either with regard to mark or a seal,<sup>5</sup> which may similarly be proved by calling the person who affixed it or who saw the seal affixed,<sup>6</sup> or by comparison with a seal already admitted or proved.<sup>7</sup> But though this section does not appear to have provided for the case, it does not follow that such evidence is inadmissible. In practice, a witness who knows the seal of another has been permitted to say that a seal appearing on a document submitted to him is the seal of that other, even though he was not present and saw the seal affixed. Such evidence is relevant to prove identity of the thing, viz. the seal in question.<sup>8</sup> In every question of identification, whether of a person's hand-

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25. Laxminipat Chararia v. State of Maharashtra, (1968) 2 S.C.R. 624 : (1968) 1 S.C.A. 682 : 1968 S.C.D. 743 : (1968) 2 S.C.J. 589 : 70 Bom. L.R. 592 : 16 Law Rep. 473 : 1968 M.L.J. (Cr.) 614 : 1968 Cr.L.J. 1124 : A.I.R. 1968 S.C. 938 (946).

1. A M is sued on a bill of exchange which she had endorsed with her mark being in the plaintiff's handwriting. W testifies that he has frequently seen A M making her mark and points out some peculiarity in it and expresses the opinion that the mark on the bill is her's. His opinion is admissible. George v. Surrey, (1890) M. & M. 516; see Lawson, op. cit., 206, 207; Pearce v. Decker, 13 Jur. 997. S to prove an obligation which is signed by E B in her handwriting and by I B her husband, by his making a mark in the shape of a cross, calls their son who testifies to the handwriting of his mother that he knows the mark of his father attached to the foot of the instrument and he believes to be his father's mark. This was held sufficient; Strong v. Brewer, 17 Ala 710 (Amer.). See Best, Ev., s. 34.

2. Com. v. Webster, 5 Cush 295 (Amer.).

3. Sayer v. Glossop, (1848) 12 Jur. 465.

4. E.g. Civil Procedure Code, S. 2; Registration Act (XVI of 1908), S. 3. On the other hand, the Succession Act (X of 1865) draws a distinction between a mark and a signature (S. 50).

5. See (Mat.) Shahzadi v. Beni Prasad, 1934 All. 390; 154 I.C. 405; Ponnuwami Goundan v. Kalyanasundra Iyer, 1934 Mad. 365 : I.L.R. 57 Mad. 662; 149 I.C. 257: 66 M.L.J. 712 : 1934 M.W.N. 884 : 39 L.W. 571.

6. Moises v. Thornton, (1799) 8 T. R. 305.

7. S. 73, post.

8. See S. 9 and S. 3, ante definition of "Fact".

writing or other thing, the evidence of a witness is opinion evidence, founded on a mental comparison of the person or thing which the witness has seen with the person or thing he sees at the trial.<sup>9</sup> The Act has in the present section made special provision with respect to the subject of handwriting one of common occurrence, requiring in many cases on the part of the witness considerable judgment and involving questions of difficulty, and has treated opinion evidence (from necessity)<sup>10</sup> whether upon the identity of other things or persons or upon other matters, as being not strictly opinion in the sense in which that term is used in the Act. Similar observations are applicable in the case of marks; the only difference between the two cases being that there is nearly always a distinguishing feature in a seal while the usual mark (a cross) is not generally distinguishable from a cross made by another, though a mark may and sometimes does contain a peculiar and distinctive feature.<sup>11</sup> If there is something peculiar to identify the mark as being that of a particular person it is impossible to distinguish the case from any other form of proof *ex visu scriptio[n]is*<sup>12</sup> and, as already stated, such evidence has been admitted both in England and America.<sup>13</sup>

If there is nothing to identify the mark, the evidence will be either inadmissible<sup>14</sup> or, if admissible, of no value whatever.

**4. Mode of proof.** Section 67 enacts that if a document is alleged to be signed or have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. Handwriting may be proved or disproved in the following ways: (a) by calling the writer, or (b) by any person, e.g., an attesting witness, who actually saw him write the document,<sup>15</sup> or (c) by the evidence of the opinion of experts under the provisions of Section 45 ante, which differs from the present section in this that under its provisions the witness is required to be skilled in the art of distinguishing writings, while, under the present section, he must be acquainted with the handwriting of the person alleged to have written the document, or (d) by the opinion evidence of non-experts, namely, under the present

9. v. ante Introd. to Ss. 45–51.

10. v. ante, ib.

11. Thus in *Yashwadabai v. Ramchandra* (1893) 18 B. 66 at p. 73, the mark was that of a plough.

12. Best, Ev., s. 234.

13. v. p. 628 (Vol. I), under Note 4, "Statements by Agents". However, in *Currier v. Hampton*, 11 Ired. 311 (Amer.), Ruffin, C.J., thought that it was only "in some very extraordinary instances that the mark of an illiterate person may become so well known as to be susceptible of proof like handwriting and it has been held in two cases in Pennsylvania that a 'mark' to a will cannot be proved by one who did not witness it, but who testifies that he is acquainted with the mark on account of certain peculiarities," Lawson, op. cit., 297. The correct view, however, is that stated in

Best, Ev., s. 234 and other cases above cited. As to wills, in this country, the attesting witnesses must affix their signatures and not a mark. See notes to Ss. 68–72 post. In *Yashwadabai v. Ramchandra*, (1893) 18 B. 66 at p. 73, a witness in cross-examination stated that his father could not write or sign his name but used to make a mark (the mark of a plough), and that the paper then shown to him was not his mark.

14. Best, Ev., s. 234.

15. Taylor, Ev., s. 1862. For a case in which the writer was called and while denying the execution of the document admitted that the writing was exactly like his own, see *Grish v. Bhugwan*, (1870) 13 W.R. 191, 193; *Abdul Basit v. Ahmad Mian*, A.I.R. 1973 Delhi 280 (person present at execution of document).

section by the evidence of a person who has acquired a knowledge of the character of the handwriting in one of the ways specified in this section, or (e) by a comparison under Section 73 of some or more of the admitted or proved specimens of handwriting of the person, with the handwriting of the disputed document alleged to have been written or signed by him.<sup>16</sup> It is the opinion of a non-expert that is made admissible by this section.<sup>17</sup>

A witness who has such knowledge may testify to his belief that a writing shown to him is in the handwriting of another person, though he cannot swear positively thereto. Such knowledge may be acquired—

(a) By having at any time seen the party write.<sup>18</sup> The frequency and recency of the occasions and the attention paid to the matter by the witness will affect the value and not the admissibility of the evidence. Thus, such evidence has been admitted though the witness had not seen the party write for twenty years, and in another case, had seen him write but once, and then only his surname.<sup>19</sup> It is possible to conceive a case in which a person knows the handwriting of another in certain characters, though he himself cannot read those characters. Such an instance is rare, but it cannot be said to be impossible.<sup>20</sup> The witness's knowledge must not have been acquired for the express purpose of qualifying him to testify at the trial, because the party might through design write differently from his common mode of writing his name<sup>21</sup> and if it should appear that the belief rests on the probabilities of the case, or on the character or conduct of the supposed writer, and not on the actual knowledge of the handwriting, the testimony will be rejected.<sup>22</sup>

(b) By the receipt of written communications purporting to be written by the party, in answer to documents written by the witness or under his authority and addressed to that party. This evidence will be strengthened by the communications having been acted on as genuine between the parties in the matters, or some of them, to which these communications relate.<sup>23</sup>

(c) By having observed, in the ordinary course of business, documents purporting to be written by the person in question. The word "habitually" in the explanation to the section means "usually", "generally" or "according to custom". It does not refer to the frequency of the occasions but rather to the invariability of the practice. It would, for instance, be perfectly permissible to say, "*A* habitually receives a letter from *X* once every year".<sup>24</sup> Thus, the clerk who has constantly read the letters, or the broker who has

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- 16. See Ganpatrao Khanderao v. Vasantrao Ganpatrao, 1932 Bom. 588, 591 : 34 Bom.L.R. 1371; Sarojini Dassi v. Haridas Ghosh, 1922 Cal. 12 : I.L.R. 49 Cal. 235 : 66 I.C. 774; 26 C.W.N. 113; Blak Ram v. Muhammad Said, 1923 Lah. 695 : 77 I.C. 872 : 5 L.L.J. 530.
- 17. (In the matter of) Chanda Singh, 28 I.C. 722: 16 Cr.L.J. 338: 18 P.R. 1915; 1915 P.W.R. 12 Cr.
- 18. Taylor, Ev., s. 1863; Best., Ev., s. 233; Phipson, Ev., 11th Ed., p. 528.
- 19. ib., Kala Ram v. Fazal Bari, 1941 Pesh. 38: 194 I.C. 824; 1941 Pesh. L.J. 38.
- 20. Ram Chandra v. Jaith Mal, 1934 All. 990: 4 A.W.R. 676.
- 21. ib., Stranger v. Searl, (1723) 1 Esp. 13 Best, Ev., s. 236; R. v. Crouch, (1850) 4 Cox 163; for exceptions, see Lawson, op.cit., 307.
- 22. R. v. Murphy, (1887) 8 C. & P. 297, 307: Da Costa v. Pym, (1797) 2 Peake Add. Cas. 144; Taylor, Ev., s. 1863.
- 23. Taylor, Ev., ss. 1864-1866; Phipson, Ev., 11th Ed., p. 528; see the illustration to the section.
- 24. P. B. Ponde v. Emperor, 1925 Bom. 429; 39 I.C. 1042: 26 Cr. L.J. 1474 : 27 Bom.L.R. 1031.

been consulted upon them, is as competent as the merchant to whom they were addressed, to judge whether another signature is that of the writer of the letters; and a servant who has habitually carried his master's letters to the post, has thereby had an opportunity of obtaining a knowledge of his writing, though he never saw him write or received a letter from him.<sup>25</sup> Officials working in Treasury habitually receiving bills signed by officers in due course of their official duty are competent to prove the signatures of such officers.<sup>25-1</sup> Sanction for prosecution can be proved by producing any person who is acquainted with the signature of sanctioning authority.<sup>25-2</sup> The handwriting of the accused can be proved by persons who became acquainted with his writing in the course of official work.<sup>25-3</sup>

But the witness should have known the writing in one of the modes enumerated in this section ; an employee is not competent to prove handwriting of the Director only on the basis of being told by his co-employees that the writing was that of the Director.<sup>25-4</sup> In whichever of these two latter ways the witness has acquired his knowledge, proof must be given of the identity of the person whose writing is in dispute with the person whose handwriting is known to the witness.<sup>1</sup>

Considering the manner in which Section 47 is framed, it has been held by the Courts generally that it is enough for a witness to say in examination-in-chief that he is acquainted with the handwriting, and that if it is desired to challenge that statement of his he has to be cross-examined on that statement to show that he could not be acquainted with the handwriting in the circumstances of any particular case.<sup>2</sup> The English law on the point is thus summarised by Taylor on Evidence<sup>3</sup> :

"The witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands." The Indian Law of Evidence is based on the English Law, and there is nothing in Section 47 which goes against this principle which has been accepted by the English Courts. Following this principle, the Indian High Courts have also taken the same view.<sup>4</sup>

It has been held by the Bombay High Court, following the English rule, that a witness need not state in the first instance how he knows the hand-

- 25. Taylor, Ev., s. 1864; Lawson, op. cit., 288; Smith v. Sainsbury, (1832) 5 C. & P. 196; see the illustration to the section and Lolit v. R., (1894) 22 C. 313; see observations on evidence of handwriting by Sir Lawrence Peel, C. J., in R. v. Hedger, supra at pp. 138, 139; (In the matter of) Chanda Singh, 1915 Lah. 425 : 28 I.C. 722 : 16 Cr.L.J. 338; Surendra Krishna Mandal v. Rani Dasse, 1921 Cal. 677 : 59 I.C. 814 : 33 C.L.J. 34.
- 25-1. (1972) 1 Cut.L.R. (Cr.) 442.
- 25-2. Prem Prakash v. State, 1971 W.L.N. 408 (Raj.).
- 25-3. State v. T. Bohidar, (1971) 37 Cut.L.T. 714.

- 25-4. K. L. Shaw v. Calcutta Credit Corpn., I.L.R. (1971) 1 Cal. 103.
- 1. Taylor, Ev., s. 1867; Wills, Ev., 3rd Ed., pp. 378, 380.
- 2. Pusaram v. Manmal, 1955 Raj. 186.
- 3. Vol. 2, Ed., 12, Para 1863, p. 1151.
- 4. Pusaram v. Manmal, 1955 Raj. 186; Shyam Pratap Ram Misir v. Beni Nath Dubey, 1942 Pat. 449 : 198 I.C. 711 : 8 B.R. 459; Mahant Jagdish Das v. Emperor, 1938 Pat. 497 : 178 I.C. 324 : 40 Cr.L.J. 27 : 1938 P.W.N. 403 : 5 B.R. 82. But see *contra* : Hardevi Malkani v. State, 1967 All.Cr.R. 508 : 1968 A.L.J. 466 : 1967 A.W.R. (H.C.) 789 : 1969 Cr.L.J. 1089 : A.I.R. 1969 All. 423 (430).

writing, since it is the duty of the opposite party to explore in cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands. It is, however, permissible and may often be expedient that the matters referred to in the explanation should be elicited on the examination-in-chief; and it is within the power of the presiding Judge and often may be desirable to permit the opposing advocate to intervene and cross-examine so that the Court may at that stage be in a position to come to a definite conclusion on adequate materials as to the proof of the handwriting.<sup>5</sup>

In (*In re Basrur Venkata Row*<sup>6</sup>) dealing with the evidence of a witness produced to prove the handwriting of the accused, it was observed :

"His evidence is most unsatisfactory. He simply says that these documents are in the handwriting of the appellant; he does not say either in examination-in-chief or in cross-examination how he was acquainted with the appellant's handwriting. A bald statement like the one made by him is not legal evidence of any knowledge of the accused's handwriting. In the course of the re-examination, however, in answer to questions put by the Court he said : 'I came to be acquainted with the first accused's writing only by seeing him write documents; I think he has written ten or fifteen documents for me.' He does not say how many years before he gave evidence he saw the appellant write or how long ago the appellant wrote documents for him. There is perhaps enough in the statement (just referred to) made by him at the very end of his examination, to make his evidence legally admissible, but it is, to say the least, of the weakest kind."

These observations, it is submitted, were about the weight of the evidence and not as to whether it was the duty of the counsel examining the witness to question him about his source of knowledge. In that case, the source of knowledge of the witness was undoubted, and the question was only whether the evidence was sufficient to prove the handwriting. In (*Mst. Jasoda Kuer v. Janak Missir*,<sup>7</sup>) it was observed that, in order to prove the handwriting or signature of another person, one must show that he is acquainted with the handwriting or signature of the person. But in that case, the learned Judge has gone on to deal with the evidence of the witness, and has shown that his evidence itself makes out that he had no knowledge about the handwriting, for the learned Judge observes that in cross-examination the witness gave away the show altogether. It is submitted that these two cases are no authority for the view that it is for the counsel producing the witness to bring out the circumstances in which the witness became acquainted with the handwriting.

The opinion as to handwriting is admissible only if the condition laid down in this section is fulfilled, namely the witness is established to have been acquainted with the writing of the particular person in one of the modes enumerated in this section.<sup>7-1</sup> But it may not be necessary to explain in the

5. *Shanker Rao v. Ramji*, 28 B. 58 : 5  
Bom.L.R. 663.

6. I.L.R. (1913) 36 Mad. 159 at 162 :  
14 I.C. 418 : 18 Cr.L.J. 226 : 22  
M.L.J. 270 : 1912 M.W.N. 125.

7. 1925 Pat. 787 at p. 790 : I.L.R. 4

Pat. 394 : 92 I.C. 1034 : 7 P.L.T.  
507.

7-1. *Rahim Khan v. Khurshid Ahmed*,  
A.I.R. 1975 S.C. 290 : (1975) 1  
S. C. R. 643 : (1974) 2 S.C.C.  
660 : (1975) 2 S.C.J. 178.

irst instance as to the manner in which the witness became so acquainted.<sup>7-2</sup> If the acquaintance of the witness with writing in question was not established in chief examination but was proved by answers given in cross-examination or other evidence the opinion of the witness became admissible.<sup>7-3</sup>

The witness need not swear to his belief, his bare opinion being admissible, though a mere statement that the writing is like that of the supposed writer is insufficient. For such a statement may be perfectly true, and yet within the knowledge of the witness, the paper may have been written by an utter stranger.<sup>8</sup> The evidence, being primary and not secondary in its nature, will not become inadmissible because the writer himself or someone who saw the document being written, might have been called.<sup>9</sup> The evidence is admissible though the disputed document cannot be produced, as where it is lost or incapable of removal.<sup>10</sup>

5. **Value of evidence of lay witness.** An opinion of a witness about handwriting is not conclusive evidence; it is justiciable and the court can refuse to act upon it.<sup>10-1</sup> While evidence of opinion or belief is admitted for the purpose of proving handwriting, where direct evidence of one who was present when the document was written is not available, and familiarity with the handwriting in question may be slight, an opinion based on mere inference is insufficient.<sup>11</sup> As Osborn, the leading author on questioned documents, says in his book, "The Problem of Proof"<sup>12</sup>: "In the interest of justice it should be better known that about the weakest and most inconclusive testimony that is ever presented in a Court of law is the usual opinion testimony of lay witnesses regarding handwriting." "It is possible for an occasional lay witness to become familiar with a particular signature by seeing it often and under conditions that enable the observer to gain a knowledge of its features and qualities. But even this knowledge, in almost every case, covers only in acquaintance with the general appearance of the signature as a whole. As every imitation takes on some elements of this general appearance, and a racing, if well made, very closely approximates the general appearance of the genuine model from which it was traced, a dependence on general appearance alone on which to base an opinion that a signature is genuine is always dangerous." But the evidence of a witness acquainted with the handwriting of the person by whom the disputed handwriting is supposed to be written is more valuable than that of a handwriting expert who only compared the disputed handwriting with a handwriting regarded as genuine—merely on the evidence of the witness.<sup>13</sup>

The evidence of persons acquainted with the handwriting of the executant of a document is relevant and admissible. But, his opinion which is based on himself comparing the handwritings would not be admissible, since

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| 7-2. Umrao Chand v. Inder Chand, 1971 Raj. L. W. 500; I. L. R. (1971) 21 Raj. 823.                                    | 10-1. Chandreswar Singh v. R. Singh, A. I. R. 1973 Pat. 215; 1973 Pat. L. J. R. 393.   |
| 7-3. I.L.R. (1972) 1 Ker. 589.  | 11. Halsbury's Laws of England, 3rd Ed (1956), p. 326 followed in Deputy Commissioner, Lucknow v. Chandra Kishore Tiwari, 1947 Oudh 180; I. L. R. 21 Luck. 362 (F.B.). |
| 8. Taylor, Ev., s. 1868.  | 12. at pp. 462, 465-466.   |
| 9. Taylor, Ev., s. 1862; Best, Ev., s. 232; Lucas v. Williams, <i>infra</i> ; Wright v. Coble, (1885) 1 T. L. R. 555. | 13. Ramanlal Rathi v. The State, 1951 Cal. 305; 52 Cr. L. J. 301.  |
| 10. Sayer v. Glossop, (1849) 2 Ex., 409; see Lucas v. Williams, (1892) 2 Q. B. 113, 116, 117.                         |  |

it would be more or less trenching upon the sphere of the expert.<sup>14</sup> Much reliance cannot be placed on the evidence of a non-expert witness about the identification of an executant's signature, who had only seen the executant writing only once or twice, more so in a case where there is question of identification of a signature which was subscribed before the witness was born.<sup>15</sup>

The Supreme Court has deprecated the practice of the Court playing the role of an expert. Before accepting the evidence of a lay witness under this section, the Court is only to apply its own observation to the admitted or proved writings and compare them with the disputed one, not to become a handwriting expert but to appraise the value of the opinion of the lay witness.<sup>16</sup> Therefore, the Court cannot discard the direct evidence of witnesses in a case and assume the role of an expert to come to the conclusion, merely on the basis of its own observation without assistance from any evidence of an expert, that the disputed signatures are not of the defendant; such a practice is neither legal nor proper.<sup>17</sup>

Section 47 describes the various methods of proving the handwriting of a person. Section 67 says that if a document is alleged to be signed by a person, the signature of that person must be proved; it does not say that the signature must be proved by a person who actually saw that person affixing his signature. If Sections 47 and 67 be read together, the reasonable inference is that the signature of the executant, may be proved either by examining the person in whose presence the signature was affixed, or else by examining another person who is acquainted with the handwriting of the executant and is able to prove his signature by his opinion.<sup>18</sup>

*48. Opinion as to existence of right or custom, when relevant.* When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

*Explanation.* The expression "general custom or right" includes customs or rights common to any considerable class of persons.

14. Rajmal v. Islam Mahomed, A. I. R. 1958 Raj. 6; 1958 Raj. L. W. 89; see however Tarini Kumar Panday v. The State, A. I. R. 1960 Cal. 318; 1960 Cr. L. J. 579.
15. Dhani Bai v. Neem Kanwar, A. I. R. 1972 Raj. 9 (14); 1971 Raj. L. W. 103; 1970 W. L. N. (I) 387.
16. Fakhruddin v. State of M. P., (1967) 2 S. C. A. 135; 1967 S. C. D. 495; (1967) 2 S. C. J. 885; (1967) 1 S. C. W. R. 449; 1967 A. L. J. 303; (1967) 2 Andh. L. T. 38; 1967 A. W. R. (H.C.) 522; 1967 B. L. J. R. 318; 1967 Cr. L. J. 1197; 1967 J. L. J. 441; 1967 M. P. L. J. 473; 1967 M. P. W. R. 38; 1967 M. L. J. (Cr.) 925; 1967 Mah. L. J. 571; A. I. R. 1967 S. C. 1326 (1928).
17. Jogendra Prasad Singh v. Joy Kanta Roy, 1971 Assam L. R. 267; A. I. R. 1971 Assam 168 (170); J. C. Galstaun v. Sonatan Pal, 78 I. C. 668; Azmatullah v. Shiam Lal, 1945 A. L. J. 110; A. I. R. 1946 All. 67.
18. Akshya Narayan v. Maheshwar, A. I. R. 1958 Orissa 207, 212.

*Illustration*

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

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| s. 3 (That a man holds a certain opinion is a fact).         | s. 51 (Grounds of opinion).  |
| s. 60 (Evidence of opinion must be (direct).                 | s. 33, clause (4) (Opinion of witness as to public right or custom or matter of general interest). |
| s. 3 ("Court").  | s. 42 (Judgments relating to matters of a public nature).  |
| s. 2 ("Relevant").   | s. 32, clause (7) (Statements contained in certain documents).                                     |
| s. 13 (Facts relevant where right or custom is in question). |  |

Norton, Ev., 227; Cunningham, Ev., 193, 194.

## SYNOPSIS

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| 1. Principle.  | —Custom.   |
| 2. Scope—Section distinguished from Ss. 13 and 32 (a). | —Explanation.  |
| 3. Usage :   | 4. Opinions of persons likely to know of existence of custom or right. |
| —Opinion.  | 5. <i>Wajib-ul-arz.</i>  |

**1. Principle.** Upon such questions the opinions of persons who would be likely to know of the existence of the custom or right are the best evidence. Such persons are, so to speak, the depositaries of customary law; just as the text-books are the depositaries of the general law.<sup>19</sup>

**2. Scope — Section distinguished from Secs. 13 and 32(a).**—The thirteenth section applies to all rights and customs, public, general and private, and refers to specific facts which may be given in evidence.<sup>20</sup> The fourth clause of Section 32 refers to the reception of second-hand opinion evidence in cases in which the declarant cannot be brought before the Court, whether in consequence of death or from some other cause, upon the question of the existence of any public right or custom or matter of public or general interest made *ante litem motam*, and the seventh clause to statements contained in certain documents. The present section also deals with opinion evidence, but refers to the evidence of a living witness produced before the Court, sworn, and subject to cross-examination,<sup>21</sup> who would be likely to know of the existence of the right or custom, if it existed.<sup>22</sup> For this section, when read with Section 60 post, requires that the person who holds the opinion should be called as a witness; the proviso to the latter section applying only in the case of experts.

19. See Jugmohan v. Mangaldas, (1886) 10 B. 528 (Observations on opinion evidence) and see Luchman v. Akbar, (1887) 1 A. 440; Bai Baiji v. Bai Santok, (1894) 20 B. 53. As to this and the next sections and English law, see Garuradhwaja v. Saparandhwaja, 27 I. A. 238; 23 All. 37; 2 Bom. L. R. 331; 5 C. W. N. 33; 10 M. L. J. 267 (P.C.); (1900) 4 C. W. N. xxxvii.

20. See Gujja v. Fateh, 6 Cal. 171, 181, 186; 6 C. L. R. 439 (T.B.); Soorjo Narain Panda v. Bissumibhur Singh, 23 W. R. 311.

21. See Parbhu Narain Singh v. Jiten-

dra Molian Singh, 1948 Oudh 307, 342; I. L. R. 22 Luck. 522; 1947 A. W. R. (H.C.) 301; 1947 O. W. N. (C.C.) 421; Amina Khatoon v. Khalil-ur-rahman, 1933 Oudh 246; I. L. R. 8 Luck. 445; 150 I. C. 282; 10 O. W. N. 268; Garuradhwaja v. Saparandhwaja, 27 I. A. 238; 23 All. 37; 2 Bom. L. R. 331; 5 C. W. N. 33; 10 M. L. J. 267 (P.C.); Protap Chandra Deo v. Jagdish Chandra Deo, 1925 Cal. 116; 82 I. C. 886; 40 C. L. J. 331.

22. Ram Chandra v. Pratap Singh, A. I. R. 1965 Raj. 217; 1965 Raj. L. W. 242.

It is admissible for a living witness to state his opinion on the existence of a family custom, and to give as the ground thereof information derived from deceased persons, and the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion. But it must be the expression of independent opinion based on hearsay, and not mere repetition of hearsay.<sup>23</sup> The section does not apply to a case where a specific right is claimed by a particular individual.<sup>24</sup> It refers only to general rights and customs, not public, the Explanation to the section adopting the sense in which the term 'general' is used by English text-writers.<sup>25</sup> It does not appear why the section does not provide for the admission of oral evidence expressing opinion as to the existence of a public custom or right. It may perhaps be said that every public custom or right is a general custom or right, though the converse of this proposition would not hold good<sup>1</sup> or that having regard to the reasons for which these terms are used by English writers the distinction between them is not of importance in this country.<sup>2</sup> The present section further differs from the fourth clause of Section 32, inasmuch as it is not governed by the limitation *ante item motam*.

**3. Usage.** Evidence as to usage will also be admissible under this section which is not limited to ancient custom.<sup>3</sup> The word 'usage' would include what the people are now or recently were in the habit of doing in a particular place. It may be that this particular habit is only of very recent origin, or it may be one which has existed for a long time. If it be one regularly and ordinarily practised by the inhabitants of the place where the tenure exists, there would be 'usage' within the meaning of the section.<sup>4</sup>

**Opinion—**Ordinarily speaking, a witness must, in his examination-in-chief, speak to facts only. But, under this section, he will be allowed to give his opinion as to the existence of a general right or custom. He will not be confined to instances in which he has personally known the right or custom exercised as a matter of fact.

An ancient certain and reasonable usage in derogation of general rules of law practised in a particular family or a particular class or community is called a custom. It has to be established by unambiguous evidence.<sup>4-1</sup> One of the modes of proving custom is by the opinion of persons likely to know its existence under this section.<sup>4-2</sup> His personal knowledge is not necessary but he should have sufficient experience as may suggest the likelihood of his

23. Garuradhwaja v. Saparandhwaja, 271 A 238; 23 All. 37; 2 Bom. L. R. 331 : 5 C.W.N. 33 : 10 M.L.J. 267 (P.C.).

24. Sankaracharya v. Manali Saravna Mudaliar, A. I. R. 1920 Mad. 815: 51 I.C. 876.

25. See p. 331 (Vol. I) under Note 3 "Res gestae."

1. Cunningham, Ev., 194.

2. See p. 331 (Vol. I) under Note 3 "Res gestae".

3. Sariatullah v. Prannath, (1898) 26 C. 184, 187; 3 C. W. N. 49 following Dalglis v. Guzuffer, (1896) 23 C. 427; Fitzhardinge v. Purcell, (1908) 2 Ch. 139; Bajrangi v. Ma-

nokarnika, I. L. R. 30 All. 1: 12 C. W. N. 74.

4. ib. The distinction between custom and usage has been said to be that "usage is a fact and custom is a law. There can be usage without custom, but not custom without usage. Usage is inductive, based on consent of persons in a locality. Custom is deductive making established local usage a law." Wharton, Ev., s. 695; see notes to S. 18 ante.

4-1. S. C. Varshney v. I. T. Commissioner, 1975 Tax L. R. 1026 (Pat.); 1975 B. B. C. J. 416.

4-2. (1971) 1 B. B. C. J. 43.

knowledge of the custom sought to be proved by him. A mere *ipse dixit* of the witnesses is not sufficient.<sup>4-3</sup>

**Custom.** Custom is not a matter to be submitted to the senses. It is made up of an aggregated repetition of the same fact, whenever similar conditions arise, and though a bare opinion is worth nothing unless we can ascertain the data on which it is founded, yet it is always to be remembered that Section 51 is to be read with this section, and that the grounds for the witness's opinion are sure to be elicited in cross-examination, even if they should not be elicited in the examination-in-chief, or demanded by the Judge. A boundary between villages; the limits of a village or town; a right to collect tolls; a right to the exclusion of others; a right to pasturage of waste lands; liability to repair roads or plant trees; rights to watercourse, tanks, ghats for washing, rights of commons and the like, will be found the most ordinary in mofussil practice.

**Explanation.** The Explanation excludes private rights from the operation of this section. Opinion or reputation evidence is not receivable to prove such rights. They must be proved by facts, such as acts of ownership. This kind of evidence is admissible to disprove as well as to prove a general right or custom.<sup>5</sup> It is only opinions as to the existence of a general custom or right that are made admissible under this section. Opinions of witnesses as to the effect in law of a customary transaction in business firms are both inadmissible and useless.<sup>6</sup>

**4. Opinions of persons likely to know of existence of custom or right.** A tribal or family custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence and its exercise without controversy. Specific instances need not be proved.<sup>7</sup> Such evidence is admissible under this section. But it *must be evidence of opinion of persons who would be likely to know of its existence if it existed*.<sup>8</sup> The answers in Wilson's Manual on Questions of Customary Law in the Punjab have been held to be admissible under this section being the opinions, as to the existence of a general custom or right, of persons who would be likely to know of its existence, if it existed. They are also admissible under Section 35, as entries relating to a relevant fact contained in what may be regarded

- 4-3. Vrajlalji v. V. M. Chandraprabha, A. I. R. 1971 Guj. 188; I. L. R. 1970 Guj. 791.
- 5. Norton, Ev., 227: "The opinions of persons likely to know about village rights to pasturage, to use of paths, watercourses, or ferries, to collect fuel, to use tank and bathing ghats, mercantile usage and local customs, would be relevant under this section." Cunningham, Ev., 193.
- 6. Sooniram Ramniranjandas v. Alagu Nachiar Koil, A. I. R. 1938 P. C. 259; 176 I.C. 906; 40 Bom. L. R. 1236; 42 C. W. N. 1125; (1939) 2 M. L. J. 192; 1938 M. W. N. 1002; 48 L. W. 466.
- 7. Ahmad Khan v. Mst. Channi Bibi, A. I. R. 1925 P. C. 267; 52 I. A. 379; I. L. R. 6 Lah. 502; 91 I. C. 455; 3 O. W. N. 93.
- 8. Hubraji v. Chandrabali Upadhiva, A. I. R. 1931 Oudh 89 (2); I. L. R. 6 Luck. 519; 130 I.C. 849; 8 O. W. N. 6; Thunti v. Dhaniram, A. I. R. 1953 H. P. 66; Ram Singh v. Jit Rain, 1954 H. P. 20; Virajlalji v. V. M. Chandraprabha, A. I. R. 1971 Guj. 188; I. L. R. 1970 Guj. 791; see also Mohammad Alam v. Mst. Hafizan, A. I. R. 1934 Lah. 351; I. L. R. 15 Lah. 791; 150 I.C. 16; 35 P. L. R. 378.

as a public record, made by a public servant in the discharge of his official duty.<sup>9</sup> Similarly, Rattigun's Digest of Customary Law has been accepted as a book of unquestioned authority in the Punjab.<sup>10</sup>

5. *Wajib-ul-arz.* *Wajib-ul-arz* or village papers, made in pursuance of Regulation VII of 1822, regularly entered and kept in the office of the Collector and authenticated by the signatures of the officers who made them were held to be admissible, under Section 35, in order to prove a custom. The Privy Council further put it as a query, whether they were not also admissible under the present section as the record of opinion as to the existence of such custom by persons likely to know of it, or under the following section.<sup>11</sup> And the Privy Council held them to be admissible under this section in the undermentioned case.<sup>12</sup> Similarly, a Settlement Report was held to be admissible under this section.<sup>13</sup> In a suit by the landlords to avoid the sale of an occupancy-holding in their mauza, and eject the purchaser thereof, one of the questions was as to the existence of a custom or usage under which the raiyat was entitled to sell such a holding. It was held that in deciding on the evidence of such a custom or usage regard should be had to the provisions of this section.<sup>14</sup> In the undermentioned case,<sup>15</sup> also the plaintiffs by virtue of *putni* settlement sought to obtain *khās* possession of certain *jote* lands which purported to have been conveyed by the *jotedars*, the first set of defendants, to the second set of defendants, although there was no custom or usage in the village recognizing the transferability of occupancy rights. It was held, that, in order to establish usage under Sections 178 and 183 of the Bengal Tenancy Act, it was not necessary to require proof of its existence for any length of time and that the statements made by the persons who were in a position to know the existence of a custom or usage in their locality were admissible under this section.<sup>16</sup> But, in a Bombay case, where the question was whether Cutchi Memons were subject by custom to Hindu Law, evidence of Counsel was adduced and it was argued that Counsel learnt from their clients in the course of advising professionally of the existence or otherwise of such a right or custom as was in controversy. Beaman, J., doubted, whether that was intended by the framers of this section and added: "Speaking for myself, I do not think that the opinion of the Bar collectively or any member of it is of any real value upon such a point."<sup>17</sup>

9. (Mst.) Subhani v. Nawab, A. I. R. 1941 P. C. 21; 68 I. A. 1; I. L. R. 1941 Lah. 154; 193 I.C. 436; 1941 A. L. J. 530; 43 Bom. L. R. 432; 43 P. L. R. 318; see also Bawa Singh v. Mst. Taro, A. I. R. 1951 Simla 239; I. L. R. 1950 Punj. 347.
10. Salig Ram v. Mst. Maya Devi, 1955 S. C. 266; (1955) 1 S. C. R. 1191; 57 Punj. L. R. 247; 1955 S. C. A. 382; 1955 S. C. J. 248.
11. Lekhraj v. Mahpal, (1879) 7 I. A. 63, 71; 5 C. 744.
12. (Mst.) Lali v. Murli, 10 C. W. N. 730.
13. Somar Ram v. Budhu Ram, A. I. R. 1937 Pat. 463; 171 I. C. 115; 18 P. L. T. 575; 1937 P. W. N. 446.
14. Dalglish v. Guzaffer, (1896) 23 C.

- 427 followed in Sariatullah v. Prannath, (1898) 26 C. 184.
15. Sariatullah v. Prannath, (1898) 26 C. 184.
16. "For example, a person who had been in the habit of writing out deeds of sale, or one who had been seeing transfers frequently made, would certainly be in a position to give his opinion whether there was a custom or usage in that particular locality and we think that the opinions of such persons would be admissible (under this section)," ib., 187, 188.
17. Advocate-General v. Jimba Bai, 41 Bom. 181; 31 I. C. 106 at 117; 17 Bom. L. R. 799; A. I. R. 1915 B. 151.

49. *Opinions as to usages, tenets, etc., when relevant.* When the Court has to form an opinion as to—the usages and tenets of any body of men or family, the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.

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| s. 3 ("Court.")  | contracts.)  |
| s. 3 ("Relevant.")                                     | s. 98 (Evidence as to technical expressions, etc.) |
| s. 3 ("Fact.")   | s. 51 (Grounds of opinion).                        |
| s. 3 (That a man holds a certain opinion is a "fact.") | s. 60 (Evidence of opinion must be direct).        |
| s. 91, Prov. (5) (Usage and custom in                  |  |

Rogers' Expert Testimony, ss. 117, 118; Norton, Ev., 228; Cunningham, Ev., 194; see also generally as to this section, Notes to Section 13, and Chapter VI, post.

#### SYNOPSIS

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| 1. Principle.                          | (d) Tenets of a family.  |
| 2. Opinion as to usages, tenets, etc.: | (e) The constitution and governments of any religious or charitable foundation.                    |
| (a) The usages of any body of men :    | (f) The meaning of words or terms used in particular districts or by particular classes of people. |
| —Special means of knowledge.           |  |
| (b) Tenets of any body of men.         |  |
| (c) Usages of family.                  |  |

1. **Principle.** On such questions as usages, tenets, etc., the opinions of persons having special means of knowledge are the best evidence. But the person should be examined in the case. An opinion expressed by a living person in a treatise will not be admissible in view of Section 60.<sup>17-1</sup>

2. **Opinion as to usages, tenets etc.** Under this section a witness may give his 'opinion' upon the following :

(a) *The usages of any body of men.* This will include usages of trade and agriculture, mercantile usage, and any other usage common to a body of men, and the opinions of persons, experienced therein will be received in evidence. "Usage is proved by witnesses testifying to its existence and uniformity from their knowledge, obtained by observation of what is practised by themselves and others in the trade to which it relates. But their conclusion or inference as to its effect, either upon the contract or its legal title or rights of parties, is not competent to show the character or force of the usage."<sup>18</sup>

17-1. Kandan v. Jitan, A. I. R. 1973 Pat. 206; I. L. R. (1974) 49 Pat. 21: 1973 Pat. L. J. R. 153.

18. Haskins v. Warren, 115 Mass. 514, 535 (Amer.) cited in Rogers' Expert

Testimony, s. 117; see also Beja v. Emperor, A. I. R. 1914 Lah. 539 (2): 26 I.C. 625; 16 Cr. L. J. 83: 18 P. R. 1914 (Cr.): 223 P. L. R. 1915.

*Special means of knowledge.* Such evidence is admissible only, if the persons giving their opinions have special means of knowledge regarding the usages or tenets of any body of men or their family.<sup>19</sup> The section only requires that the persons testifying should have "special means of knowledge". It does not, in any manner, limit the character of such special means of knowledge, which may be derived only from the witness's own business, if that has been sufficiently extensive and long continued,<sup>20</sup> or from his knowledge of the same or different business carried on by others, if he has been connected with such business.<sup>21</sup> So, it has been held, that a London stock-broker is a competent witness as to the course of business of London Bankers.<sup>22</sup>

A person may be competent to testify as to the usage which prevails in a certain business, without himself being engaged in that business. So that, when the question was as to the custom of the New York Banks in paying the cheques of dealers, it was held not improper to call as witnesses persons who were not employed in Banks.<sup>23</sup>

On the issue, whether an alleged commercial usage exists, a witness may be asked to describe how, under the usage in force, a transaction like the one in question would be conducted by all the parties thereto from its inception to its conclusion.<sup>24</sup> The weight of such evidence would depend upon the position and character of the witness, and his evidence must be the expression of an independent opinion formed on what he has known or heard. Repetition of hearsay is still evidence.<sup>25</sup>

This section deals with 'opinion'. Specific facts as to usages are provable under the 13th section ante.

(b) *Tenets of any body of men.* This includes any opinion, principle, dogma, or doctrine which is held or maintained as truth. It applies to religion, politics, etc.

(c) *Usages of a family.* Such for instance, as the custom of primogeniture in the families of ancient zemindars<sup>1</sup>; any peculiar course of descent; the

- 19. Tulasiram v. Ramprasanna, A. I. R. 1956 Orissa 41; I. L. R. 1955 Cut. 653.
- 20. Haskins v. Warren, 115 Mass. 514 at p. 535 cited in Rogers, 2nd Ed., s. 117, p. 271.
- 21. ib.
- 22. Adams v. Peters, (1849) 2 C. & K. 723.
- 23. Griffin v. Rice, 1 Hilton, N. Y. 184 (Amer.) in which it was said: "Although not employed in banking business, the witnesses were dealers with the banks, and had knowledge of the ordinary course of dealing with them. There is no necessity for showing a man to be an expert in banking in order to prove a usage. He should know what the usage is, and then he is competent to testify, whether he be

- a banker, or employed in a bank, or a dealer with banks. There is no reason why a dealer should not have as much knowledge on such a subject as a person employed in a bank." Cited in Rogers, 2nd Ed. s. 117, pp. 272-273.
- 24. Krishono v. Wright, 115 Mad. 361 (Amer.).
- 25. Tulasiram v. Ramprasanna, 1956 Orissa 41, 46; I. L. R. 1955 Cut. 653.
- 1. See Lekhraj Singh v. Mahpal Singh, 7 I. A. 63; I. L. R. 5 Cal. 744; 6 C. L. R. 593 (P.C.); Garuradhwaja v. Saparandhwaja, 27 I. A. 238; I. L. R. (1900) 23 All. 37; 2 Bom.-L. R. 831; 5 C. W. N. 33; 10 M. L. J. 267 (P. C.); Sarabjit v. Inderjit, I. L. R. 27 All. 203; 2 A. L. J. 720, 732.

usages of native convert families and the like.<sup>2</sup> In such and the like cases, in order to prove a custom of this kind, the evidence must be cogent, aboveboard and unimpeachable. It should further be established that the custom was an ancient one. It is true that about things which happened a long time ago, it is difficult to expect direct testimony of persons who were living then and are dead. In such cases, a party has to remain content by examining witnesses who may otherwise be competent to speak either about the inheritance or the custom governing succession of the property belonging to any family. However, the question remains whether the witness who comes to depose about the custom heard of it from his ancestors and whether there was any occasion for his having any conversation with his ancestors about that custom.<sup>3</sup> Where there are three families, all descending from a common ancestor, and it is found that in the two families the rule of primogeniture is prevalent, it gives rise to a probability that the custom is prevalent in the third family as well.<sup>4</sup> Where a custom prevails in one branch of a family, it is strong evidence that it prevails in another branch of the same family.<sup>5</sup>

The burden of proving that a custom of primogeniture regulates the succession to the property rests upon the person who claims to inherit in that right.<sup>6</sup> There is no presumption, either of law or of fact that a custom of primogeniture prevails in a family, simply because it prevails in another branch of the same family, though the latter fact gives rise to a probability that the same custom prevails in the other branch of the same family.<sup>7</sup> If one family branches out into more families, the greater possibility is that such custom may also prevail in other branches.<sup>8</sup>

Custom is of two kinds: kulachar, or family custom and desachar, or local custom.<sup>9</sup>

(d) *Tenets of family.* These are the opinions, principles or doctrines which the family holds or maintains as true.

(e) *The constitution and governments of any religious or charitable foundation.* As to the Acts and Regulations touching such foundations, see.<sup>10</sup>

(f) *The meaning of words or terms used in particular districts or by particular classes of people.* Under Section 98 post, evidence may be given with reference to a document to show the meaning of 'technical, local and provincial expressions, abbreviations, and of words used in a peculiar sense'. For this purpose, as for others, the opinions of persons having special means

2. See Garuradhwaja v. Saparandhwaja, I. L. R. (1900) 23 A. 37; 27 I. A. 238; 2 Bom. L. R. 831; 5 C. W. N. 33; 10 M. L. J. 267 (P.C.).
3. Kameshwar Prasad v. Mithilesh Kishori, A. I. R. 1964 Pat. 150.
4. Garuradhwaja v. Saparandhwaja, 27 I. A. 238; I. L. R. (1900) 23 All. 37; 2 Bom. L. R. 831; 5 C. W. N. 33; 10 M. L. J. 267 (P.C.); Kameshwar Prasad v. Mithilesh Kishori, A. I. R. 1964 Pat. 150.
5. Gajendra Nath v. Mathurjal, A. I. R. 1916 Pat. 337; 1 Pat. L. J. 109; Kameshwar Prasad v. Mithilesh Kishori, supra.
6. Garuradhwaja Prasad v. Saparandhwaja, supra.
7. Kameshwar Prasad v. Mithilesh Kishori, A. I. R. 1964 Pat. 150.
8. Ibid.
9. See Notes to S. 13 ante.
10. Beng. Reg. XIX of 1810; Mad. Reg. VII of 1817; Act VII (Bom.) of 1865; Act XX of 1863.

of knowledge on the subject would be the best evidence.<sup>11</sup> This part of the section is particularly valuable in a multilingual country like India where even the dialect of the same language varies from district to district and justice is largely administered in languages other than English. A police officer might give evidence that he had had a long experience amongst people who indulged in *satta* gambling in a particular district, and from that experience, supported by instances which he should be prepared to give so as to establish his means of knowledge, he was satisfied that a system or code prevailed among such persons, and he might then express an opinion (which would be relevant under the section) that the slips in question were prepared in accordance with that system or code and had a certain meaning.<sup>12</sup> But the witness must claim to be an expert having special means of knowledge of the meaning of the words used in recording betting transactions. Otherwise his evidence is not admissible under this section.<sup>13</sup> A Judge may also consult a dictionary as to the meaning of a word, as to which see the penultimate paragraph of Section 57 post. This section, like the others, must be read with Section 51 post, for the opinion, without the grounds upon which it is based, may be of comparatively little value.<sup>14</sup> By Section 60, if oral evidence refers to an opinion or the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. Thus it is admissible evidence for a living witness to state his opinion on the existence of a family custom and to state as the grounds of that opinion by the information derived from deceased persons, and the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion. But it must be the expression of the independent opinion based on hearsay and not mere repetition of hearsay.<sup>15</sup> Sections 48 and 49 do not deal with the statements of dead person or persons who cannot be found. Such cases are dealt with by Section 32.<sup>16</sup>

50. *Opinion on relationship, when relevant.* When the Court has to form an opinion as to the relationship<sup>17</sup> of one person to another the opinion, expressed by conduct, as to the existence of such relation-

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- 11. Cunningham, Ev., 191; Norton, Ev., 228; see notes to S. 98 post.
- 12. *Haifilal Gordhan v. Emperor*, 1937 Bom. 385; I. L. R. 1937 Bom. 670: 39 Bom. L. R. 613: 171 I. C. 282: 38 Cr. L. J. 1047.
- 13. *Harakchand Radhakishan v. State*, 1954 M. B. 145: 55 Cr. L. J. 1347.
- 14. Norton, Ev., 228.
- 15. *Garuradhwaja v. Saparaudhwaja*, I. L. R. (1900) 23 A. 37, 51, 52; 27 I. A. 238: 2 Bom. L. R. 331: 5 C. W. N. 33: 10 M. L. J. 267 (P.C.); *Protap Chandra Dco v. Jagdish Chandra Deo*, 1925 Cal. 116: 82 I. C. 886: 40 C. L. J. 331; *Tulasiram v. Ramprasanna*, 1956 Orissa 41; *Sri Chandra Choor Deo v. Bibhuti Bhushan Deva*, 1945 Pat. 211: I. L. R. 23 Pat. 763: 220 I. C. 260: 12 B. R. 5; *Mst. Amina Khatun v. Khalilurrahman*, 1933 Oudh 246: I. L. R. 8 Luck. 445: 10 O. W. N. 268.
- 16. *Parbhoo Narain Singh v. Jitendra Mohan Singh*, 1948 Oudh 307: I. L. R. 22 Luck. 522: 1947 A. W. R. (C.C.) 301: 1947 O. W. N. (C.C.) 421; see also cases discussed therein.
- 17. It will be noted that the words "by blood, marriage or adoption" have not been inserted after the word "relationship" by Act XVIII of 1872, as in the case of S. 32, cl. (5) and (6). Illustration (a) refers to the case of marriage and Illustration (b) to relationship by blood. Relationship by adoption is not expressly mentioned but is no doubt included within this section. See notes to Sec. 114 with reference to Hindu and Mahomedan Law.

ship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact :

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869) or in prosecutions under sections 494, 495, 497 or 498 of the Indian Penal Code, 1860 (45 of 1860).

### *Illustrations*

(a) The question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(b) The question is, whether A was the legitimate son of B.

The fact that A was always treated as such by members of the family, is relevant.

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| s. 3 ("Court".)  | non-witness.)  |
| s. 3 (That a man holds a certain opinion is a "fact"). | s. 32, cl. (6) (Statement relating to relationship in family document, etc.) |
| s. 3 ("Relevant.")                                     | s. 51 (Grounds of opinion.)  |
| s. 32, cl. (5) (Statement on relationship by           |  |

Taylor, Ev., ss. 578, 649; Norton, Ev., 229, 230; Phipson, Ev., 11th Ed., 424, 426; Steph. Dig., Art. 53; Act IV of 1869 (Indian Divorce); Penal Code, ss. 494, 495, 497, 498.

### SYNOPSIS

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|------------------------------------|--|
| 1. Principle.                      | (b) Whose conduct is relevant?   |
| 2. Conduct and hearsay.            | (c) Conduct expressed in documents.  |
| 3. Scope :                         | (d) Other cases of conduct.  |
| (a) General.                       | 10. "As to the existence of such relationship".  |
| (b) Nature of evidence admissible. | 11. "Of any person who as a member of the family or otherwise has special means of knowledge". |
| 4. Sections 32 (5) and 50.         | 12. Presumptions from conduct.   |
| 5. Sections 50 and 60.             | 13. Proviso : Divorce or criminal proceedings.   |
| 6. Requirements of the section.    |  |
| 7. Opinion on relationship.        |  |
| 8. General reputation.             |  |
| 9. Opinion expressed by conduct :  |  |
| (a) "Conduct", what is?            |  |

1. **Principle.** As the opinion in this case is to be evidenced by the conduct, there is an additional guarantee of its trustworthiness, besides that of special knowledge of the subject.<sup>18-20</sup> The proviso is enacted because strict proof is required in all criminal cases<sup>21</sup> as also in proceedings under the Divorce Act, in which marriage is the main fact to be proved before jurisdiction can be shown or relief granted.<sup>22</sup>

18-20. Norton, Ev., 229 and see Taylor, Ev., ss. 578, 649, and notes post.

21. R. v Kallu, (1882) 5 A. 233.

22. See R. v. Pitambur, (1879) 5 C. 566; 5 C. L. R. 597 (F.B.); Norton, Ev., 233. "The proviso is inserted because in divorce and bigamy cases marriage must be strictly proved,

that is, by the evidence of a witness who was present at the marriage, or by the production of the register, or examined copy of the register, or of such other record as the law of a country or custom of a class may provide"—ib.

2. **Conduct and hearsay.** A question arises whether conduct can amount to hearsay. Does apparent belief translated into action stand in a better position as respects the hearsay rule than apparent belief, translated into statements? Both Taylor<sup>23</sup> and Willes<sup>24</sup> take the view that conduct can amount to hearsay, at least "whenever it is relied upon for the same purpose as an express statement, that is, as tending to show his knowledge or opinion in regard to the existence of some fact which it is sought to prove", to use Willes's own words. Phipson<sup>25</sup> does not agree that conduct can amount to hearsay, and says that such conduct is excluded as being "opinion evidence upon a subject on which such evidence is not receivable". The leading decision on the subject is *Wright v. Tatham*.<sup>1</sup> A study of the judgments in that case leads to the conclusion that conduct in such a case is equivalent to a direct and positive statement, but Phipson maintains that the evidence in this case was excluded as opinion evidence and not as hearsay which is not inconsistent with his contention that assertions by conduct cannot amount to hearsay and that they are admitted or excluded on grounds of relevancy only. Stephen<sup>2</sup> also confines hearsay to oral or written statements, and points out that many cases in their implications show that evidence of conduct is outside the sphere of hearsay; for example, on question of family relationship, the fact that the person in question was treated as a relation by members of the family is admitted.<sup>3</sup> Again, the fact that neighbours have treated a couple as husband and wife is admitted as evidence of their marriage. Presumably, this is the reason why this subject is treated in the Indian Evidence Act as a part of opinion evidence. It may also be recalled here that under Section 8 of the Act conduct does not include statements, unless these statements accompany and explain acts other than statements.

It is not clear what stand Wigmore took on the matter. In paragraph 459 he draws a distinction between conduct which, he says, is used circumstantially and so is original evidence, and assertions (oral or written) which are used testimonially; although he admits that in effect an inference from conduct may be the same in result as an inference from assertion, he maintains that the two are distinct. According to this paragraph he would admit conduct in evidence and confine the hearsay rule to deliberate utterances. Yet in paragraph 267 he argues that conduct evidence as supporting an inference of a person's belief and so of the fact believed, is generally inadmissible because it is open to construction as an assertion and is therefore hearsay. Then in paragraphs 268-9 he cites two cases where conduct is admitted, namely to evidence marriage and legitimacy, but he does agree that however well-founded these may be, they must be regarded as casual and unusual.

This section enacts an exception to the general rule excluding hearsay evidence and allows to prove relationship between two persons by the opinion of a particular class of witnesses expressed by conduct.<sup>2-1</sup>

3. **Scope. (a) General.** The Evidence Act does not contain any express provision making evidence of general reputation admissible as proof of

23. Evidence, S. 570.

24. Evidence, p. 147.

25. Evidence, 9th Ed., p. 222.

1. (1838) A. & E. 313; 5 Cl. & F. 670.

2. Art. 15.

3. *Greaves v. Greenwood*, (1877) 2 Ex. D. 289.

3-1. *Natabar Sahu v. Paicha Pel*, (1978) 1 C. W. R. 152.

relationship.<sup>4</sup> Reputation is simply a cumulation of ordinary "perception testimonies" heard and gathered and reduced to a single implied assertion, which assertion is now reported to the tribunal by the witness who perceived the cumulative assertions. The special weakness of reputation is the anonymity of the original assertors. All the considerations for hearsay testimony apply here. The other special weakness of "reputation evidence" is difficulty of checking the trustworthiness of the witness reporting it. Where a witness asserts that a reputation existed as to the particular relationship of some particular persons it is ordinarily impracticable to uncover his error, if any. Cross-examination, of other witnesses, may disclose grounds for doubt. But, for the most part, his assertion is likely to remain simply an assertion, dependent for its value on his own appearance and relationship to the parties. This section is the only provision which, to a certain extent, allows evidence somewhat akin to "reputation evidence". It makes "opinion expressed by conduct", as to the existence of relationship of one person to another, a relevant fact.

(b) *Nature of evidence admissible.* An opinion about relationship is admissible if it satisfies the tests laid down in section 50.<sup>4-1</sup> What is made admissible by this section is the opinion expressed by conduct. The conduct must be of such a tenor as to be the result of an inner existence of such opinion.<sup>4-2</sup> Opinion means judgments or beliefs—what one thinks on a particular question—a belief, a conviction. So, when a Court has to judge as to the relationship of one person to another, it is permitted to take into consideration the "belief" or "judgment" of a person provided the requirements of this section are satisfied. The "belief" is indeed a state of mind and can be evidenced by (1) external circumstances, calculated by their presence or occurrence to bring about the state of mind in question; and consequently showing the probability that the state of mind subsequently ensued; (2) conduct or behaviour illustrating and pointing back to the state of mind producing it, (3) a prior or subsequent state of mind indicating within certain limits, its existence at the time in question. The section allows only "conduct" as evidence of the opinion, a conduct, which is the expression, in outward behaviour, of the belief entertained, and the section makes only "opinion" as relevant, and enjoins how this opinion itself is to be proved. It is only "opinion as expressed by conduct" which is made relevant. This is how the conduct comes in. The offered item of evidence is "the conduct", but what is made admissible in evidence is "the opinion", the opinion as expressed by such conduct. The offered item of evidence thus only moves the Court to an intermediate decision; its immediate effect is only to move the Court to see, if this conduct establishes any "opinion" of the person, whose conduct is in evidence, as to the relationship in question. In order to enable the Court to infer "the opinion", the conduct must be of a tenor which cannot well be supposed to have been willed without the inner existence of the "opinion". When the conduct is of such a tenor, the Court only gets to a relevant piece of evidence, namely, the opinion of a person. It still remains for the Court

4. Lakshmi Reddi v. Venkata Reddi, 1937 P. C. 201 at 202; 168 I. C. 881; 1937 A. W. R. 1010; 39 Bom. L. R. 1005; 1937 M. W. N. 1271; 46 L. W. 88; 1937 O. W. N. 724; 1937 P. W. N. 547; 18 P. L. T.

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| 4-1. | 471.   |
|      | Balaram Das v. J. Das, A. I. R. 1972 Orissa 141; 38 Cut. L. T. 44. |
| 4-2. | Bhagwathy v. Raman Kutty, A. I. R. 1976 Ker. 34.                   |

to weigh such evidence and come to its own opinion as to the *factum probandum*—as to the relationship in question.<sup>5</sup>

Oral evidence of witnesses who have no special means of knowledge and whose evidence can be said to be mere hearsay, is not admissible under this Section, because that is not the opinion expressed by conduct as to the existence of relationship.<sup>6</sup> However, when a person has been treated as an adopted son since quite a long time, an unimpeachable oral evidence of a neighbour or relative that he heard the son addressing the adoptive parents as father or mother may be accepted although the proof of giving and taking was not available.<sup>6-1</sup> It is not necessary that the person whose conduct expresses his opinion about relationship between two persons must be called in witness-box; such opinion can be proved by any other witness who has seen the person expressing his opinion by conduct.<sup>6-2</sup> The special means of knowledge required by the section is that of the person whose opinion is sought to be proved and not of the person who comes to prove such opinion.<sup>6-3</sup>

**4. Sections 32(5) and 50.** The statement of a witness on the question of relationship can be admissible either under Section 32(5) or Section 50, Evidence Act. If any particular statement does not fall within the purview of one or the other of these provisions, it should be ruled out as inadmissible.<sup>7</sup> The points of difference between the two are:

(a) Section 32(5) relates to statements of deceased persons only whereas this section makes opinion of living persons also admissible. That portion of Section 60 which provides that the person who holds an opinion must be called does not apply to the evidence dealt with by this section, namely, opinion expressed by conduct, which, as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is so evidenced, or by that of some other person acquainted with the facts which evidence such opinion. As the testimony in both the cases relates to such external facts and is given by persons personally acquainted with them, the testimony is in each case direct within the meaning of the earlier portion of that section.<sup>8</sup>

5. Chandu Lal Agarwalla v. Khatemonnessa, 1943 Cal. 76; I. L. R. (1942) 2 Cal. 299; 205 I. C. 344; 75 C. L. J. 301; 46 C. W. N. 729.
6. Dukh Haran v. Bihasa Kuer, A. I. R. 1963 Pat. 390.
- 6-1. Sankhi Bewa v. Chandra Majhi, (1973) 39 C. L. T. 635; I. L. R. (1972) Cut. 98; Jagabandhu v. Bhagu, (1973) 1 C. W. R. 809; I. L. R. (1973) Cut. 553; A. I. R. 1974 Orissa 120.
- 6-2. Amar Singh v. Chhajju Singh, A. I. R. 1973 Punj. 213 (F.B.); I. L. R. (1972) 2 Punj. 424; 74 Punj. L. R. 625; 1972 Cut. L. J. 591; Balaram Das v. J. Das, A. I. R. 1972 Orissa 141; 38 Cut. L. T. 44.
- 6-3. Hazara Singh v. Attar Kaur, A. I. R. 1976 Punj. 24; 1975 Rev. L. R. 567.
7. (Mst.) Chunna Kunwar v. Lala Mukut Behari Lal, 1934 All. 117; 151 I. C. 338.
8. In R. v. Subbarayan, (1885) 9 M. 9, 11, it seems to be suggested by Hutchins, J., that proof of the opinion by other than the person holding it can only be given when the latter is dead or cannot be called. But if this be so, it is submitted that such a limitation is incorrect for, amongst others, the reason given above. The Supreme Court in the case cited in the next footnote, at p. 919 of A. I. R. 1959 S.C. has held that there is no such limitation.

(b) A statement to be admissible under Section 32(5) must have been made before any controversy as to the matter has arisen. There is no such restriction under this section.

There can be a combination of both the provisions. When a person is told about relationship with his ancestors and acting on that information he formed opinion about that relationship and expressed such opinion by conduct, e.g. by offering Fatiha to those ancestors, his evidence as to such relationship is admissible.<sup>8-1</sup>

**5. Sections 50 and 60.** In a Supreme Court decision, namely, *Dolgobinda Paricha v. Nimai Charan Misra*,<sup>9</sup> the law has been lucidly laid down with reference to the relevant provisions of the Evidence Act, S. K. Das, J., said :

"On a plain reading of the Section 50 it is quite clear that it deals with relevancy of a particular fact. It states in effect that when the Court has to form an opinion as to the relationship of one person to another the opinion expressed by conduct as to the existence of such relationship of any person who has special means of knowledge on the subject of that relationship is a relevant fact. The two illustrations appended to the section clearly bring out the true scope and effect of the section. It appears to us that the essential requirements of the section are—(1) there must be a case where the Court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact; (3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of family or otherwise has special means of knowledge on the particular subject of relationship; in other words, the person must fulfil the condition laid down in the latter part of the section.

"If the person fulfils that condition, then what is relevant is his opinion expressed by conduct. Opinion means something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. Now the 'belief' or conviction may manifest itself in conduct or behaviour which indicates the existence of the belief or opinion. What the section says is that such conduct or outward behaviour as evidence of the opinion held is relevant and may, therefore, be proved. We are of the view that the true scope and effect of Section 50, Evidence Act, has been correctly and succinctly put in the following observations in *Chandu Lal v. Khalilah Rahman*.<sup>10</sup>

'It is only "opinion as expressed by conduct" which is made relevant. This is how the conduct comes in. The offered item of evidence is the "conduct", but what is made admissible in evidence is "the opinion", the opinion as expressed by such conduct. The offered item of evidence thus only moves the Court to an intermediate decision: its immediate effect is only to move

8-1. *S. M. Dawood Bibi v. A. P. Pula-var*, A. I. R. 1972 Mad. 228.

9. A. I. R. 1959 S. C. 914 (918, 919): (1960) 1 S. C. R. 39: 26 Cut. L. T. 130; 1959 (Supp.) 2 S. C. R.

814.  
10. I. L. R. (1942) 2 Cal. 299 at p. 309; 205 I. C. 344; A. I. R. 1943 Cal. 76 at p. 80.

the Court to see if this conduct establishes any "opinion" of the person, whose conduct is in evidence, as to the relationship in question. In order to enable the Court to infer "the opinion" the conduct must be of a tenor which cannot well be supposed to have been willed without the inner existence of the "opinion". When the conduct is of such a tenor, the Court only gets to a relevant piece of evidence, namely, "the opinion of a person". It still remains for the Court to weigh such evidence and come to its own opinion as to the *factum probandum*—as to the relationship in question.'

"We also accept as correct the view that Section 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship".<sup>11</sup>

After referring to Section 60 of the Act, his Lordship further observed :

"If we remember that the offered item of evidence under Section 50 is conduct in the sense explained above, then there is no difficulty in holding that such conduct or outward behaviour must be proved in the manner laid down in Section 60; if the conduct relates to something which can be seen, it must be proved by the person who saw it; if it is something which can be heard, then it must be proved by the person who heard it, and so on. The conduct must be of the person who fulfils the essential conditions of Section 50, and it must be proved in the manner laid down in the provisions relating to proof. It appears to us that that portion of Section 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily delimit the scope of Section 50 in the sense that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct, as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is evidence under Section 50 or by some other person acquainted with the facts which express such opinion, and as the testimony must relate to external facts which constitute conduct and is given by persons personally acquainted with such facts, the testimony is in each case direct within the meaning of Section 60. This, in our opinion, is the true inter-relation between Section 50 and Section 60 of the Evidence Act".<sup>12</sup>

**6. Requirements of the section.** The section requires that the person whose opinion is sought to be given in evidence must be proved to have special means of knowledge on the subject. It lays down that :—

(a) the opinion alone is evidence;

(b) the opinion as expressed by conduct only is evidence, or, in other words (i) conduct only can be given in evidence; (ii) from the conduct given in evidence the Court is to see whether it is the result of any opinion held by the persons;

11. Lakshmi Reddi v. Venkata Reddi, A. I. R. 1937 P. C. 201; 168 I.C. 881.

12. Dolgobinda Paricha v. Nimai Charan Misra, A. I. R. 1959 S.C. 914 (918, 919); Fulkalia v. Nathuram, A. I. R. 1960 Pat. 480; Gurubari Deb v. Sankuri Devi, I. L. R. 1966

Cut. 193; Ajaib Singh v. Mana Singh, (1968) 70 P. L. R. 83 (85); 1968 Cur. L. J. 162; Shanker Lal v. Vijay Shanker, A. I. R. 1968 All. 58 (62, 63); Bishwanath Gosain v. Dulhira Lalmuni, I. L. R. 47 Pat. 630; A. I. R. 1968 Pat. 481.

(c) the opinion which is relevant must be as to the existence of the relationship.<sup>13</sup>

Where the opinion of relationship is expressed by conduct, the belief or conviction must manifest itself in conduct or outward behaviour which indicates existence of belief or opinion. Where the opinion is based on hearsay and not on any belief or conviction, it is not admissible.<sup>14</sup>

**7. Opinion on relationship.** So far as opinion is expressed by conduct, that is, by evidence of specific facts of the character mentioned in the illustrations, this section is in accordance with English Law upon the subject, according to which "family conduct" such as the tacit recognition of relationship, and the distribution and evolution of property is frequently received as evidence from which the opinion and belief of the family may be inferred, and as resting ultimately on the same basis as evidence of family tradition. For, since the principal question in pedigree cases turns on the parentage or descent of an individual, it is obviously material in order to resolve this question, to ascertain how he was treated and acknowledged by those who sustained towards him any relations of blood or affinity. Thus, in the Berkley Peerage case,<sup>15</sup> Sir James Mansfield remarked that "if the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate". When a woman lives for a number of years in close association with a man and bears children, who are acknowledged by the man as born to him; relations and persons of the village treat them as such, there is a presumption of legitimacy, as vice and immorality are not usually attributed to such associations between a man and a woman.<sup>16</sup> Where, therefore, the question was whether the defendant was the legitimate son of one *M*, evidence that the plaintiff, wife of *M*, herself, *M* and his brothers acknowledged and recognized the defendant as the legitimate son, and his mother as the legitimate wife, of *M*, was admissible under this section.<sup>17</sup> So the concealment of the birth of a child from the husband,<sup>18</sup> the subsequent treatment of such child by the person who, at the time of its conception, was living in a state of adultery with the mother, and the fact that the child and its descendants assumed the name of the adulterer and had never been recognized in the family as the legitimate offspring of the husband are circumstances that will go far to rebut the presumption of legitimacy, which the law raised in favour of the issue of a married woman.<sup>19</sup> Where the question is

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- 13. Chandu Lal Agarwalla v. Khatemnessa, 1943 Cal. 76: I. L. R. (1942) 2 C. 299: 205 I. C. 344; Ramadhar v. Janki, 1956 Pat. 49.
- 14. Paras Ram v. Dayal Das, A. I. R. 1965 H. I. 32.
- 15. 4 Camp. 410; Wharton, Ev., s. 211. As to treatment and acknowledgment under Mahomedan Law, see Amer Ali's Mahomedan Law, Vol. II, p. 215, 2nd Ed., 1894; Bailie's Digest of Mahomedan Law (1875), Part I, p. 406, Part II, 89 and Abdul v. Aga, (1893) 21 C. 666: 21 I. A. 56 (P.C.) (acknowledgment in the sense meant by that law is required, viz., of antecedent right, and not a mere recognition of paternity);
- 16. Aizumissa v. Karimunnissa, (1895) 23 C. 130.
- 17. Shivalingiah v. Chowdamma, 1956 Mys. 17, 18; see also observations of Lord Shaw in A. Dinohamy v. W. L. Balabamby, 1927 P. C. 185 at 187: 101 I. C. 327: 54 M. L. J. 388: 4 O. W. N. 759 (P.C.) and of Sir James Colville in Rajendra Nath v. Jogendra Nath, 14 M. I. A. 67: 7 Beng. L. R. 216 (P.C.).
- 18. Shivalingiah v. Chowdamma, supra.
- 19. Hargrave v. Hargrave, (1848) 2 C. & Kir 701: 19 L. J. Ch. 261. Goodright v. Saul, (1791) 4 T. R. 356, per Ashurst, J.; Morris v. Davies, (1837) 5 Cl. & Fin. 163: (1811) 1 Sim. & S. 155; Gardner

as to the legality of a particular type of marriage<sup>20</sup> among the members of a Raja's family, much may be gathered from the treatment accorded to the sword-wives by the Raja, so far as the records are available of such treatment and from the way in which they speak of themselves in official documents and petitions and legal proceedings in which they were parties. Evidence of this kind is conduct admissible under this section<sup>21</sup> as it shows the repute in which sword-marriage was held in this family.<sup>22</sup> Again, if the question be whether a person, from whom the claimant traces his descent, was the son of a particular testator, the fact that all the members of the family appear to have been mentioned in the will, but that no notice is taken of such person, is strong evidence to show either that he was not the son or at least that he had died without issue before the date of the will,<sup>23</sup> and if the object be to prove that a man left no children, the production of his will, in which no notice is taken of his family, and by which his property is bequeathed to strangers or collateral relations is cogent evidence of his having died childless.<sup>24</sup> The evidence must tend to show not any relationship, but the particular relationship as to which the Court has to form an opinion.<sup>25</sup> A person claiming as an illegitimate son must establish his alleged paternity like any other disputed question of relationship, and can, of course, rely upon statements of deceased persons under the fifth clause of Section 32, upon opinion expressed by conduct under this section, and also upon such presumptions of facts as may be warranted by the evidence.<sup>1</sup> The section is not limited to the opinion of members of the family. The opinion may be of any person who, as such member or otherwise, has special means of knowledge on the subject. When the legitimacy of a person in possession has been acquiesced in for a considerable time and is afterwards impeached by a party, who has a right to question the legitimacy, the defendant, in order to defend his status, is allowed to invoke against the claimant every presumption which arises from long recognition of his legitimacy by members of his family.<sup>2</sup> The Section can be pressed into service to decide the question of membership of a joint family which is a peculiar incident of Hindu Law and which is relevant to prove the relationship between persons. The opinion of persons expressed by conduct is also relevant.<sup>3</sup>

Peerage (1824) *Le Marchant's Rep.* 169; *R. v. Mansfield*, (1841) 1, Q. B. 444; *Townsend Peerage*, (1843) 10 Cl. & Fin. 298; *Atchley v. Sprigg*, (1864) 33 L. J. Ch. 345; "This evidence will be admissible in India under S. 8, 9 or 11 ante and under S. 50 post.

20. Khadgavivaley or sword-marriage in the instant case.  
 21. See illus. (b).  
 22. *Maharaja of Kolhapur v. Sundaram Ayyar*, 1925 Mad. 497; I. L. R. 48 Mad. 1; 93 I. C. 705.  
 23. *In re Tracy Peerage*, (1843) 10 Cl. & Fin. 191, per Lord Campbell; *Robson v. Att. Genl.*, (1843) 10 Cl. & Fin. 500, per Lord Cottenham; see *Taylor, Ev.*, s. 620 and further.  
 24. *Taylor, Ev.*, S. 649; *Hungate v. Gascoigne*, (1846) 2 Ph. 25 : 2 Coop

<sup>1</sup> *emp Cott* 405; *Dc Ross Peerage*, (1804-5) 2 Coop 542 and , see as examples of this class of evidence, *Bejai v. Bhupindar*, 22 I. A. 199; 17 A. 456, 462 (P.C.); *Muthuswamy v. Venkateshwara*, (1868) 12 M. I. A. 203; 11 W. R. (P.C.) 56 ; 62 B. L. R. (P.C.) 15; *Rajendro v. Jogendro*, (1871) 14 M. I. A. 67; 7 Bom. L. R. 216; 15 W. R. (P.C.) 41; *Pertab v. Subhao*, (1877) 3 C. 626; 1 C. L. R. 113; 4 I. A. 228.

25. *Mohanlal v. Mst. Tulsan*, 1928 Lah. 824; 103 I.C. 774.  
 1. *Gopalaswami v. Aruna*, (1903) 27 M. 32, 34, 35.  
 2. *Rajendro v. Jogendro*, supra.  
 3. *Shriram Sardarmal v. Gouri Shankar*, A. I. R. 1961 Bom. 136: 62 Bom. L. R. 336.

8. General reputation. According to English Law general reputation (except in petitions for damages by reason of adultery and in indictments for bigamy where strict proof of marriage is required) is admissible to establish the fact of parties being married. Accordingly, general evidence of reputation in the neighbourhood, even when unsupported by facts, or when partially contradicted by evidence of a contrary repute, has been held receivable in proof of marriage.<sup>4</sup> This section is limited to opinion as expressed by conduct, and there appear to be no other provisions in the Act under which such evidence of general reputation would be receivable.<sup>5</sup> In *Ma Hmun v. Ma Ngwe Thin*,<sup>6</sup> it was held that evidence of general repute was of considerable importance, because it was supported by conduct. It is necessary to put forward evidence of the kind described in Section 32, clauses (5), (6) and (7) and Section 50 to prove the existence of relationship between persons deceased whenever the question is in issue.<sup>7</sup> Mere rumour or gossip is inadmissible.<sup>8</sup> But it has been held by the Privy Council that where there is no direct proof of consent to a marriage in Burmah it may be inferred from the conduct of the parties or established by general reputation.<sup>9</sup> Where, however, proof of marriage is an essential ingredient, there must be strict proof of marriage.<sup>10</sup>

9. Opinion expressed by conduct. The section allows only "conduct" as evidence of the opinion, a conduct which is the expression, in outward behaviour of the belief entertained. The conduct must be the result, being the motive cause.<sup>11</sup> What people think may be expressed in words, or by conduct. If there is a rumour, or gossip, to the effect that two persons are married, the existence of that rumour or gossip is inadmissible in evidence. On the other hand, as pointed out in the illustration to the section, when the question is whether two persons were married, the fact that they were usually received and treated by their friends as husband and wife is relevant. The witness must prove conduct on the part of the man and woman, or on the

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- 4. Taylor, Ev., s. 578. So the uncorroborated statement of a single witness, who did not appear to be related to the parties, or to live near them, or to know them intimately, but who asserted that he had heard they were married was held sufficient *prima facie* to warrant the jury in finding the marriage, the adverse party not having cross-examined the witness, nor controverted the fact by proof; Evans v. Morgan, (1832) 2 C. & J. 453
- 5. See *Chandu Lal Agarwalla v. Khatemonnessa*, 1943 Cal. 76: I. L. R. (1942) 2 Cal. 299; 205 I. C. 344; 75 C. L. J. 301; 46 C. W. N. 729; *Maung Mya Maung v. Ma Mya Sein*, 1936 Rang. 518; *Ramadhar v. Janki*, 1956 Pat. 49; *Lakhmichand v. Mst. Anandi*, 1933 All. 130; 143 I. C. 815; 1932 A. L. J. 208; *Natabar Parichha v. Nimai Charan Misra*, 1952 Orissa 75; *Kunjilal v. Subalal*, 1952 M. B. 12; *Seshammal v. Kuppanaiyyangar*, 1926 Mad. 475; 91 I. C. 462.
- 6. 1923 Rang. 171 : I.L.R. 1 Rang 34 : 74 I.C. 104.
- 7. *Shivalal v. Jootha*, 1952 Raj. 167 ; *Kunjilal v. Subalal*, 1952 M.B. 12.
- 8. *Maung Maung v. Ma Sein Kyi*, 1940 Rang. 181 ; 192 I.C. 49; *Lakhmichand v. Mst. Anandi*, 1933 All. 130 : 143 I.C. 815 : 1932 A.L.J. 208.
- 9. *Mi Mc v. Mi Shwe*, 39 C. 492 : 39 I.A. 57; see also *Sadik Husain v. Hashim Ali Khan*, 1916 P.C. 27 : 43 I.A. 212 : I.L.R. 38 All. 627 : 36 I.C. 104 : 14 A.L.J. 1248 : 18 Birn. L.R. 1087 : 25 C.L.J. 363 : 21 C. W.N. 130 : 31 M.L.J. 607 : (1916) 2 M.W.N. 577, where statements as to relationship were held to be good evidence of family repute, but it is not stated under which section they were admissible.
- 10. *Phankari v. State*, A.I.R. 1965 J. & K. 105.
- 11. *Chandu Lal Agarwalla v. Khatemonnessa*, I.L.R. (1942) 2 Cal. 299 : 1943 Cal. 76.

part of their friends and neighbours from which the Court can draw this conclusion. It is not for the witness to draw the conclusion himself and to express a mere opinion about the very matter which the Court has to decide. The general reputation of a man amongst the community may no doubt be evidence in inquiries under Section 110, Criminal Procedure Code,<sup>13</sup> the nature of which section is such as to render admissible what persons who know him think of him. But this fact in no way nullifies the provisions of this section, which lays down a clear rule as to the limits within which opinion may be evidence, when a question of relationship has to be decided.<sup>14</sup>

Where witnesses testify to the conduct of a particular person living and being in joint possession of property with her daughter since the lifetime of the mother's husband, and witnesses testify that the husband died leaving behind the widow and her daughter, that his properties devolved jointly on the widow and the daughter, and that, after the widow's death, the daughter alone remained in possession, the evidence given satisfies the requirements of this section and as such is admissible to prove the parentage of the daughter. The devolution of family property is often valuable evidence of conduct within the meaning of this section.<sup>15</sup>

(a) "*Conduct*", what is? "Distribution and devolution of family property is often very valuable evidence of conduct".<sup>16</sup> The fact that certain names have been omitted from the list of names of ancestors usually recited at Shradhas and that members of a family observed pollution on the death of certain persons is evidence of opinion expressed by conduct made admissible under this section.<sup>17</sup>

(b) *Whose conduct is relevant.* It is not the conduct of the two persons *inter se* whose relationship is in dispute but the conduct of the witness himself towards them which is material for the purposes of the section.<sup>17-1</sup> It is not necessary that the person whose conduct expresses his opinion about relationship between two persons must himself appear in the witness-box. Such opinion expressed by conduct can be proved by any other witness who has seen that person expressing his opinion by conduct.<sup>17-1</sup>

(c) *Conduct expressed in documents.* Description of parentage in record of rights becomes relevant in a case of ancient adoption to show that such person was being treated during the long period by persons who were likely to know the correct relationship.<sup>17-2</sup> Documentary evidence showing dissolution

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| 12. See King-Emperor v. Po Yin, A.I.R. 1925 Rang. 174 : 85 I.C. 368 : 26 Cr.L.J. 528 : 2 Rang. 686.   | 17. Ajai Singh v. Mann Singh, (1968) 70 P.L.R. 83 (85) : 1968 Cur.L.J. 162.  |
| 13. Maung Maung v. Ma Sein Kyi, 1940 Rang. 181 : 192 I.C. 49 : 1940 I.L.R. 562.                       | Amar Singh v. Chhaju Singh, A.I.R. 1973 Punj. 213 (F.B.) : I.L.R. 1972) 2 Punj. 424 : 74 Punj.L.R. 625 : 1972 Cur.L.J. 591; Balaram v. J. Das, A.I.R. 1972 Orissa 141 : 38 Cut.L.T. 44; Hazara Singh v. Attar Kaur, A.I.R. 1976 Punj. 24 : 1975 Rev.L.R. 567; Bhagwathy v. Rajman Kutty, A.I.R. 1976 Ker. 34. I.L.R. (1972) Cut. 98. |
| 14. Bhogal v. Nabihani, A.I.R. 1963 Pat. 450; Brundaban Baral v. Sasi-mani Bewa, (1973) I.C.W.R. 402. |  |
| 15. Seshammal v. Kuppanalayyanar, 1926 Mad. 475 : 91 I.C. 462.  |  |
| 16. Ramakrishna Aiyar v. Chinna Ven-gamma, 1915 Mad. 953 : 26 I.C. 110.                               |  |

and treatment of family property is admissible as it shows the conduct of the executants expressing opinion on relationships.<sup>17-2</sup>

(d) *Other cases of conduct.* When the fact of an adoption has been acquiesced in by the members of the adopting family for a long period, there is a very strong presumption in favour of the validity of the adoption and the burden is very heavy on the person who challenges the adoption.<sup>18</sup> But there must be clear evidence to the effect that for a long period the parties behaved on the footing that the adoption had been recognised.<sup>19</sup>

Law presumes in favour of marriage and against concubinage, and long cohabitation raises a rebuttable presumption of wedlock. Where the descendants of a common ancestor do not challenge the legitimacy of a person, that is an important circumstance in favour of legitimacy. Acknowledgment and repudiation of legitimacy, both being conduct, are admissible in evidence under the section. So, where in a suit instituted by a father and his son, the father makes a statement in the plaint describing the son without mentioning whether he is an illegitimate son amounts to an acknowledgment that the son is legitimate. The fact that the descendants of a common ancestor who are defendants in the suit do not challenge the legitimacy in the suit is an important circumstance in favour of the legitimacy of the son.<sup>20</sup>

Every presumption ought to be made in favour of marriage when there has been a lengthened cohabitation, specially in cases where the alleged marriage took place so long ago that it must be difficult if not impossible to obtain a trustworthy account of what really occurred. Such presumption would be almost irresistible if the conduct of the parties is compatible with the existence of the relation of husband and wife.<sup>21</sup>

Where the question is whether *A* divorced *B* and *B's* marriage to *C* was valid, the conduct and opinion expressed by the parties concerned and of all the people of their caste is relevant under Section 50.<sup>22</sup> The proviso to the section cannot be applied to ordinary civil cases where the fact of marriage or divorce is in dispute.<sup>23</sup> It is well settled that continuous cohabitation for a number of years may raise the presumption of marriage.<sup>24</sup> Evidence of opinion expressed by conduct is admissible even to prove a marriage among Indian Christians. But Section 488, Cr. P. C., 1898 (now Section 125 of Cr. P. C., 1973) is not included in the proviso to this section, and hence even opinion expressed by conduct of persons who had special means of knowledge on the subject, may suffice to prove the fact of marriage in a proceeding under Section 488,

- 17-3. Brundaban Baral v. Sasimani Bewa, (1973) 1 Cut.W.R. 402.
- 18. Ramakrishna Pillai v. Tirunarayana Pillai, 1932 Mad. 198 : I.L.R. 55 Mad. 40 : 139 I.C. 684 : 62 M.L.J. 116 : 1932 M.W.N. 31 : 35 L.W. 73; see also Kanchumarthi Venkata Seetharama v. Kanchumarthi Raju, A.I.R. 1925 P.C. 201 : 89 I.C. 817.
- 19. Gridhari Biswal v. Golak Biswal, 1940 Orissa 27.
- 20. Sheodhar Prasad v. Jagdhar Prasad, A.I.R. 1964 Pat. 316.
- 21. Rewa v. Galharsingh, A.I.R. 1961 M.P. 164 : 1960 M.P.L.J. 1889.
- 22. Janglia v. Jhingrya, A.I.R. 1921 Nag. 71 : 63 I.C. 594.
- 23. Bhadursingh Dalipsingh v. Kartar Singh, 1950 M.B. 1:1 Madh.B.L.R. 425.
- 24. Gokul Chand v. Pravin Kumari, 1952 S.C. 231 : 1952 S.C.J. 331 : I.L.R. 1953 Punj. 1 : 90 C.L.J. 73 : 65 L.W. 646; Harnam Singh v. Mst. Bhagi, 1936 Lah. 261 : I.L.R. 16 Lah. 1007; 161 I.C. 916 : 38 P.L.R. 26.

Cr. P. C., 1898 (now Section 125 of Cr. P. C., 1973).<sup>25</sup> Where the question is as to the legitimacy of a son, an acknowledgment by the father, which involves the assertion that he, the father, was married to the son's mother, raises a presumption in favour of the marriage and of the legitimacy. The presumptions of law cannot be wiped out by reason of the conduct and mode of life and predilections of other persons.<sup>1</sup>

It is no doubt true, as pointed out in *Ma Wundi v. Ma Kin*,<sup>2</sup> by the Privy Council, that the presumption in favour of lawful marriage is not to be lightly applied to situations where sex relationships are proved to be loose and the appellation "wife" is indiscriminately used. But it is also equally the law, as pointed out by the Privy Council in *Mohabbat Ali Khan v. Mohammad Ibrahim Khan*,<sup>3</sup> that mere evidence of what may be called class or clan proclivity to concubinage is not admissible in evidence and cannot be used to rebut the presumption of marriage.<sup>4</sup> The quantum of evidence of family conduct, that is necessary to render admissible evidence on the question of relationship, must vary with the facts of each case. For instance, if a stranger to the family of *A* says that *A* is the grandson of *B*, such statement may not be admissible under this section unless it is supported by ample evidence of conduct. But, if a relation or close neighbour of *B* says that *A* is the grandson of *B* and adduces some evidence of conduct, the 'admissibility' of his statement cannot be doubted, though the 'weight' to be attached to such statement will depend on the facts elicited in cross-examination, and other circumstances, such as the age and other factors indicative of his competence to speak about such relationship.<sup>5</sup>

10. "As to the existence of such relationship". The section opens with the words : "When the Court has to form an opinion as to the relationship". These words would certainly mean "as to the existence or the non-existence of the relationship". But the opinion that is made relevant by the section is "the opinion..... as to the existence of such relationship", and not "the opinion as to such relationship". This may mean that "the opinion as to the non-existence of such relationship" will not be admissible in evidence at all. A comparison of the language of this section with those of Sections 47, 48 and 49 also seems to lend some support to this view.<sup>6</sup> It has, therefore, been doubted whether under this section evidence of non-existence of relationship, is admissible.<sup>7</sup> But it has been definitely held in *Suba Raut v. Dindayal Choudhury*<sup>8</sup> that the existence of any relationship within the meaning of the section includes the non-existence of such relationship. If a

25. K.J.B. David v. Nilamoni Devi, 1953 Orissa 10; I.L.R. 1952 Cut. 511.

1. Mohabbat Ali Khan v. Md. Ibrahim Khan, 1929 P.C. 185: 56 I.A. 201: I.L.R. 10 Lah. 725: 117 I.C. 17: 1929 A.L.J. 465: 31 Bom. L.R. 846: 50 C.L.J. 89: 33 C.W.N. 645: 57 M.L.J. 366: 1929 M.W.N. 676: 30 L.W. 97: 6 O.W.N. 517: 31 P.L.R. 1; see also Habibur Rahman Chowdhury v. Altaf Ali Chowdhury, 1922 P.C. 159: I.L.R. 48 Cal. 856: 48 I.A. 114: 60 I.C. 837: 19 A.L.J. 414: 33 C.L.J. 479: 26 C.W.N. 81: 28

Bom. L.R. 636: 40 M.L.J. 510: 1921 M.W.N. 366: 14 L.W. 175. 2. 35 Cal. 232: 4 L.B.R. 175. 3. 56 I.A. 201: I.L.R. 10 Lah. 725. 4. See Subarna v. Arjuno, 1951 Orissa 337: I.L.R. (1949) Cut. 527. 5. Natabar Parichha v. Nimai Charan, 1952 Orissa 75. 6. Chandulal Agrawalla v. Khatemonnessa, 1943 Cal. 76 at 80: I.L.R. (1942) 2 Cal. 299: 205 I.C. 344: 75 C.L.J. 301: 46 C.W.N. 729. 7. Subarna v. Arjuna, 1951 Orissa 337: I.L.R. (1949) 1 Cut. 527. 8. 1941 Pat. 205: 191 I.C. 674: 7 B.R. 274.

statement relating to the existence of such relationship is evidence under that section, any statement which implies that there is no existence of such relationship between two persons also comes under it.

11. "Of any person who as a member of the family or otherwise has special means of knowledge". What is made admissible by this section is opinion expressed by conduct of any person who, *as a member of the family or otherwise*, has special means of knowledge of the relationship.<sup>9</sup> Special means of knowledge about the relation is essential. A statement about the relationship between two persons by another person who is not shown to have any special means of knowledge, cannot be relevant.<sup>10</sup> The evidence of witnesses that a certain man and a woman were regarded as man and wife by the members of the community does not fall within this section, since it is not an opinion expressed by conduct as to existence of such relationship of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, and if this section does not apply there is no other statutory provision either in the body of this Act, or outside it, under which such evidence could be let in to prove marriage.<sup>11</sup>

The person whose opinion is made evidence by the section must be shown to have "special means of knowledge on the subject".<sup>12</sup> The 'special means of knowledge' required by this section relates to the person whose opinion is sought to be proved, it is not necessary that the witness who comes to prove such opinion must himself have special means of knowledge.<sup>12-1</sup> Such persons may be members of the family or outsiders, but they must have had special means of knowledge on the subject of relationship. A member of the family can speak in the witness-box of what he has been told and what he has learned about his own ancestors, provided what he says is an expression of his own independent opinion (even though it is based on hearsay, derived from deceased, not living persons) and is not merely repetition of the hearsay opinion of others, and provided the opinion is expressed by conduct. His sources of information and the time at which he acquired the knowledge (for example, whether before the dispute or not) would affect its weight, but not its admissibility. Personal knowledge is not necessary.<sup>13</sup>

What is true about a member of a family is also true of a person, who although not a member of the family, has special means of knowledge about the relationship of the parties. The words "or otherwise" occurring after the words "of any person who as a member of the family" in this section clearly contemplate such a case.<sup>14</sup> Special means of knowledge must be proved independently of the opinion expressed by conduct. If, however, the opinion

- 9. Secretary of State v. Mst. Mariam, 1987 Sjnd 126 : 169 I.C. 685 : 31 S.L.R. 71.
- 10. Bujhawan Singh v. Shyama Devi, A.I.R. 1964 Pat. 301.
- 11. Lakhmi Chand v. Mst. Anandi, 1933 All. 130 : 143 I.C. 815 : 1932 A.L.J. 208.
- 12. Chandulal Agrawalla v. Khatemonnessa, 1948 Cal. 76 : I.L.R. (1942) 2 Cal. 299 : 205 I.C. 344 : 75 C.L.J. 301 : 46 C.W.N. 729.
- 12-1. Hazara Singh v. Attar Kaur,

- A.I.R. 1976 Punj. 24 : 1975 Rev. L.R. 567; Balaram Das v J. Das, A.I.R. 1972 Orissa 141 : 38 Cut. L.T. 44; Bhawathy v. Raman Kutty, A.I.R. 1976 Ker. 34.
- 13. Sitaji v. Bijendra Narain, A.I.R. 1954 S.C. 601; S. M. Dawood Bibi v. A. B. Pulavar, A.I.R. 1972 Mad. 228.
- 14. Ramadhar v. Janki, A.I.R. 1956 Pat. 49; Ulla Dej v. Malli Bewa, I.L.R. 1967 Cut. 430 : 33 Cut.L.T. 740.

of a third person is expressed by different types of conduct as expressing the opinion at different times, special means of knowledge would be established thereby. The third person expressing the opinion cannot be said to have special means of knowledge as a matter of course from the mere fact that he formed an opinion expressed by conduct on a single occasion. The third person must himself form an independent opinion as to the existence of the disputed relationship. The court is not precluded from coming to its own independent conclusion from disjointed statements of facts not narrated in logical sequence if such a conclusion is permissible on the materials on the record.<sup>16</sup> Apart from a person's testimony as to his own relationship which is in dispute being valueless, it cannot be said that he had *otherwise* special means of knowledge. Again, unless a person had special means of knowledge, his mere statement that M was the son of T is inadmissible under the section.<sup>17</sup> The statement of a teacher, who admitted a pupil, gave him lessons and marked his attendance, that the pupil was the son of a particular person is not relevant under the section as to the relationship of the pupil as the teacher did not disclose the source of his knowledge as to the relationship.<sup>17</sup> When the question is whether A was son of B, the evidence of A's wife's brother who gave her in marriage to A and of the barber of B's family who officiated in that marriage are admissible as they had special means to know who was the father of the bridegroom.<sup>17-1</sup> To prove the marriage between a man and woman, evidence of a doctor, who used to visit the family on professional duty, that a brother of the woman used to call the man as his *jija* (sister's husband) was held to be admissible under this section.<sup>18</sup> On a question of adoption, the opinion expressed by the conduct of the wife of the deceased adopter and his brother in a genuine document reciting the fact of adoption is relevant as both of them had special means of knowledge on the question.<sup>19</sup> Evidence of notoriety of an adoption must be evidence of a number of people who, owing to their circumstances, are in a position to say what was the attitude of the alleged adoptive parents towards the claimant.<sup>20</sup> Where, however, a witness belonging to the same caste, had been residing in the same village for a long time and had enough opportunities to observe for himself the conduct of the parties whose relationship was in question, his evidence as to the relationship between the parties has been held to be admissible in a Patna case.<sup>21</sup>

In a suit for partition it is open to the plaintiffs to give evidence regarding jointness of the parties and to prove that the immovable properties in dispute had been purchased from joint funds. Such evidence fulfils the conditions of the section.<sup>22</sup>

15. Ulla Dei v. Malli Bewa, I.L.R. 1967 Cut. 430 : 33 Cut.L.T. 740 (746, 747).
16. Ajaib Singh v. Mann Singh, (1968) 70 P.L.R. 83 (86); 1968 Cur.L.J. 162.
17. Shanker Lal v. Vijaya Shanker, A.I.R. 1968 All. 58(63).
- 17-1. B. K. Misra v. Chief Justice, A.I.R. 1973 Orissa 1 : (1972) 2 Cut.W.R. 1078.
18. Parvin Kumari v. Goktal Chand Balu Ram, 1949 East Punjab 35 : 50 P.L.R. 151; see also Ajmer Singh v. Jangir Singh, A.I.R. 1952 Pepsu 76 : 7 D.L.R. Pepsu 54.
19. Manraj v. Rameshwar, 1969 Raj. L.W. 507, 513.
20. Maung Mya Maung v. Ma Mya Sein, 1986 Rang. 518.
21. Ramadhar v. Janki, A.I.R. 1956 Pat. 49; Bhogal Paswan v. Bibi Bhogal Paswan V. Nabihon, A.I.R. 1963 Pat. 450; Ganeah Narain Singh v. Jadunandan Singh, A.I.R. 1969 Pat. 82.
22. Ramesh Sao v. Kamla Sao, A.I.R. 1969 Pat. 329 (331).

The section does not make evidence of mere general reputation (without conduct) admissible as proof of relationship.<sup>23</sup> But the section read with section 60 makes the recital in a decree by a person having special means of knowledge admissible to prove relationship.<sup>24</sup> The devolution of family property is often very valuable evidence of conduct within the meaning of the section.<sup>25</sup>

The evidence of a person having special means of knowledge is admissible under sections 50 and 60.<sup>1</sup>

**12. Presumptions from conduct.** In a case in which legitimacy of a person in possession is questioned a very considerable time after his possession has been acquired by a party who has strict legal right to question his legitimacy, the defendant, in order to defend his status, should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons.<sup>2</sup> In a society where another marriage is permissible long cohabitation with a woman raises presumption of second marriage and the mere fact that the wife by first marriage was living does not rebut that presumption.<sup>2-1</sup> Where there is *prima facie* evidence of cohabitation as husband and wife, and a long course of treatment of the lady as a wife and the children as legitimate, the presumption of marriage can be repelled only by evidence of the clearest character. The presumption of law is not to be lightly repelled. Much weight must necessarily be attached to reputation among the relations on both sides, among all the friends and among all the acquaintances in the locality where the parties resided.<sup>3</sup> Where the legitimacy of a person is in question an acknowledgment by his father, which involves the assertion that he is the father and was married to the person's mother undoubtedly raises a presumption in favour of the marriage and of the legitimacy. The presumption is no doubt rebuttable; but it cannot be wiped out by reason of the conduct and mode of life and predilections of other persons.<sup>4</sup>

In respect of an ancient adoption, the actual evidence of giving and taking may not be available, and if there is sufficient evidence to show that for a long time the boy was treated as the adopted son at a time when there was no controversy, the burden will shift on to the other side to show that the adoption

23. Lakshmi Reddi v. Venkata Reddi, A.I.R. 1937 P.C. 201, accepted as correct by the Supreme Court in Dolgobinda Parich v. Nimai Charan Misra, A.I.R. 1959 S.C. 914 (919).
24. Md. Ayub Khan v. Abdus Samad Khan, 1969 B.L.J.R. 932 (936, 937).
25. *Ibid.*
  1. Toval Mahton v. Chandeshwar Mahton, 1971 B.L.J.R. 418 (423).
  2. Rajendro Nath Holdar v. Jogendro Nath Banerjee, 14 M.I.A. 67 : 15 W.R. 41 : 7 Rang.L.R. 630 (P.C.).
  - 2-1. Raghuvir c. Shanmughavadi, A.I.R. 1971 Mad. 530 : (1970) 2 M.L.J. 193.
  3. Imambandj v. Mutasuddi, 13 I.C. 678 : 15 C.L.J. 621 : s.c., on Appeal

- sub-nom* 1918 P.C. 11 : 45 I.A. 73 : 45 Cal. 878 : 47 I.C. 513 : 16 A.L.J. 800 : 20 Bom.L.R. 1022 : 28 C.L.J. 409 : 23 C.W.N. 50 : 35 M.L.J. 422 : 1919 M.W.N. 91 : 9 M.L.W. 518.
4. Mohabbat Ali Khan v. Muhammad Ibrahim Khan, A.I.R. 1929 P.C. 135 : 56 I.A. 201 : I.L.R. 10 Lah. 725 : 117 I.C. 17 : 50 C.L.J. 89 : 1929 A.L.J. 465 : 33 C.W.N. 645 : 31 Bom.L.R. 846 : 57 M.L.J. 366 : 1929 M.W.N. 676 : 30 M.L.W. 97; see also Moujilal v. Chandrabati Kumari, I.L.R. 38 Cal. 700 : 38 I.A. 122 : 11 I.C. 502 : 13 Bom.L.R. 534 : 14 C.L.J. 72 : 15 C.W.N. 790 : 21 M.L.J. 933 : (1911) 2 M.W.N. 391 : 10 M.L.T. 53.

did not take place.<sup>5</sup> In the case of adoptions, which occurred long ago, one cannot expect actual evidence that all the proper formalities were observed, and it is quite sufficient to show that the parties have always been treated as adopted and have enjoyed the rights of adopted sons.<sup>6</sup> Long recognition raises the same presumption in favour of validity of adoptions as in the case of legitimacy.<sup>7</sup> The burden resting, altogether apart from the law of limitation, upon any litigant, who challenges the authority of an adoption that has been recognized as valid during a long course of years, is of the heaviest order.<sup>8</sup> But such a presumption can be raised only where there is a clear evidence to the effect that for a long period the parties behaved on the footing that the adoption had been recognized.<sup>9</sup>

**13. Proviso : Divorce or criminal proceedings.** The proviso to the section enacts that opinion expressed by conduct is not sufficient for certain offences under the Penal Code. It does not direct the Court to exclude evidence of opinion expressed by conduct. It only directs the Court not to base a finding that such a marriage has taken place upon the evidence of opinion alone.<sup>10</sup> The framers of the Evidence Act have endeavoured, in dealing with this subject, exactly to follow the English law, according to which, in an indictment for bigamy, the first marriage, or in proceedings founded upon adultery, the marriage must be proved with the same strictness as any other material fact. In the case of offences relating to marriage, the marriage of the woman is as essential an element of the crime charged as the illicit intercourse. And the provisions of this section show that where marriage is an ingredient in an offence, as in bigamy, adultery and the enticing of married women, the fact of the marriage must be strictly proved.<sup>11</sup> In *Queen-Empress v. Subbarayan*,<sup>12</sup> Hutchins, J., discussing the previous decisions said that if learned Judges meant to decide in the preceding cases that a husband or wife is precluded from proving his or her marriage, he expressed his dissent. It is submitted that the learned Judge did not so decide, but that a vague assertion by either to the effect 'I am married' or the like is insufficient proof; in fact the statement assumes the very question to be proved. The existence of a valid marriage is a mixed question of law and fact. A witness, therefore, must

- 5. Harihar v. Nabakishore, I.L.R. 1962 Cut. 422 : A.I.R. 1963 Orissa 45 : Balinki v. Gopalkrishna, A.I.R. 1964 Orissa 117.
- 6. Mullangi Venkatarangam Chetty v. M. Venkata Subbamah, 19 I.C. 740 : 25 M.L.J. 373 : 13 M.L.T. 515.
- 7. Rajendro Nath Holdar v. Jogendro Nath Banerji, 14 M.I.A. 670 : 15 W.R. 41 : 7 Rang.L.R. 630 (P.C.).
- 8. S. Rama Krishna Pillai v. Tirunarayana Pillai, A.I.R. 1932 Mad. 198 : I.L.R. 55 Mad. 40 : 139 I.C. 684 : 62 M.L.J. 116 : 1932 M.W.N. 31 : 35 L.W. 73; Kanchumarthi Venkata Seetharama Chandra Rao v. Kanchumarthi Raju, A.I.R. 1925 P.C. 201 : 89 I.C. 817.
- 9. Giridhari v. Golak, A.I.R. 1949 Orissa 27.
- 10. Raghupat Singh v. King-Emperor, 1927 Oudh 140 : 100 I.C. 535 : 28 Cr.L.J. 311 : 4 O.W.N. 172; see also Bhagu Dhondhi v. Emperor, 27 I.C. 837 : 16 Cr.L.J. 213 : 17 Bom. L.R. 75 : A.I.R. 1915 B. 294.
- 11. R. v. Pitambur, 5 C. 566 (F.B.); 5 C. L. R. 597 C. this case has overruled: R. v. Wuzeerah, (1872) 8 B. L. R. App 63 : 17 W. R. 5 followed in R. v. Arshed, (1883) 13 C.L.R. 125; R. v. Kallu (1882) 5 A. 233; Gopal v. Emperor, A.I.R. 1925 Rang. 328 : 27 Cr. L. J. 651; Gul Mahomed v. Emperor, A.I.R. 1934 Sind 10 : 35 Cr.L.J. 816 : 148 I.C. 753; Aziz Khan v. Ekram Husain, A.I.R. 1937 Pat. 219 : 38 Cr.L.J. 213 : 166 I.C. 338.
- 12. 9 Mad. 9.

speak to the facts which are said to constitute the marriage, so that the Court may determine whether what the witness states to have taken place did take place in fact and, if so, whether it constituted a marriage in point of law. In this country the validity of any particular marriage depends chiefly on the usages of the caste to which the parties belong.<sup>12</sup> Where a charge is made under Section 498 of the Indian Penal Code of enticing away a married woman, the Court should require some better evidence of the marriage than the mere statement of the complainant and the woman.<sup>14</sup> And this is so, not only having regard to the provisions of this section, but also, to the principle that strict proof should be required in all criminal cases.<sup>15</sup> In *Mutyala v. Subbalakshmi*,<sup>16</sup> it was said that the proviso makes the opinion as to the relationship insufficient to prove marriage in proceedings under the Divorce Act or in prosecutions under Section 494, 495, 497 or 498 of the Penal Code. This means that the proof of act of marriage is not to depend on opinion or conduct evidence. But such opinion evidence is neither irrelevant nor inadmissible. It can be taken into consideration along with other evidence to reach the conclusion that the factum of marriage has been proved.<sup>17</sup>

"In the English Courts a marriage is usually proved by the production of parish or other register, or a certain certified extract therefrom; but if celebrated abroad, it may be proved by any person who was present at it, though circumstances should also be proved from which the jury may presume that it was a valid marriage according to the law of the country in which it was celebrated. Proof that the ceremony was performed by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony according to the rites and the customs of the foreign country, would be sufficient presumptive evidence of it,<sup>18</sup> so as to throw on the defendant the onus of impugning its validity.<sup>19</sup> And, even a marriage in England may be proved by any person who was actually present and saw the ceremony performed; it is not necessary to prove its registration or the licence or publication of banns.<sup>20</sup>

The proviso applies only to cases under the Indian Divorce Act and prosecutions under sections 494, 495, 497 or 498 of the Penal Code.<sup>20-1</sup> Section 488, Cr. P. C., 1898 (now Section 125 of Cr. P. C., 1973), is not included in the proviso. Hence, for proving a marriage in proceedings under Section 488, Cr. P. C., 1898 (now Section 125 of Cr. P. C., 1973), the standard of proof is not as high as that required under the Indian Divorce Act, 1869 or

- 13. Queen-Empress v. Subbarayan, 9 Mad. 9 at p. 11; see also Syed Munir v. Emperor, 42 I.C. 760 : 18 Cr.L.J. 1016 ; 14 N.L.R. 28 : A.I.R. 1917 Nag. 76; Ganga Patra v. Emperor, 1928 Pat. 481 : 29 Cr.L.J. 1045 : 112 I.C. 469.
- 14. Queen-Empress v. Dal Singh, 20 All. 166 : (1898) 18 A.W.N. 7.
- 15. R. v. Kallu, (1882) 5 A. 233.
- 16. A.I.R. 1962 A.P. 311 : (1962) 1 Andh.W.R. 91.
- 17. Rabindra Kumar v. Prativa, 1970 Cr.L.J. 838 : A.I.R. 1970 Tripura 30 (32).
- 18. See R. v. Inhabitants of Brampton, 10 East. 282.
- 19. Archbold, p. 925, Bigamy, ib., 25th Ed., (1918), 1234, 1237.
- 20. ib., quoting R. v. Allison, 1806 R. & R. 109; R. v. Manwaring, (1857) Dears. & B. 132; 26 L.J.M.C. 10; Queen-Empress v. Subbarayan, (1885) 9 M. 9, 11.
- 20-1. Bhagavathy v. Ramankutty, A.I.R. 1976 Ker. 34.

in a prosecution under Section 494, 495, 497 or 498, I. P. C. Even opinion expressed by conduct of persons who had special means of knowledge may suffice to prove the fact of a marriage under section 488, Cr. P. C., 1898 (now Section 125 of Cr. P. C., 1973).<sup>21</sup> The proviso does not apply to contempt proceedings nor is the contemner a person accused of any offence. The principle of strict proof of marriage in cases where marriage is an ingredient of the offence cannot, therefore, be extended to contempt proceedings for disobedience of an injunction not to take a second wife.<sup>22</sup>

51. *Grounds of opinion, when relevant.* Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

#### *Illustration*

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

ss. 45, 46, 47–50 (Opinion when relevant.) s. 8 ("Relevant".)

#### SYNOPSIS

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| 1. Principle.<br>2. Scope.<br>3. Grounds of opinion. | 4. Report of Government Analyst when admissible. |
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1. **Principle.** A test of the value of opinion evidence is thus provided. The correctness of the opinion or otherwise can better be estimated in many instances when the grounds upon which it is based are known. The value of the opinion may be greatly increased or diminished by the reasons on which it is founded.<sup>23</sup>

2. **Scope.** The present section applies to the opinions of "any living persons" whether those opinions be the opinions of "experts" under Sections 45, 46 or of others under Sections 47, 48, 49. *Quaere*—whether the section is applicable to opinion "expressed by conduct" under Section 50. The section to some extent repeals the principles involved in Section 46. The present section, however, deals with the subjective grounds upon which the opinion is held which can only generally be proved by the testimony of the person whose opinion is offered whereas Section 46 deals with the objective external facts, provable either by that person or others, which support or rebut the opinion of an expert. With regard to the latter it has been said<sup>24</sup> that the consideration that the opinions may be given on the assumption of facts not proved is a reason why the grounds and reasons of the opinion should be stated, in order that the Court and jury may see that it is not founded on hear-

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| 21. Vanajakshamma v. P. Gopalakrishnan, (1970) 2 Mys.L.J. 15 : 1970 M.L.J. (Cr.) 552; 1970 Cr. L. J. 1584 ; A.I.R. 1970 Mys. 305 (308); K.J.B. David v. Nilamani Devi, 1953 Cr.L.J. 260 : A.I.R. 1953 Orissa 10; Bebi Bai v. Japamony, 1967 M.L.J. (Cr.) 311 (Kerala). | 22. Bhonrilal v. Kaushaliya, (1969) 20 Raj.L.W. 427 (429); A.I.R. 1970 Raj. 83 (86).           |
|  | 23. Cunningham, Ev., 196; Lawson's Expert Ev., 231.  |
|  | 24. Dickinson v. Inhabitants of Fitchburg, 18 Gray 555 (Amer.) cited in Lawson, Ev., 232, 233. |

say, general rumour or facts of which some evidence may have been given but being controlled by other evidence, are not found true by the Court or the jury. This inquiry is perhaps more frequently made in cross-examination, but it is also competent in evidence-in-chief.<sup>25</sup> In the same way, when, in reference, the Court has to consider the opinion of a divided jury, it should also consider their reasons, and for this purpose a Judge should note such reasons after telling the jury of his intention to refer the case. But even if the Judge has omitted to note such reasons, this will not warrant the Court in declining to go into the evidence.<sup>1</sup>

**3. Grounds of opinion.** The opinion of an expert by itself may be relevant but would carry little weight with a Court unless it is supported by a clear statement of what he noticed and on what he based his opinion. The expert should, if he expects his opinion to be accepted, put before the Court all the materials which induced him to come to his conclusion so that the Court, although not an expert, may form its own judgment on those materials.<sup>2</sup> In India, the Chemical Examiner merely tenders a report and he does not appear and give evidence. It is extremely desirable that his report should be full and complete and take the place of evidence which he would give, if he were called to Court as a witness. It is not enough for the Chemical Examiner to merely state his opinion. He must state the grounds on which he arrived at that opinion.<sup>3</sup> An Excise Inspector is an expert on the question whether a certain liquid is illicit liquor or not. But, before he is in a position to give such an opinion as an expert, he has to examine it and has also to furnish the data on which his opinion is based. His bald statement without examining the liquid that the content was illicit liquor is not sufficient to prove that fact.<sup>4</sup> But it would be unfair to require an exact exposition of reasons in all cases. In a valuation case, their Lordships of the Privy Council observed :

"It is quite true that in all valuations, judicial or other, there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others. Everyone who has gone through the process is aware of this lack of demonstrative proof in his own mind, and knows that every expert witness called before him has had his own set of conjectures of more or less weight according to his experience and personal sagacity. In such an enquiry relating to subjects abounding with uncertainties, and on which there is little experience, there is more than ordinary room for such guess-work; and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at."<sup>5</sup>

25. Government of Bombay v. Merwanji, 10 Bom. L. R. 907.
1. R. v. Ananda, 36 C. 629 : 2 I.C. 497 : 9 C.L.J. 630 : 13 C.W.N. 757; R. v. Chellan, (1905) 29 M. 91.
2. Mst. Titli v. Alfred Robert Jones, A.I.R. 1934 All. 273, 280 : I.L.R. 56 All. 428; 153 I.C. 733; 1934 A.L.J. 1129 : 3 A.W.R. 70; Ram Karan Singh v. Emperor, A.I.R. 1935 Nag. 18 : 154 I.C. 341 : 36 Cr.L.J. 511; Paltu Matabadal v.

- State of M. P., A.I.R. 1961 Madh. Pra. 5 : 1961 (1) Cr.L.J. 88(1).
3. Mst. Gajrani v. Emperor, A.I.R. 1933 All. 394, 399 : 144 I.C. 357 : 34 Cr.L.J. 754 : 1933 A.L.J. 1617.
4. Gobardhan v. The State, A.I.R. 1959 All. 53 : 1959 Cr.L.J. 13.
5. Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co., I.L.R. 26 Bom. 1 (21) : 28 I.A. 121 (P.C.).

**4. Report of Government Analyst when admissible.** Section 25 of the Drugs and Cosmetics Act, 1940 (23 of 1940) has to be read with section 22 of that Act. Where the samples were not taken while the drug was being manufactured or sold from a place where it was stocked for sale or distribution as required by section 22 (b), there cannot be any question of the report of the Government Analyst being conclusive evidence. Therefore, if the report cannot be made available under section 25 (3) of the Act, it cannot be read as evidence without the Government Analyst being examined.<sup>6</sup>

*Character when relevant*

**SYNOPSIS**

- 1. General.
- 2. Character of animals, places and things.

**1. General.** The rules with regard to evidence of character<sup>7</sup> are divisible first into those which concern the character of witnesses, and secondly, those which concern the character of parties.

In respect of the first, the rule is, that the character of a witness, whether a party or not, is always material as affecting his credit. The credibility of a witness is always in issue.<sup>8</sup> For, as witnesses are the media through which the Court is to come to its conclusion on the matters submitted to it, it is always most material and important to ascertain whether such media are trustworthy, and as a test of this, questions, amongst others, touching character are allowed to be put to the witnesses in the cause.<sup>9</sup>

In respect of the character of a party, two distinctions must be drawn, namely between the cases where the character is in issue and is not in issue, and where the cause is civil or criminal. When a party's general character is itself in issue, whether a civil<sup>10</sup> or criminal<sup>11</sup> proceeding, proof must necessarily be received of what that general character is, or is not.<sup>12</sup> But when general character is not in issue but is tendered in support of some other issue it is, as a general rule, excluded. So, in civil proceedings evidence of character to prove conduct imputed is declared by the Act to be irrelevant.<sup>13</sup> The two exceptions to this rule are that in civil proceedings evidence of character as affecting damages, is admissible<sup>14</sup> and in criminal proceedings, for reasons which will be found considered in the Notes to Sections 53 and 54 post, the fact that the person accused is of a good character, is relevant, but the fact that he has a bad character is, except in certain specified cases, irrelevant.<sup>15</sup> Evidence of character in criminal proceedings is, generally speaking, only a make-weight, though there are two classes of cases in which it is highly important, viz. :

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- 6. Drugs Inspector, M. P. v. Chiman Lal & Co., 1968 J.L.J. 448 : 1968 M.P.L.J. 489 : 1968 M.P.W.R. 468 : 1968 Cr.L.J. 1561 : A.I.R. 1968 M.P. 238 (247) (F.B.).
- 7. As to the meaning of the term "character", see S. 55, Explanation post. and the notes to that section.
- 8. Best, Ev., s. 263.
- 9. See Ss. 145–153 post.
- 10. See notes to S. 52 post.
- 11. See S. 54, Explanations (1) and (2) to that section.
- 12. Taylor, Ev., 355; Best, Ev., s. 258.
- 13. S. 52 post.
- 14. S. 55 post.
- 15. Ss. 53 and 54

(a) Where conduct is equivocal or even presumably criminal. In this case evidence of character may explain conduct and rebut the presumptions which it might raise in the absence of such evidence. A man is found in possession of stolen goods. He says he found them and took charge of them to give them to the owner. If he is a man of very high character, this may be believed.

(b) When a charge rests on the direct testimony of a single witness and on the bare denial of it by the person charged. A man is accused of an indecent assault by a woman with whom he was accidentally left alone. He denies it. Here a high character for morality on the part of the accused person would be of great importance.<sup>16</sup> In the first case the character of the party prosecuting is made relevant by the Act. When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.<sup>17</sup>

**2. Character of animals, places and things.** The following Sections 52 to 55 deal with the character of persons. As regards the character of animals, Phipson<sup>18</sup> summarised the law as follows: "When the doings of animals are in question, it is admissible to prove, not only the general habits and propensities of the species<sup>19</sup> or of the particular animal,<sup>20</sup> but the doings of the same animal on other occasions<sup>21</sup> or even those of other animals of the same species.<sup>22</sup> Though, however, a propensity to bite animals of one species is evidence of a propensity to bite those of another,<sup>23</sup> it is no evidence of its propensity to bite human beings, nor *vice versa*.<sup>24</sup>

In a Peshawar case, it has been held, that though a dog may be of assistance to the police in tracing a criminal, its behaviour cannot be evidence in the case against the criminal.<sup>25</sup>

The condition or character of a place or thing may sometimes be proved by showing its condition or character at other times. Thus, in actions of negligence, to show that a particular spot was dangerous, previous accidents threat, or even the condition of other similar places, may be proved. So also as to the condition of ship.<sup>1</sup>

**52. In civil cases character to prove conduct imputed, irrelevant.** In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

- s. 55 (Meaning of term "character.")
- s. 3 Illust. (e) ("Fact.")
- s. 55 (Character as affecting damages.)

- s. 140 (Witnesses to character may be cross-examined and re-examined.)

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- 16. Steph. Introd., 167, 168.
- 17. S. 155, cl. (4) post.
- 18. Phipson, Ev., 11th Ed., 217.
- 19. McQuaker v. Goddard, (1940) 1 K.B. 687.
- 20. Joy v. Phillips, 85 L.J.K.B. 770; Adham v. United Dairies, (1940) 1 K.B. 507.
- 21. Osborne v. Chocqueel, (1896) 2 Q.B. 109.
- 22. Brown v. E. & M. Ry., (1889) 22 Q.B.D. 391.
- 23. Quin v. Quin, (1905) 39 Ir.L.T.R. 163.
- 24. Glanvill v. Sutton, (1928) 1 K.B. 571; Osborne v. Chocqueel, *supra*. See also Hartley v. Harriman, (1817-18) 1 B. & Ald. 620; cf. Williams v. Richards, (1907) 71 J.P. 222.
- 25. Said Ali Dost Mohammad v. Emperor, A.I.R. 1940 Pesh. 47 : 192 I.C. 246.
- 1. Phipson, Ev., 11th Ed., p. 118.

Steph. Dig., Art. 55; Taylor, Ev., ss. 354, 355; Wharton, Ev., ss. 17–56; Roscoe, N. P. Ev., 87; Best on Ev., ss. 256, et seq.; Norton, Ev., 230.

### SYNOPSIS

1. Principle.
2. Character in civil cases :
  - (a) General.
  - (b) Where character is in issue.
  - (c) Where character is not in issue.
3. "Except in so far as such character appears from facts otherwise relevant".
4. Sections 52, 138, 140, 145, 146, 148, 154 and 155. Scope of.

**1. Principle.** Evidence of character is excluded in civil cases as being too remote, and at the best affording but slight assistance towards the determination of the issue.<sup>2</sup> Such evidence is foreign to the point in issue and only calculated to create prejudice.<sup>3</sup>

When in a civil case the evidence of a witness is rejected on the ground of his being ex-convict, the rejection is bad but is not vitiated if the rejection was based on other grounds also.<sup>3-1</sup>

**2. Character in civil cases.** (a) *General.* The meaning of the term "character", as used in this and the following sections, is defined in the Explanation to Section 55 post, which must be read in connection with the present section.<sup>4</sup> The term "persons concerned" is vague, but this section, it is presumed, refers to the character of the parties to the suit, and not to the character of witnesses,<sup>5</sup> whose credibility is always in issue,<sup>6</sup> and represents the old state of the law according to which, in actions unconnected with character, the character of either of the parties is irrelevant and evidence introduced with the sole object of exposing the character of a party to the view of the Court is excluded.<sup>7</sup>

But under this section, as under Section 54, a distinction must be drawn between cases (a) where the character of party is in issue, as in an action for defamation,<sup>8</sup> and (b) where it is not in issue, but is tendered in support of some other issue.<sup>9</sup>

(b) *Where character is in issue.* In case (a), the party's general character being itself in issue, proof must necessarily be received of what the general character is or is not.<sup>10</sup> But in no case, apparently, is evidence of the character of the defendant admissible, except possibly to mitigate damages in actions for breach of promise of marriage.<sup>11</sup> This section only excludes evidence of character for the purpose of rendering probable or improbable any conduct imputed to him. So, where the question in a suit was whether a governess was "competent, lady-like and good tempered" while in her employer's service, witnesses were allowed to assert or deny her general

2. Taylor, Ev., s. 354.
3. Roscoe, N.P. Ev., 87.
- 3-1. Smt. Safi Devi v. Mahdeo Prasad A.I.R. 1978 All. 215; (1978) 4 A.L.R. 181.
4. v. Notes to S. 55 post.
5. Norton Ev., 330.
6. Best, Ev., s. 263; see as to witnesses ss. 145, 146 and 153 post.

7. Norton, Ev., 230.
8. Scott v. Sampson, (1882) 2 Q.B.D. 491; 51 L.J.Q.D. 380; 46 L.T. 412; 46 J.P. 408; 30 W.R. 541.
9. Norton, Ev., 230.
10. Taylor, Ev., s. 355; Best, Ev., s. 258; Roscoe, N.P. Ev., 87.
11. Cockle's Cases and Statutes on Evidence, (1952) 8th Ed., p. 95.

competency, good manners and temper.<sup>12</sup> And in such cases, it is not only competent to give general evidence of the character of the party with reference to the issue raised, but even to enquire into particular facts tending to establish it.<sup>13</sup> These cases, however, can scarcely be deemed an exception to the rule of exclusion ; for, it is clear that, as in cumulative offence, such as treason, or a conspiracy to carry on the business of common cheats, many acts are given in evidence because such crimes can be proved in no other way ; so, where general behaviour of a party is impeached, it is only by general evidence that the charge can be rebutted.<sup>14</sup>

(c) *Where character is not in issue.* In case (b), where character is not in issue but is tendered in support of some other issue, it is excluded as irrelevant,<sup>15</sup> except so far as it affects the amount of damages.<sup>16</sup> As evidence of general character can, at best, afford only glimmering light, where the question is whether a party has done a certain act or not, its admission for such a purpose is exclusively confined to criminal proceedings,<sup>17</sup> in which it was originally received *in favorem vitae*.<sup>18</sup> So, in an action of ejection, brought by the heir-at-law against a devisee, where the defendant was charged with having imposed a fictitious will on the testator *in extremis*, he was not permitted to call witnesses to prove his general good character, and a similar rule was laid down in an action for slander, where the words charged the plaintiff with stealing money from the defendant, though the latter, by pleading truth as a justification, had put the character of the former directly in jeopardy.<sup>19</sup> So also, in a divorce case, the husband cannot, in disproof of a particular act of cruelty, tender evidence of his general character or humanity.<sup>20</sup> Evidence of general reputation of character of the identifiers in the Registration Office was held to be inadmissible to refute the *bona fides* of the transaction evidenced by the document registered.<sup>21</sup> Thus, in a case, where it was alleged that certain documents had been obtained from a person while he was under the influence of drink, and that allegation stood disproved, it was held that evidence could not be let in to prove his general bad character, with a view to establish want of consideration for the transaction.<sup>22</sup>

3. "Except in so far as such character appears from facts otherwise relevant". That is to say, when facts relevant otherwise than for the purpose of showing character, are proved, and those facts, in addition to their primary inferences, raise others concerning the character of the parties to the suit, they become relevant not only for the purposes for which they were directly tendered, but also for the purpose of showing the character of the parties concerned. The Court may, of course, form its own conclusion as to the character of the parties or witnesses from their conduct as exhibited by the relevant facts proved in the case ; and it is perfectly legitimate for a Court to draw, from the opinion which it has so formed of the character of a party or witness, the inference that he might probably have enough been guilty of the conduct imputed to him, or that he is not worthy of credit.<sup>23</sup>

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| 12. Fountain v. Boodle, (1842) 3 Q.B. 5; and see Brine v. Bazalgette, (1849) 3 Ex. R. 692; King v. Waring, (1803) 5 Esp. 14. | 19. ib. and cases there cited.  |
| 13. Best, Ev., s. 258; Wharton, Ev. s. 48.   | 20. Naracott v. Naracott, (1864) 33 L.J. P. & M. 61; and see Jones v. James, (1868) 18 L.T.N.S. 243.  |
| 14. Taylor, Ev., s. 355; and see Best, Ev., s. 258.  | 21. Gangamoyi Debi v. Troiluckhya Nath Chowdhry, I.L.R. 33 Cal. 537 : 33 I.A. 60 : 8 Bom.L.R. 375 : 3 C.L.J. 349 : 10 C.W.N. 522 : 16 M.L.J. 161 : 1 M.L.T. 181 (P.C.). |
| 15. Jagannath Prasad v. Ramchandra, 1952 All. 408 : 53 Cr.L.J. 786.  | 22. Abdul Shakur v. Kotwaleswar, A.I.R. 1958 All. 54.   |
| 16. See S. 55 post.  | 23. Norton, Ev., 280.   |
| 17. S. 53 post.  |   |
| 18. Taylor, Ev., s. 354.   |   |

The reputation of a seller becomes admissible in evidence to show the degree of caution exercised by the purchaser in his dealings with the seller.<sup>23-1</sup>

4. Secs. 52, 138, 140, 145, 146, 148, 154 and 155. Scope of. These sections deal with the relevancy of character evidence in civil cases. The character of a party to a civil suit cannot be relevant to the decision of an issue arising in that suit. When a question arises whether a contract was entered into between the parties, or whether it is supported by consideration, the character of the plaintiff or defendant is certainly irrelevant to the issue, whether there was a contract or whether it was supported by consideration. But, there may be cases in which the character of a person may be relevant for the disposal of a suit, such as action for seduction, etc., but this section has no bearing on a case where the veracity of a witness is in question. This is governed by Section 146.

Sections 52 and 155 deal with different matters. Section 52 prohibits character evidence in regard to the subject-matter of the suit, whereas Section 155 prescribes the manner of impeaching the credit of a witness. Section 155 cannot, therefore, be construed as an exception to Section 52.

Further, Sections 155 and 146 are not in conflict with each other. Sections 138, 140, 145, 148 and 154 provide for impeaching the credit of a witness by cross-examination.

Section 155 lays down a different method of discrediting a witness by allowing independent evidence to be adduced. Section 155 is not an exception to this section. Though independent evidence of the character of a plaintiff is not admissible under this section, if he offers himself as a witness, he may be discredited by answers elicited in his cross-examination.<sup>24</sup>

53. *In criminal cases, previous good character relevant.* In criminal proceedings, the fact that the person accused is of a good character, is relevant.

Section 53 provides that, in criminal proceedings, the fact that the accused is of a good character is relevant. The evidence is important in weighing the probabilities in doubtful cases, but it can be dispensed with in cases where the prosecution case has not been proved.<sup>25</sup>

<sup>1</sup>[54. *Previous bad character not relevant, except in reply.* In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

*Explanation 1.* This section does not apply to cases in which the bad character of any person is itself a fact in issue.

23-1. Hako v. Bipan, 1971 Sim.L.J. (H.P.) 91.

24. Guntaka Hussenaiah v. Busetti Yeraiyah, A.I.R. 1954 Andhra 39. (1954) 2 M.I.J. 39.

L.E.-180

25. Data Xiva v. State, A.I.R. 1967 Goa 4 : 1967 Cr.L.J. 52 (F.B.).

1. Subs. by the Indian Evidence (Amendment) Act, 1891 (3 of 1891), S. 6 for the original section.

*Explanation 2.* A previous conviction is relevant as evidence of bad character.]

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| s. 3, Illus. (e) ("Fact.")                        | s. 14, Explanation (2), Illus. (b) (Relevancy of previous conviction.) |
| s. 3 ("Relevant.")                                | s. 3 ("Evidence.")   |
| s. 55, Explanation (Meaning of term "character".) | s. 3 ("Fact in issue.")  |
| s. 155, cl. (4) (Character of prosecutrix.)       | s. 140 (Witness to character may be cross-examined and re-examined.)   |

Taylor, Ev., ss. 349–353; Wharton, Cr. Ev., ss. 57, 84; Roscoe, Cr. Ev., 103; Phipson, Ev., 230; Steph. Dig., Art. 56; Best, Ev., ss. 256, et seq.; Wills, Ev., 85–92; Norton, Ev., ss. 231–233; Stephen's General View of the Criminal Law of England, Cr. P. C. 211, 236, 298; Penal Code, S. 75; Act VI of 1864, Ss. 3, 4; Act V of 1869, Art. 117.

### SYNOPSIS

1. General.
2. Principle.
3. Previous good character.
4. Previous bad character.
5. "Unless evidence has been given that

he has a good character".  
 —Explanation 1.  
 —Explanation 2.  
 —Previous conviction when can be proved.  
 6. Character of party prosecuting.

**1. General.** The provisions of Sections 52, 53, 54 and 55 make it clear that the evidence of general reputation and general disposition is relevant in a criminal proceeding. Under this Act, unlike in England, evidence can be given both of general character and general disposition. But the character evidence is very weak evidence. It cannot outweigh the positive evidence in regard to the guilt of a person. It may be useful, in doubtful cases, to tilt the balance in favour of the accused, or it may also afford a background for appreciating his reactions in a given situation. It must give place to acceptable positive evidence.<sup>2</sup>

**2. Principle.** Evidence of good character is allowed to be given on grounds of humanity for the purpose of raising a presumption of innocence, and as tending to explain conduct,<sup>3</sup> but evidence of bad character is in general excluded as being too remote,<sup>4</sup> and as tending to prejudice,<sup>5</sup> the accused whose guilt must be established by proof of the facts with which he is charged and not by presumptions to be raised from the character which he bears.<sup>6</sup> The exceptions are, first, where the character is itself a fact in issue, as distinguished from cases where evidence of character is tendered in support of other issue. Being a fact in issue, it must necessarily be proved. Secondly, where the accused has by giving evidence of good character challenged enquiry it is as fair that such evidence, like any other, should be open to rebuttal, as it is unjust that he should have the advantage of a character which in point of fact is undeserved.<sup>7</sup>

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| 2. Bhagwan Swarup v. State of Maharashtra, (1964) 2 S.C.R. 378; (1964) 2 S.C.J. 771; A.I.R. 1965 S.C. 682; (1965) 1 Cr.L.J. 608. | 17; R. v. Kartick Chunder Das, (1887) 14 C. 721.   |
| 3. Taylor, Ev., s. 352; Stephen's General View of the Criminal Law of England, pp. 311, 312.                                     | 6. R. v. Tuberfield, (1864) 10 Cox. 1; Amrita v. R., A.I.R. 1916 Cal. 188; I.L.R. 42 Cal. 957; 29 I.C. 513; 21 C.L.J. 331; 19 C.W.N 676. |
| 4. Stephen's op., cit, 309, 310.   | 7. v. notes post; Wills, Ev., 3rd Ed., 87.   |
| 5. R. v. Bykunt, (1868) 10 W.R. (Cr.)  |  |

**3. Previous good character.** Section 53 accords with the English rule. "Though general evidence of bad character is not admitted against the prisoner, general evidence of good character is always admitted in his favour." This would, no doubt, be an inconsistency justifiable, or at least intelligible, on the ground of the humanity of English law, if such evidence were not often of great importance as tending to explain conduct. In criminal proceedings a man's character is often a matter of importance in explaining his conduct and in judging his innocence or criminality. Many acts of an accused person would be suspicious or free from all suspicion when we come to know the character of the person by whom they are done.<sup>8</sup> In criminal proceedings, the character of the accused, as indicating the probability of his doing or not doing the act charged, is essentially relevant. Character being thus relevant, it follows that the accused may offer his good character to evidence the improbability of his doing the act charged, unless there is some collateral reason for exclusion, and the law recognizes none such.<sup>9</sup> It was once thought that character evidence was receivable in doubtful cases only, to turn the balance of evidence. But it is now understood to be admissible without any such limitation. Whether, when admitted, it should be given weight, except in a doubtful case, or whether it may suffice of itself to create a doubt, is a question of the weight of evidence, with which the rules of admissibility have no concern.<sup>10</sup> A loses his watch. B is found in possession of it the next day, and says he found it, and was keeping it for the owner. If A and B are strangers, and if B can call no one to speak on his character, this is a very poor excuse, but if B is a friend of A's and of the same position in life and if he calls many respectable people, who have known him from childhood and say he is a perfectly honest man, the story becomes highly probable. If the same thing happened to a thoroughly respectable, well-established inhabitant of the town, say, for instance, the Rector of the parish, being a man of first-rate character and large fortune, no one would think twice of it. These illustrations give the true theory of evidence of character. Judges frequently tell juries, that evidence of character cannot be of use, where the case is clearly proved, except in mitigation (or possibly aggravation) of punishment; but that, if they have any doubt,<sup>11</sup> evidence of character is highly important. This always seems to me to be equivalent to saying 'if you think the prisoner guilty say so; and if you think you ought to acquit him independently of the evidence of character, acquit him rather the more readily because of it.' Evidence of character would thus be superfluous

8. Habeeb Mohammad v. State of Hyderabad, A.I.R. 1954 S.C. 51 : 1953 S.C.J. 678 : 55 Cr.L.J. 338 : 1954 M.W.N. 233.
9. Wigmore, ss. 55, 56.
10. Wigmore, s. 56.
11. "When the point at issue is whether the accused has committed a particular criminal act, evidence of his general good character is obviously entitled to little weight, unless some reasonable doubt exists as to his guilt, and, therefore, in this event alone will the jury be advised to act upon such evidence." Taylor, Ev., s. 351. See The Govern-

ment of Bengal v. Umesh Chunder Mitter, 16 Cal. 310; Queen-Empress v. Nur Mahomed, 8 Bom. 223. See also Norton, Ev., 231, in which the case is given of an Irish Judge who summed up thus: "Gentlemen of the jury, there stands a boy of most excellent character, who has stolen six pairs of silk stockings," and see Hyde, C. J.'s observation in R. v. Turner, (1664) 6 How. St. Tr. 565; Queen-Empress v. Nur, (1883) 8 B. 223 at p. 227 (No importance can be attached to evidence of this kind when the case against the accused is clear).

in every case. The true distinction is that evidence of character may explain conduct, but cannot alter facts.<sup>12</sup>

It was held by a single Judge of the Lahore High Court that the mere fact that a person has enjoyed the confidence of his superiors or that he had in fact led a life of honesty during the past, is no reason to suppose that he will not succumb to temptation at the close of his career, but before a man of this type and such antecedents is adjudged guilty, the evidence against him must be of an unimpeachable character.<sup>13</sup> But a Bench of the same High Court expressly dissented from this view, and held that "cases of bribery like all other criminal cases, are subject to the rule that the accused cannot be convicted unless the Court is satisfied concerning his guilt beyond reasonable doubt, to which may be added as corollary, that where the accused person in a bribery case pleads and produces evidence of good character which the Court regards as satisfactory, and if it appears to the Court that a person possessing such a character would not be likely to act, in the circumstances proved to have existed at the time, in the manner alleged by the prosecution, such improbability must be taken into account in determining the question whether or not there is reasonable doubt as to the guilt of such accused person."<sup>14</sup>

It is wrong to say that evidence of previous good character is not material in a case under Section 110, Cr. P. C.<sup>15</sup> Evidence of good character of the accused and the fact that he is an educated man of good family connection would render it *prima facie* unlikely that he would be guilty of crimes of violence, but this presumption cannot be pressed too far in the case of offences originating in extreme political feeling.<sup>16</sup>

Where the act done is in itself indifferent, or, in other words, where the act amounts to an offence only by reason of being done with a vicious intention, evidence of character is valuable as to the probability or otherwise of the existence of such an intention. Where, on the other hand, the intention is not of the essence of the act, such evidence may be of use, only if it be doubtful whether the prisoner was the person who committed the act.<sup>17</sup> Even where the act charged is not in dispute, evidence of character is receivable for the purpose of mitigation of punishment.<sup>18</sup> Evidence of the good character of the accused may be given either by cross-examining the witnesses for the prosecution, or by calling separate witnesses on behalf of the accused of the specific kind impeached.<sup>19</sup> This section must be read in conjunction with the Explanation to Section 55 post. According to English and American laws, the character proved must be of the specific kind impeached, as honesty where

12. Stephen's General View of the Criminal Law of England, pp. 311, 312; and see Best, Ev., s. 262; Taylor, Ev., 351; Wharton, Cr. Ev., s. 66. See also The Government of Bengal v. Umesh Chunder Mitter, 16 Cal. 310.
13. Mangat Rai v. Emperor, A. I. R. 1928 Lah. 647: 110 I. C. 676: 29 Cr. L. J. 740; 29 P. L. R. 703.
14. Emperor v. Khurshid Hussain, A. I. R. 1947 Lah. 410: 48 Cr. L. J. 882.
15. Shiamlal v. Emperor, 2 I. C. 225: 9 Cr. L. J. 528; 6 A. L. J. 487; Rajpati Mahto v. State, 1961 B. L. J. R. 528.
16. In re Loganathaiyar, 4 I. C. 700: 11 Cr. L. J. 30; 6 M. L. T. 17.
17. See Habeed Mohammad v. State of Hyderabad, A. I. R. 1954 S.C. 51: 1953 S. C. J. 678: 55. Cr. L. J. 338: 1954 M. W. N. 233.
18. Draper's Trial, 30 How. St. Tr. 1018 (Criminal libel), per Lord Ellenborough. See also Habeed Mohammad v. State of Hyderabad, *supra*. Cf. S. 140 post.
19. Shiamlal v. Emperor, 2 I. C. 225: 9

dishonesty is charged, good character in other respects being irrelevant,<sup>20</sup> and must relate to a period proximate to the date of the charge.<sup>21</sup>

**4. Previous bad character.** By the provisions of Section 54, evidence of bad character, except in reply, is inadmissible for a man's guilt is to be established by proof of the facts, and not by proof of his character.<sup>22</sup> Character evidence is strictly relevant to the issue in the sense that it has some probative value, but is excluded for reasons of policy and humanity.<sup>23</sup>

"The rule and practice of our law in relation to evidence of character rests on the deepest principles of truth and justice. The protection of the law is due alike to the righteous and unrighteous. The sun of justice shines alike for the evil and the good, the just and the unjust. Crime must be proved, not presumed; on the contrary, the most vicious is presumed innocent until proved guilty. The admission of a contrary rule, even in any degree, would open a door not only to direct oppression of those who are vicious because they are ignorant and weak, but even to the oppression of prejudices as to religion, politics, character, professions, manners, upon the minds of honest and well-intentioned jurors."<sup>24</sup>

This policy of the Anglo-American law is more or less due to the inborn sporting instinct of Anglo-Norman-dom—the instinct of giving the game fair-play even at the expense of efficiency of procedure. This instinct asserts itself in other departments of our trial-law to much less advantage. But, as a pure question of policy, the doctrine is and can be supported as one better calculated than the opposite to lead to just verdicts. The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of Court. There are also indirect and more subtle disadvantages.

"The rule, then, firmly and universally established in policy and tradition, is that the prosecution may not instantly attack the defendant's character."<sup>25</sup>

Evidence of bad character might create a prejudice but not lead a step towards substantiation of guilt. This principle has been carried so far that, on a prosecution of an infamous offence, evidence of an admission by the accused, that he was addicted to the commission of similar offences, was rejected as irrelevant.<sup>1</sup> This section is in accordance with English law<sup>2</sup> and its provi-

- 20. Taylor, Ev., s. 551; Wharton, Cr. Ev., s. 60. If a man is indicted for felony, evidence is produced to his honesty; if for rape, to his chastity. "As far as my experience goes, the inquiry into character is always adapted to the charge"—Per Abbott, J., in Turner's Trial, 32 How. St. Tr. 1.
- 21. R. v. Swendsen, (1702) 14 How. St. Tr. 596. "A man is not born a knave; there must be time to make him so, nor is he presently discovered after he becomes one."—ib., per Lord Holt.
- 22. Amrita v. R., A. I. R. 1916 Cal. 188; I. L. R. 42 Cal. 957; 29 I.C. 513; 21 C. L. J. 331; 19 C. W. N. 676. See R. v. Sher Mahamed, A. I. R. 1923 R. 71; I. L. R. 46 B. 958; 75 I. C. 67; 25 Bom. L. R. 214; 24 Cr. L. J. 867.
- 23. Per Wills, J., in R. v. Rowton, (1865) 34 L. J. M. C. 57; 11 L.T. 745; 13 W. R. 436; 10 Cox. C. C. 25; L. & G. 520, 540.
- 24. Per Verplanck in People v. White, Ir. R. 247, quoted in Wigmore, s. 57, p. 454 of 3rd Ed.
- 25. Wigmore, s. 57.
- 1. S. 54; Norton, Ev., 232; R. v. Tubb, erfield, (1864) 10 Cox. 1; Best, Ev., S. 257; as to evidence in rebuttal, see Taylor, Ev., s. 352; Best, Ev., s. 261, 91; the subject is fully considered in R. v. Rowton, (1865) 34 L. J. M. C. 57.
- 2. v. post; and see also Taylor, Ev., s. 352; to this general rule the Statute, 32 and 33 Vict., c. 90, s. 11, which

sions were followed in India even before the enactment of this Act.<sup>3</sup> "A man's general bad character is a weak reason for believing that he was concerned in any particular criminal transaction, for it is a circumstance common to him and hundreds and thousands of other people, whereas the opportunity of committing the crime and facts immediately connected with it are marks which belong to very few, perhaps only to one or two persons. If general bad character is too remote, *a fortiori*, the particular transactions, of which that general bad character is the effect, are still further removed from proof; accordingly it is an inflexible rule of English Criminal Law to exclude evidence of such transactions."<sup>4</sup> And when in England a person charged with an offence is called as a witness in his own defence in pursuance of the Criminal Evidence Act, 1898, he can only be cross-examined as to character subject to the provisions set out in that Act. It is sufficiently clear from this section that in criminal proceedings the fact that the accused person has a bad character is not relevant for the purpose of raising a general inference from such bad character that the accused person is likely to have committed the crime charged.<sup>5</sup>

Evidence of bad character is not admissible even to corroborate the prosecution story.<sup>6</sup> Reference to the accused as a notorious goonda in the charge to the jury is bound to adversely affect the accused and is irrelevant in a case in which his bad character is not in issue.<sup>7</sup>

If, however, evidence is otherwise relevant it is not rendered inadmissible merely because it shows bad character or the commission of offence, other than the offence with which the accused is charged.<sup>8</sup>

A man's general reputation is that which he bears amongst all the townsmen in the place in which he lives, and if the state of things is that the body of his fellow townsmen who know him look upon him as a dangerous man and man of bad habits, that is strong evidence that he is a man of bad character.<sup>9</sup> Where the accused is said to have been an associate of dacoits, the evidence of his reputation may come from people of the villages where the dacoities had taken place.<sup>10</sup> Evidence of the accused frequenting or running gambling and cocaine dens is evidence of bad character.<sup>11</sup> Evidence that the ac-

allows evidence of previous convictions to be given in order to prove guilty knowledge in cases of receiving stolen goods, forms an exception; Taylor, *Ev.*, s. 353; see *R. v. Kartick Chunder Das*, (1887) 14 C. 721.

3. *R. v. Gopal*, (1896) 6 W. R. Cr. 72; *R. v. Beharee*, (1867) 7 W. R. Cr. 7; *R. v. Phoolchand*, (1867) 8 W. R. Cr. 11; *R. v. Bykunt*, (1868) 10 W. R. Cr. 17. Evidence of character and previous conduct of a prisoner being matters of prejudice and not direct evidence of facts relevant to the charge against the prisoner, ought not to be allowed to go to the jury; *R. v. Kulum*, (1868) 10 W. R. Cr. 39.
4. Stephen's General View of the Criminal Law of England, pp. 309, 310.
5. *R. v. Alloomiya*, (1903) 5 Bom.
6. *L. R.* 805, 819; (1903) 28 B. 129. *Phekan Singh v. Emperor*, A. I. R. 1931 Pat. 345; 133 I. C. 449; 32 Cr. L. J. 1025; 12 P. L. T. 471.
7. *Nimoo Pal Mazumdar v. The State*, 1955 Cal. 559; 56 Cr. L. J. 1358.
8. *Saroj Kumar v. Emperor*, A. I. R. 1932 Cal. 474; I. L. R. 59 Cal. 1361; 139 I. C. 873; 33 Cr. L. J. 854; 55 C. L. J. 439; *Raikhon Boro v. Emperor*, A. I. R. 1936 Cal. 469; 166 I. C. 364; *Teka Ahir v. Emperor*, A. I. R. 1920 Pat. 351; 60 I. C. 331; 22 Cr. L. J. 219.
9. *Rai Istri Prasad v. Queen-Empress*, I. L. R. 23 Cal. 621.
10. *Chintamon Singh v. Emperor*, I. L. R. 35 Cal. 243 at 263.
11. *Sital Singh v. Emperor*, A. I. R. 1920 Cal. 300; I. L. R. 46 Cal. 700; 54 I.C. 53; 21 Cr. L. J. 5; 30 C. L. J. 255.

cused had been bound down under Section 110, Cr. P. C., is evidence of bad character, but not evidence that proceedings under that section were pending against him. It is fair to the accused to caution the jury against drawing any adverse inference against the accused even from that fact.<sup>12</sup>

This section, as originally framed,<sup>13</sup> allowed a previous conviction to be in all cases admissible in evidence against an accused person for the purpose of prejudicing him, and in so doing deliberately departed from the rule of English law already mentioned.<sup>14</sup> The framers of the Act gave as their reason for such departure that they were unable to see why a prisoner should not be prejudiced by such evidence if it was true.<sup>15</sup> In consequence of the decision of the Full Bench in the case of *R. v. Kartick Chunder Das*,<sup>16</sup> the present section was amended by Act III of 1891 so as to bring it into more general accordance with the English law on the same subject.<sup>17</sup> The provisions of Section 310, Code of Criminal Procedure, 1898 (now Section 236 of Cr. P. C., 1973), whereby, in Sessions trials all knowledge of previous conviction is rightly withheld from jurors and assessors until after the accused has either pleaded, or been found guilty, indicate the importance of the complete exclusion of such knowledge when weighing the evidence as to the truth or otherwise of the main charge. The principle underlying this legal provision may also be seen in Section 54, Indian Evidence Act, under which a previous conviction is declared inadmissible against an accused person, except where evidence of bad character is relevant.<sup>18</sup>

And now a previous conviction is not admissible against an accused person under this section, except where evidence of bad character is relevant,<sup>19</sup>

12. *Moseladdi v. Emperor*, A. I. R. 1939 Cal. 497; 184 I. C. 206: 40 Cr. L. J. 877.

13. The original section ran as follows: "In criminal proceedings the fact that the accused person has been previously convicted of any offence is relevant, but the fact that he has a bad character is irrelevant unless evidence has been given that he has a good character, in which case it becomes relevant. Explanation 1—This section does not apply to cases in which the bad character of any person is itself a fact in issue."

14. See *R. v. Kartick Chunder Das*, (1887) 14 C. 721. Notwithstanding the express provisions in the original section, the Calcutta High Court, in the earlier case of *Roshun v. R.*, (1880) 5 C. 768, refused to allow a previous conviction to be given in evidence.

15. See First Report of the Select Committee on the Evidence Bill, p. 259, cited in *R. v. Kartick Chunder Das*, *supra* at p. 729. It was apparently also considered that in such cases the matter had been reduced to legal certainty by the conviction; see *R. v. Parbhudas*, (1874) 11 Bom. H. C. R. 90; *R. v. Ram-saran*, (1886) 8 A. 304, but as point-

ed out in *Norton*, Ev., 231, the language of the original section was so wide as to include Acts not relevant in any real sense of the word at all. For what bearing would a previous conviction for theft have on a question of guilt on a charge of rape? And See also *I. Phip. Ev.*, 606, 10th Ed.; *Best*, Ev., s. 259.

16. (1887) 14 C. 721; see as to the effect of this decision *R. v. Naba*, (1887) 1 C. W. N. 148, 148.

17. ib.; S. 14 ante. Explanation (2) and Illus. (b) must be considered in dealing with the effect of this amendment which, while removing the latitude relating to the introduction of evidence of previous convictions which prevailed under this section as it originally stood, has yet not made such previous convictions wholly inadmissible, v. post.

18. *Maung E Gyi v. Emperor*, A. I. R. 1924 Rang. 91; I. L. R. 1 Rang. 520; 81 I. C. 106: 25 Cr. L. J. 618. See also *Gayalal v. Emperor*, A. I. R. 1946 Oudh 233; 224 I. C. 311; 47 Cr. L. J. 588; 1946 O. W. N. 232.

19. S. 54, Explanation (2); cf. the following earlier cases as to previous convictions; *R. v. Thakordas*, (1867) 7 W. R. (Cr.) 7; *R. v.*

i. e., (a) when evidence of bad character is admissible to rebut evidence given of good character for here the accused challenges or invites enquiry, and the reply of a previous conviction by the prosecution is fair and legitimate enough,<sup>20</sup> and (b) where the fact of bad character is itself a fact in issue, namely, where the charge itself implies the bad character of the accused.<sup>21</sup> But a previous conviction may be admissible otherwise than under this section. Thus, first, a previous conviction is admissible in evidence in cases in which the accused is liable to enhanced punishment on account of having been previously convicted.<sup>22</sup> Secondly, where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of Section 14 ante, the previous conviction of such person is also a relevant fact. So, it has been held that having regard to the character of the offence under Section 400 of the Penal Code (punishment for belonging to a gang of dacoits) previous commissions of dacoity are relevant under the fourteenth section and convictions previous to the time specified in the charge or to the framing of the charge are relevant under the second explanation to that section *aliter* as to subsequent conviction.<sup>23</sup> Thirdly, a previous conviction may be admissible as a fact in issue or relevant otherwise than under Section 14 or 54, as for example, under the eighth section as showing motive.<sup>24</sup>

In one case of the Calcutta High Court, it was said that proof of previous convictions must always be strict.<sup>25</sup> And it was held, that a register produced from the Central Bureau and purporting to contain the prisoner's thumb-impressions and descriptive rolls and list of previous convictions was insufficient in the absence of evidence to show how it was made and lodged in the Central Bureau.

**5. "Unless evidence has been given that he has a good character".** Although under this section evidence that the accused has a bad character is generally irrelevant, it would become relevant if evidence has been given

Phoolchand, (1867) 8 W. R. (Cr.) 11; R. v. Shiboo, (1865) 3 W. R. (Cr.) 38; Roshun v. R., (1880) 5 C. 768.

20. S. 54; Norton, Ev., 232. In England previous conviction is allowed to be given in reply in certain cases only; Roscoe, Cr. Ev., 13th Ed., 86; Phipson, Ev., 9th Ed., 191; Steph. Dig., Art. 56.

21. S. 54, Explanation 1. v. post.

22. See Cr. P. Code, S. 310, (now sec. 236 of new Cr. P. C. of 1973) (Notwithstanding anything in this section evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act, 1872; Act III of 1891, S. 91; Cr. P. C. of 1973, S. 211; Penal Code, S. 75; Act VI of 1864, Ss. 3, 4 (Whipping Act) replaced by Whipping Act, 1909 (Act IV of 1909) which has been repealed by the Abolition of Whipping Act, 1955 (44 of 1955); Act V of 1869, Art.

117 (Indian Articles of War); Cr. P. C., S. 298 (mode of proving previous convictions).

23. Empress v. Naba, (1897) 1 C. W. N. 146; S. 14, Explanation (2) and illus. (b) (added by Act III of 1891. S. 1); for a case where previous conviction was taken into consideration in awarding punishment see Ismail v. R., 39 B. 326; 26 I. C. 995; 16 Cr. L. J. 83; A. I. R. 1914 B. 216.

24. S. 43 ante; see illus. (e) and (f); it cannot be said that these two illustrations are exhaustive and that in no other cases except those mentioned can a previous conviction be relevant; this is shown by Explanation (2) to S. 14; R. v. Naba, (1897) 1 C. W. N. 146, 149; Mangal Singh v. State of Madhya Bharat, A. I. R. 1957 S.C. 199; 1957 Cr. L. J. 325.

25. R. v. Abdul, 43 C. 1128; 33 I. C. 825; 20 C. W. N. 725; 17 Cr. L. J. 185; A. I. R. 1916 C. 344.

that he has a good character.<sup>1</sup> The prosecution cannot lead evidence of bad character to prejudice the accused, but it can lead such evidence if that particular accused has previously led evidence of his good character.<sup>2</sup> Under the English law also, whenever the accused gives evidence of good character, either by cross-examination or by his own or others' testimony (unless such evidence has been inadvertently introduced),<sup>3</sup> or has been forced from him in cross-examination,<sup>4</sup> the prosecution may rebut it either by cross-examination<sup>5</sup> or independent testimony<sup>6</sup> but this does not apply where the accused attacks the witnesses for the prosecution in cross-examination but does not give evidence.<sup>7</sup>

It is no disproof of good character that the accused has been suspected or accused of a previous crime but not convicted, and questions directed to such matters can only be asked if the accused has expressly sworn to the contrary.<sup>8</sup> When a prisoner elects to give evidence on his own behalf under the Criminal Evidence Act, 1898, he may be cross-examined as to character if he has been put forward as a man whose character is unblemished.<sup>9</sup> The same principle would apply when the accused offers to give evidence on his own behalf under section 315 of the Cr. P. C., 1973.

The present section must be read in conjunction with the Explanation to Section 55 post. The words "unless evidence has been given" are ambiguous; they may refer either to the evidence of witnesses called for the defence or to the evidence elicited in cross-examination from the witnesses for the prosecution. In a Madras case, it has been held, that even if the accused leads evidence of good character, the prosecution cannot, as a matter of right, claim to lead rebutting evidence. The Criminal Procedure Code gives the prosecution no such privilege. If the Magistrate, in his discretion, thinks such evidence essential to the just decision of the case, he may summon it, but the prosecution cannot insist upon his doing so.<sup>10</sup>

*Explanation 1.* The section does not apply to cases in which the bad character of any person is itself a fact in issue.<sup>11</sup> The first Explanation aims at that class of cases in which the charge itself implies the bad character of the accused.<sup>12</sup> It is undoubtedly not competent for the prosecution to adduce

1. Lale v. Emperor, A. I. R. 1929 Oudh 321 (2); 118 I. C. 423: 30 Cr. L. J. 922; Beni Madho v. Emperor, A. I. R. 1933 Oudh 355; 146 I. C. 1064; 10 O. W. N. 688.
2. Abdul Jalil Khafi v. Emperor, A. I. R. 1930 All. 746; 128 I. C. 593; 32 Cr. L. J. 152; 1930 A. L. J. 1105; Babulal v. The State, A. I. R. 1959 Cal. 693; 1959 Cr. L. J. 1313; 1973 J. & K. L. R. 524.
3. R. v. Redd, (1923) 1 K. B. 104.
4. R. v. Beecham, (1921) 3 K. B. 464; R. v. Parkar, (1924) 18 Cr. App. R. 14.
5. Stirland v. D. P. P., 1944 A. C. 315 at p. 327.
6. R. v. Gadbury, (1838) 8 C. & P. 676; R. v. Shrimpton, (1851) 2 Den. C. C. 319; R. v. Farrington, (1908) 1 Cr. App. R. 113, 116, 119.
7. R. v. Butterwasser, (1948) 1 K. B. 4; (1947) 2 All E. R. 415.

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8. Stirland v. D. P. P., 1944 A. C. 315.
9. R. v. Hollamby, (1908) C. C. C. 149, p. 168.
10. Ramasami Mudaliar v. Ramalinga Udayar, 1930 Mad. 448 (2); 127 I. C. 304; 31 Cr. L. J. 1198; 1930 M. W. N. 96; 32 L. W. 215.
11. Explanation 1.
12. Norton, Ev., 233; cf. Cr. P. C. Chap. VIII, relating to the taking of security from persons of bad character under S. 117 ib., the fact that a person is a habitual offender may be proved by evidence of general repute. Rai Isri v. R., (1895) 23 C. 621. See as to evidence of general repute; Rup Singh v. R., (1904) 1 All. L. J. 616. See also Best, Ev., s. 258, and cf. Act XXVII of 1871 (Criminal Tribes); Alep. v. R., (1906) 11 C. W. N. 413; and Chintamon v. R., (1907) 35 C. 243.

evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. But "the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible, if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."<sup>13</sup> If the evidence of bad character is introduced in order to establish a relevant fact, which cannot be proved *aliunde*, the evidence of bad character is admissible.<sup>14</sup>

*Explanation 2.* Under the second Explanation, a previous conviction is made relevant as evidence of bad character. Therefore, whenever evidence of bad character is admissible, a previous conviction will be admissible, namely, to rebut evidence which has been given of good character and in cases under the preceding explanation where the bad character is itself a fact in issue.<sup>15</sup> Therefore, evidence of bad character is irrelevant when there is no evidence of good character of the accused.<sup>16</sup>

There seems to be divergence of opinion as to whether evidence of a previous conviction of the offence of dacoity alone would be relevant for an offence under Section 400, I. P. C., or else whether evidence of previous conviction of any other offence such as theft or burglary or the fact that a person was bound down under Section 109 or Section 110, Cr. P. C., would also be relevant.

In *Empress v. Naba Kumar Patnaik*<sup>17</sup> evidence of previous commission or conviction of the offence of dacoity was held to be admissible. In *Publio Prosecutor v. Bonigiri Pottigadu*,<sup>18</sup> some doubt was thrown about the admissibility of evidence regarding the commission of crimes other than dacoity. In *Emperor v. Sher Mahomed*,<sup>19</sup> a single Judge held that in a case under Section 400, I. P. C., evidence of previous conviction on a charge of theft or of an order under Section 109 or Section 110, Cr. P. C., was inadmissible. In *Man-kura v. R.*,<sup>20</sup> it has been held that the character of the accused not being a fact in issue in the offence belonging to a gang of persons associated for the purpose of habitually committing theft punishable under Section 401 of the Indian Penal Code, evidence of bad character whether by proof of previous

13. Per Lord Herschell in *Makin v. Attorney-General of New South Wales*, (1894) A. C. 57 at 65; 63 L. J. P. C. 41 cited in *Noor Mohamad v. The King*, A. I. R. 1949 P. C. 161 at 163; 50 Cr. L. J. 770; 1949 A. L. J. 136; 1949 A. W. R. 240; 53 C. W. N. 736; 1949 M. W. N. 437; 62 L. W. 530. See also *Ramsumiran Pandc v. Emperor*, 1942 Pat. 291; 198 I. C. 662; 43 Cr. L. J. 413; 8 B. R. 441; *Emperor v. Stewart*, A. I. R. 1927 Sind 28; 97 I. C. 1041; 27 Cr. L. J. 1217; *Gopal v. The Crown*, 1950 H. P. 18; 51 Cr. L. J. 786.
14. *Khilawan v. Emperor*, A. I. R. 1928 Oudh 430; 112 I. C. 337; 29 Cr. L. J. 1009; 5 O. W. N. 760; *Beni Ma-dho v. Emperor*, 1933 Oudh 355; 146 I. C. 1064; 10 O. W. N. 688.
15. The amended section clears up an obscurity which existed in the old section; see *Norton, Ev.*, 232.
16. *Kuruna Behera v. State*, 33 Cut. L. T. 146 (148).
17. (1897) 1 C. W. N. 146.
18. 32 Mad. 179; 9 Cr. L. J. 567.
19. A. I. R. 1923 Bom. 71; I. L. R. 46 Bom. 958; 24 Cr. L. J. 867; 75 I. C. 67.
20. 27 Cal. 139.

conviction or otherwise is inadmissible.<sup>21</sup> But in *Bonai v. King-Emperor*,<sup>22</sup> where a person was charged under Section 400, I. P. C., it was held that evidence of previous conviction, whether for offences against property or for bad livelihood, was admissible not as evidence of character but as evidence of habit. The learned Judges observed that conviction for bad livelihood would be more cogent evidence of habit than isolated acts of theft. In *Kade Sundar v. Emperor*,<sup>23</sup> another Division Bench of the Calcutta High Court held that for a charge under Section 400, I. P. C., the past history of the accused including his conviction for an offence of theft or of his having been bound down under Section 110, Cr. P. C., would be relevant. In *Kasem Ali v. Emperor*,<sup>24</sup> such previous conviction was pointed out to be some evidence of association. Again in *Ledu Molla v. Emperor*,<sup>25</sup> it was held that evidence of previous convictions for dacoity and of orders under Section 110 of the Criminal Procedure Code was admissible for the purpose of proving habit and association in a subsequent trial under Section 400 of the Penal Code. In *Moti Ram Hari v. Emperor*,<sup>1</sup> the Bombay High Court followed the decision of the Calcutta High Court in *Bonai v. King-Emperor*.<sup>2</sup> So also, the Sind Court in *Baksho v. Emperor*.<sup>3</sup> The Lahore High Court has held that, in the absence of direct evidence, the associating and the purpose of the association may be established by proof of acts from which these may be reasonably inferred.<sup>4</sup> In a Full Bench case of the Nagpur High Court also, it has been held that evidence of previous convictions of dacoity and orders under Section 110, Cr. P. C., are admissible for the purpose of proving habit and association, in a subsequent trial under Section 401, I. P. C.<sup>5</sup> Thus, the majority view seems to be that in a trial for an offence under Section 400, I. P. C., evidence of previous conviction may be admissible for the purpose of proving habit and association. It is indeed difficult to dissociate habit from character. For proving a charge under Section 400, I. P. C., it must be established (1) that there was a gang associated for the purpose of habitually committing dacoity, and (2) that the accused belonged to the gang, that is to say, the association of the accused with the gang was not casual but was intended to be habitual. Hence, habit is a fact in issue to be proved for the purpose of establishing both the aforesaid ingredients of the offence.

As habit is equivalent to character, it may be reasonably said that character of an accused is itself a fact in issue for proving a charge under Section 400, I. P. C. Thus Explanations 1 and 2 to Section 54, Evidence Act, are attracted and previous convictions not only in respect of dacoities but also in respect of other offences, such as theft, burglary and orders under Section 109 or Section 110, Cr. P. C., may be admissible.

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- 21. In this case the previous convictions were rejected as evidence of bad character; it does not appear to have been argued or considered whether such convictions were admissible under S. 14 [as was held in *Empress v. Naba*, (1897) 1 C. W. N. 146, which was a trial for the commission of a cognate offence under S. 400 of the Penal Code], or under other sections of the Act. v. ante.
- 22. 88 Cal. 408; 12 Cr. L. J. 97.
- 23. 13 Ind. Cas. 279 (Cal.); 13 Cr. L. J. 39.
- 24. A. I. R. 1920 Cal. 87; 47 Cal. 154; 21 Cr. L. J. 386; 55 I. C. 994.
- 25. A. I. R. 1925 Cal. 872; I. L. R. 52 Cal. 595; 87 I. C. 925; 26 Cr. L. J. 1037; 42 C. L. J. 501.
- 1. A. I. R. 1925 B. 195; 89 I.C. 527; 26 Cr. L. J. 1391; 26 Bom. L. R. 1223.
- 2. 38 Cal. 408; 12 Cr. L. J. 97.
- 3. A. I. R. 1930 Sind 211; 126 I. C. 468; 31 Cr. L. J. 1046.
- 4. *Pir Bakush v. The Crown*, A. I. R. 1923 Lah. 327; 73 I. C. 815; 24 Cr. L. J. 703.
- 5. *Amdumiyan Guljar Patel v. Emperor*, A. I. R. 1937 Nag. 17; I. L. R. 1937 Nag. 315; 166 I. C. 582; 38 Cr. L. J. 237, 251 (F.B.).

If a habitual thief is found in the company of a gang of dacoits, and it is established that he knew that the said gang was habitually committing dacoity, it may be reasonably inferred that his association with them was not casual but that he joined the gang for the purpose of habitually committing dacoity, unless there are other circumstances connected with his association with the gang which would support a contrary view. Apart from the evidence of habit and character, previous convictions may also be admissible for the purpose of proving association of group of individual.<sup>6</sup> This view, however, is too broadly stated. The fact in issue, in a charge under section 401, I. P. C., is a particular trait of bad character, namely association for the purpose of habitually committing robbery and theft. Evidence can be given of only that particular trait of bad character but not of general bad character, e. g. that the accused is a murderer or a cheat.<sup>7</sup>

A charge under clause (f), Section 110 of the Criminal Procedure Code could not formerly be proved by general reputation, but there must be evidence of the facts charged.<sup>8</sup> It has now been held that "in proceedings under clause (f), Section 110, Cr. P. C., evidence of general repute may be tendered by the Crown to prove that a person so desperate and dangerous as to render his being at large without security hazardous to the community. Evidence of association with proved revolutionaries is also evidence of reputation."<sup>9</sup> It is only in the case of a person who is an habitual offender and is called upon to furnish security for good behaviour that the fact of his being an habitual offender may be proved by evidence of general repute, for a provision of law which is in itself an exception of general rules of evidence must be only applied to the case to which it is expressly confined.<sup>10</sup> Where a person is called upon to furnish security to keep the peace, evidence of general repute cannot be made use of to show that such person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity.<sup>11</sup> Upon the objection that the evidence given before a Magistrate was not that of general repute, but of specific acts spoken to by witnesses from mere hearsay, it was held that though the evidence given was necessary yet it amounted to evidence of repute, and that hearsay evidence amounting to evidence of general repute was admissible for the purpose of proceedings under Chap. VIII of the Criminal Procedure Code. When there is direct evidence of any offence committed by a person, the action taken against him by way of prosecution is one of a punitive character; but when the object of the Legislature is simply to provide preventive measures, evidence of repute, though hearsay, is admissible.<sup>12</sup> When the prosecution sets out to prove that the accused is an habitual thief and burglar, it is obviously insufficient to prove merely that he is a "bad character", as that expression may not mean that he is a thief or burglar. A witness should not be allowed to state merely that an accused person is a "bad character" if he does not explain more precisely what he means by that expression. But when a witness starts by saying that a person is a "bad character" and immediately follows this up by saying that the per-

6. Bhimashaw v. State, 1956 Orissa 177.
7. Baichaturi v. State, A. I. R. 1960 Guj. 5; Bhimashaw v. State, A. I. R. 1956 Orissa 177, dissented from.
8. Kalai v. R., (1901) 29 C. 779 aliter now.
9. Satgur Dayal v. Emperor, A. I. R.

- 1933 All. 674 (2): 146 I. C. 875: 35 Cr. L. J. 183: 1933 A. L. J. 927.
10. Muthu v. R., (1910) 34 M. 255.
11. R. v. Bidhyapati, (1903) 25 A. 273.
12. R. v. Raoji, (1903) 6 Bom. L. R. 34.

son habitually commits theft, then there is no ambiguity about his meaning and his deposition is then relevant and admissible as evidence of general repute.<sup>12</sup> The second Explanation does not say that a previous conviction is never relevant unless evidence of bad character is relevant or is itself a fact in issue. Evidence that the accused had been previously convicted of the same offence is admissible to show guilty knowledge or intention.<sup>14</sup>

*Previous conviction when can be proved.* There are two stages at which a previous conviction can be proved. One is before conviction for a subsequent offence, the other is after such conviction. Before conviction, such evidence is admissible, if evidence has been given that the prisoner is of good character, or if the bad character is in itself a fact in issue. The admission of evidence of a previous conviction after conviction for a subsequent offence is regulated by the Criminal Procedure Code, 1973, Section 211. If the accused, having been previously convicted of any offence, is liable by reason of such previous conviction to enhanced punishment or to a punishment of a different kind for a subsequent offence, and it is intended to prove such previous conviction for the purpose of effecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge. Section 310 further provides that in this case such further charge shall not be read out in Court and the accused shall not be asked to plead thereto nor shall the same be referred to by the prosecution or any evidence adduced thereon unless and until he has been convicted of the subsequent offence.<sup>15</sup>

The reason for not permitting the previous conviction to be proved or even to be made known during the trial of the accused for the main offence is that the fact of the previous conviction may prejudice the accused by creating an adverse opinion in the mind of the Judge, jury or the assessors. Upon this principle the reading of the charge, the previous statement of the accused and the evidence relating to the previous conviction are scrupulously suspended till the accused is convicted of the substantive offence, or the opinion of the assessors has been obtained.<sup>16</sup> The provisions of Section 310, Cr. P. C., 1898 (Section 236 of Cr. P. C., 1973), are imperative and must be complied with strictly.<sup>17</sup> That section, however, is expressly made applicable to trials before the Court of Session only and does not apply to trials before a Magistrate,<sup>18</sup> and it has been observed in a Rangoon case: "Too early an admission of evidence as to previous conviction may possibly result in the accused's being prejudiced, but where, under the system now in force, the fact of previous conviction is made known to the Magistrate before he even begins the trial, there seems to be no particular object in waiting till the end of the trial in order to question the accused regarding it."<sup>19</sup> But, it is an elementary principle of criminal law that a prisoner on his trial ought not to be prejudiced by statement of a previous conviction suffered by him. Previous convictions are no doubt made admissible by Explanation 2, but they cannot be admitted

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| <p>13. Emperor v. Kumera, 1929 All. 650: I. L. R. 51 All. 275.</p> <p>14. R. v. Alloomiya, (1903) 5 Bom. L. R. 805, 819, 821; see Ss. 14, 15 ante.</p> <p>15. Bhura Singh v. Emperor, A. I. R. 1935 Sind 115: 158 I. C. 282: 36 Cr. L. J. 1810.</p> <p>16. Teka Ahir v. Emperor, 60 I. C. 33: 22 Cr. L. J. 219: 5 Cr. L. J. 706.</p> | <p>17. Raja v. Emperor, A. I. R. 1927 Lah. 774: 103 I. C. 203: 28 Cr. L. J. 667.</p> <p>18. Dehri Sonar v. Emperor, A. I. R. 1923 Cal. 707: I. L. R. 50 Cal. 367: 77 I. C. 991: 25 Cr. L. J. 527.</p> <p>19. Maung F Gyi v. Emperor, A. I. R. 1921 Rang. 91: I. L. R. 1 Rang. 520: 81 I. C. 106: 25 Cr. L. J. 618.</p> |
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to prejudice the trial. It is an elementary principle of criminal jurisprudence that the previous convictions of the accused are not relevant and cannot be proved, unless his good character is relevant under this section or unless an enhancement of sentence is sought for under Section 75, I. P. C.<sup>20</sup>

Previous convictions may also become relevant when an offender claims the benefit of Section 360, Cr. P. C., 1973. As to the manner of proving previous convictions see Section 298 of the same Code.

**6. Character of party prosecuting.** When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.<sup>21</sup> This seems to be the only case in which evidence is allowed of the character of the person prosecuting. The act here charged as a crime is, unlike most criminal acts, one which may be consented to, and the character of the prosecutrix is material as to consent.<sup>22</sup> In a charge for murder, the Supreme Court has held that evidence which disclosed certain unsavoury things about the accused could be let in to furnish the motive for the killing.<sup>23</sup>

In some cases of prosecution for defamation questions in cross-examination of the complainant affecting his reputation were held to be admissible.<sup>24</sup> Thus, in the Lahore case *Devi Dial v. Crown*<sup>25</sup> it was observed : "It is settled law that in an action for damages for libel or slander evidence may be given in mitigation of damages to show that the plaintiff had general bad character.<sup>1</sup> Similarly, in criminal prosecution where it is essential, in order to constitute the offence of defamation, that the person who makes or publishes the imputation complained of should intend to harm, or know or have reason to believe that the imputation will harm the reputation of the person concerning whom it is made or published, the question what reputation the complainant had, is relevant. If the petitioner in the present case were able to prove that the complainant had a notoriously bad reputation as a bribe-taker it might reasonably be argued that the imputation made as to his having taken a bribe on the particular occasion in question, even if false, could not damage his reputation as he had none to lose; and in any case proof of the complainant's bad reputation would affect the sentence to be passed in case of conviction." Similarly, in the Allahabad case of *Munnalal v. D. P. Singh*,<sup>2</sup> it was observed :

"One of the main ingredients of the offence of defamation, as defined in Section 499, Penal Code, is that the imputation must have been made with the intention of harming, or with the knowledge or reason to believe that it would harm the reputation of the person concerning whom it is made. While the complainant is entitled to lead evidence to prove

- 20. Kamya, *In re*, A. I. R. 1960 Andh. Pra. 490; 1960 Cr. L. J. 1302.
- 21. S. 155 (4) post.
- 22. Cockle's Cases and Statutes on Evidence, 8th Ed., p. 117.
- 23. Mangal Singh *v. State of M. B.*, A. I. R. 1957 S. C. 199; 1957 Cr. L. J. 325.
- 24. Laidman *v. Hearsey*, 7 All. 906; 1885 A. W. N. 272; *Devi Dial v. Crown*, 1923 Lah. 225 at 226: I. L. R.
- 25. *Supra*.
- 1. 8 Q. B. D. 491 and Odgers on Libel and Slander, 5th Ed., 402.
- 2. A. I. R. 1950 All. 455 at 457; 51 Cr. L. J. 964; 1950 A. L. J. 787; 1950 A. W. R. (H.C.) 481.

this ingredient, the accused is entitled to produce evidence, or put questions in cross-examination of the complainant or his witnesses, to rebut it. In so doing, however, he cannot lead evidence of or put questions relating to rumours and suspicions to the same effect as the defamatory matter complained of, or particular facts tending to show the general character and disposition of the complainant. That being so, an important duty rests upon the trial Court to see, on the one hand, that the accused is not prejudiced in any manner by shutting out evidence, which he is entitled to produce, or disallowing questions, which he is entitled to put; and, on the other hand, that the complainant, who complains of defamation, is not unnecessarily harassed."

But, a Division Bench of the Patna High Court has dissented from the view taken in the above cases, and has held that reputation of the complainant is not at all a necessary fact to be proved in a charge under Section 500, I. P. C., and it does not become a fact in issue, and the accused is not entitled to ask questions in general concerning the character and reputation of the complainant, to show that it was such that the imputation in question could not lower it further.<sup>3</sup> The fact is that everyone has a reputation, and the only question that can arise regarding it is whether it is high or low. This question is irrelevant in a prosecution for defamation. The law does not contemplate that any person's reputation is so low that it cannot fall lower by the publication of fresh defamatory matter relating to him. Also, it is unthinkable that the law can intend that defamatory matter about a person of high reputation can be published without incurring liability for prosecution under Section 500, Penal Code, merely because his reputation stands so high that the imputation is not likely to be believed. Even in civil libel the absence of damnum is no defence and the plaintiff may recover general damages without proof of special damages. Still less can it be a defence in a criminal case that the reputation of the complainant is such that it cannot be injured by the imputation.<sup>4</sup> For further discussion see note under section 155, post.

*55. Character as affecting damages.* In civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

*Explanation.* In sections 52, 53, 54 and 55, the word "character" includes both reputation and disposition; but [except as provided in section 54] evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

s. 3 (Relevant).

s. 12 (Facts tending to determine the am-

ount of damages).

s. 140 (Witnesses to characters).

Steph. Dig., Art. 57; Taylor, Ev., Sections 356-362; Mayne on Damages, 536, 579, 582; Roscoe, N. P., Ev., 87; Wharton, Ev., Sections 47-56; Wigmore, Ev., s. 1608, et seq.

3. Devbrata Shastri v. Krishna Ballabh, A. I. R. 1954 Pat. 84; I. L. R. 32 Pat. 276: 55 Cr. L. J. 124.

4. Per Reuben, C. J., in Devbrata Shastri v. Krishna Ballabh, 1954 Pat.

84 at 92; I. L. R. 32 Pat. 276: 55 Cr. L. J. 124.

5. Ins. by the Indian Evidence (Amendment) Act, 1891 (3 of 1891), S. 7.

## SYNOPSIS

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| 1. Introduction to character evidence : | (b) <b>Defamation.</b>                 |
| (a) Character.                          | (c) Petition for damages for adultery. |
| (b) Reputation.                         | 5. In aggravation of damages.          |
| (c) Disposition.                        | 6. Meaning of the word "character".    |
| (d) Conclusion.                         | 7. "Reputation".                       |
| 2. Principle.                           | —Hearsay and reputation.               |
| 3. Character as affecting damages.      | 8. "Disposition".                      |
| 4. Mitigation of damages.               | 9. Both must be general.               |
| (a) Breach of promise of marriage.      |  |

**1. Introduction to character evidence.** The fact that a person has a good or bad character in the legal sense of reputation and disposition cannot be admitted in evidence as tending to show that he did or did not do a certain thing. This has been the general rule of evidence from early times. Evidence of character, good or bad, is generally irrelevant in civil cases unless character is of the substance in issue. As has been well put in *Thompson v. Church*,<sup>6</sup> the business of the Court is to try the case and not the man. A very bad man may have a very righteous cause. Character is of no moment when the issue is whether a contract was entered into or not. But, of course, when a person's general character is in issue, evidence may, of course, be given of his general character whether in civil or criminal proceedings. Note the words "except in so far as such character appears from facts otherwise relevant".<sup>7</sup> It is a settled policy of law to reject character evidence of parties in civil cases in proof or disproof of any act attributed to the parties. Where character is not in issue or relevant to the issue, character evidence is excluded. It is a safe rule in civil cases that each transaction should be ascertained in its own circumstances and not by the character of the parties.<sup>8</sup> In criminal cases, the accused may present character evidence as showing the improbability of his having committed the crime, thus opening up the question for the prosecution to meet the issue; in cases, where character is a fact in issue or an evidentiary fact, it may be proved. There are six exceptions. These exceptions are :

- (a) In suits for damages, though character is not directly in issue, character evidence is admissible in mitigation of damages, e. g., adultery, defamation. Evidence of good character is not, however, admissible in aggravation of damages as there is always a presumption in favour of good character. Such evidence is admissible only to rebut evidence of bad character, if given by the defendant.<sup>9</sup>
- (b) Character of the accused.<sup>10</sup> But even in cases, where general evidence of good character is admissible in criminal cases, if must be appropriate to the particular nature of the offence charged,<sup>11</sup> e. g., honesty where dishonesty is charged and that too must be general, and not relate to particular instances of such honesty, etc.<sup>12</sup> It is irrelevant to show the defendant's reputation for honesty and integrity in a prosecution for adultery or rape, or for truth and veracity in

6. 1 Root 312.

9. Sections 55 and 12.

7. S. 52 ante.

10. Ss. 53 and 54 ante.

8. *Abdul Shakur v. Kotwaleshwar Prasad*, A. I. R. 1958 All. 54.11. Cunningham Evidence, Intro., xxxiii.  
12. Phipson, 11th Ed., p. 280.

a murder prosecution.<sup>13</sup> Reputation evidence again must relate to the time or the period of the commission of crime.<sup>14</sup>

- (c) Character of prosecutrix. In charges for rape and other sexual offences, evidence of general immoral character of the prosecutrix is admissible.<sup>15</sup> On questions of illegitimacy, the ill-fame of the child's mother has been received. In divorce cases, the moral character of the co-respondent or other person with whom adultery is charged is relevant.<sup>16</sup>
- (d) Character of witnesses whether a party or not may be impeached to shake their credit.<sup>17</sup>
- (e) Character of animals, places and things when the doings of animals are in issue, and the condition or character of a place or thing as dangerous spot in cases of negligence, are relevant. The general character or the habits of the species or the particular animal as well as the doings of the same or similar animals on other occasions will be relevant.<sup>18</sup>
- (f) Character as affecting state of mind. Evidence of bad character may become relevant under Sections 14 and 15. On a charge of homicide, the bad character of the deceased and previous assaults by the latter have been received to show that the prisoner had reasonable grounds for apprehending violence.<sup>19</sup> In America, evidence of the character, e. g., violent and dangerous character and threats by the deceased, etc., are admissible on a plea of self-defence.<sup>20</sup> That of course must be known to the accused, either through his own observation or through information communicated to him by others.<sup>21</sup>

The general policy of the law, however, is one of exclusion.

(a) *Character.* Character is what a person really is, while reputation is what he is supposed to be by general repute. They are distinct. Strictly speaking, according to Webster, "character" means peculiar qualities impressed by nature or by habit on the person which distinguish him from others; these constitute his real character. In other words, they are the inherent qualities of a person or the sum of his traits. The Model Code of Evidence defines character as "character as used in these rules means the aggregate of a person's traits including those relating to care and skill and their opposites".<sup>22</sup> "Character" means fixed disposition or tendency.<sup>23</sup>

According to the Explanation to section 55, the term "character" in sections 52 to 55 includes both reputation and disposition. In England and

- 13. Wharton, Criminal Evidence, Vol. I, p. 460.
- 14. Wharton, Criminal Evidence, Vol. I, p. 463; Nimoo Pal v. State, A. I. R. 1955 Cal. 559; 1956 Cr. L. J. 1358; Mangal Singh v. State of M. B., A. I. R. 1957 S. C. 199; 1957 Cr. L. J. 325; Babulal v. State, A. I. R. 1959 Cal. 693; 1959 Cr. L. J. 1313.
- L. E.—182
- 15. S. 54 and sub-section (4) of S. 155.
- 16. Phipson, 11th Ed., p. 236.
- 17. Ss. 146, 53 and 55.
- 18. Phipson, 11th Ed., p. 217.
- 19. Phipson, 11th Ed., p. 237.
- 20. Wharton, Criminal Evidence, 12th Ed., Vol. I, p. 473.
- 21. Ibid, p. 477.
- 22. Rule 304.
- 23. Underhill, Cr. Ev., p. 415.

the United States of America it includes reputation only. Therefore, the terms "reputation" and "disposition" require further consideration.

Character as just now pointed out is what a person really is, while reputation is what the neighbours say he is. These two are different things and may not coincide at all. It has been well said that a prominent businessman, a pillar of the Church, a model citizen might suddenly blow up and it is then discovered that he has practised clandestine vices and irregular methods for a long time. The immortal bard has succinctly said that reputation is an idle thing oft got without merit and oft lost without reason.

(b) *Reputation.* Reputation means what is thought of a person by others and is constituted by public opinion ; it is the general credit which a man has obtained in that opinion. In *Isri Pershad v. Queen-Empress*,<sup>24</sup> a man's general reputation is defined as reputation which he bears in the place in which he lives amongst all the townsmen, and if it is proved that a man who lives in a particular place is looked upon by his fellow townsmen, whether they happen to know him or not, as a man of good repute, that is strong evidence that he is a man of good character. On the other hand, if the state of things is that the body of his fellow townsmen who know him look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character. *Dunia Singh v. King-Emperor*,<sup>25</sup> puts it in another way. Reputation is founded on the general opinion of the neighbourhood in which the bad character lives. It is not necessary that the evidence should show that such general opinion is based on the personal knowledge of the man by his neighbours generally, or that such general opinion has been expressed by his neighbours. If a witness is asked what the man's character is and he were to say that in the general opinion of the neighbours the man is a habitual thief, that statement is evidence of general repute. But of course evidence of reputation, if it comes from amongst neighbours and the caste or class of the subject, deserves the highest amount of credence. But it does not follow that the persons who testify to the reputation of the person proceeded against must be either neighbours or his caste or class, for it is quite possible for a shrewd rogue as has been put in *Wahid Ali v. Emperor*,<sup>1</sup> to conceal his real character from his neighbours. Therefore, a police officer, who goes to the place where a particular person lives and who makes enquiries to find out what his reputation is, is perfectly competent to speak in the witness-box about the result of his enquiries, and especially if his enquiries are further supported by contemporaneous records by history-sheets, village crime note-books, police diaries, etc.

There is, however, a substantial difference between mere rumour and reputation. Reputation is admissible but not rumour. The line of distinction, however, is a fine one. Reputation to be admissible must be the collective opinion of a number of persons, though it need not be the opinion of the entire community. Therefore, in order that rumours might ripen into reputation, the instances of rumour concerning a person must be so numerous that the person concerned can be said to have acquired a bad reputation and form the collective opinion of the persons living in the locality or having knowledge of the subject. Thus reputation is the sum total of rumours and talks about a man accepted and believed by those who know him well. As Wigmore puts it : "Reputation being the community's opinion is distinguished

24. 23 Cal. 621 (628).

25. 5 O. C. 203.

1. 6 Cr. L. J. 1.

from mere rumour in two respects. On the one hand, reputation implies the definite and final formation of opinion by the community while rumour merely implies a report that is not yet finally credited. On the other hand, a rumour is usually thought of as signifying a particular act or occurrence, while a reputation is predicated upon a general trait of character. A man's reputation, for example, may declare him honest and yet today a rumour may have circulated that this reputed honest man had defaulted yesterday in his account."<sup>2</sup>

Reputation is also distinguishable from hearsay. If the evidence is of persons who are living in the locality where the reputation is prevailing and people talk of their beliefs about him, it is admissible. But, if the evidence is of a man who does not know the reputation himself but heard of it from others, it will be hearsay and inadmissible.<sup>3</sup> In short, reputation evidence must be the reflection of the general or collective opinion of the community. It is, as Underhill says,<sup>4</sup> the general consensus of opinion regarding him and his conduct based on his deportment and his conduct which is held by his neighbours, friends and acquaintances. One's general reputation is what is generally said of him in the community in which he lives and is necessarily based on hearsay.<sup>5</sup>

But the evidence of general reputation, though admissible, is evidence of the weakest type and in order to command any credence the witnesses should themselves be of good repute and in a position to know the reputation of the accused, and secondly, they should be drawn if possible from different classes of the community and not only from the locality but also from neighbouring localities and the witnesses should be free from any suspicion of grudge against the suspected subject and should be discarded in particular, if any faction exists in the locality, and finally, the witnesses should speak on the foot of their own belief and not that of other people, and their belief would carry little or no weight unless their evidence of general repute is supported by good grounds. So, it will be seen that admissible evidence of reputation is the weakest form of evidence and cannot be acted without material corroboration by other evidence.

(c) *Disposition.* Disposition, on the other hand, differs from reputation inasmuch as it has no relation to the general opinion of the community but has to be inferred from (a) certain acts which the person has done, or (b) certain demonstrable facts directly connected with them. The word 'disposition' means natural tendency. The tendency of a man has to be inferred from his acts, and facts directly connected with them, and therefore, witnesses produced to prove disposition should ordinarily be persons who have been in close contact with him and thus have knowledge of his acts. It should also be remembered that though a witness is entitled to express an opinion about the person proceeded against by way of inference from these specific acts and facts known to him, yet his opinion and inferences are not binding on the Court; for, independently of the opinion of the witness, the Court has to see whether the inference of the witness is justified by the evidence of the facts and the acts deposed to by the witness.

2. Wigmore, S. 1611.

229 I. C. 474.

3. Firangi v. Rex, A. I. R. 1933 Pat. 189 : 143 I. C. 687 followed in Baso

4. Criminal Evidence, 5th Ed., S. 190.

Rai v. Rex, A. I. R. 1948 Pat. 84 :

5. Underhill, p. 413.

The explanation to section 55 makes it clear that evidence may be given only of general reputation and general disposition and not of particular facts, and a witness to reputation may also testify the negative as well as affirmative evidence on the subject, provided of course that the witness was in such a position that if anything would have been said against the accused he would most probably have heard of it.<sup>6</sup> The best character as has been well said in *R. v. Rowton*,<sup>7</sup> is that which is least talked of.<sup>8</sup>

To conclude this discussion of reputation and disposition, Stephen in including both reputation and disposition, within the definition of character in these sections, has made a deliberate departure from the law of England and United States of America and brought it in consonance with practice and reason, as the distinction between reputation and disposition even in those countries has seldom if ever been adhered to. The inclusion of disposition in the definition is based on the reasons given by Erle, C. J., and Wills, J. in their dissenting judgments in *R. v. Rowton*.<sup>9</sup>

*Erle, C. J.:* "What is the principle on which evidence of character is admitted? It seems to be that such evidence is admissible for the purpose of showing the disposition of any party accused, and basing thereon a presumption that he did not commit the crime imputed to him. Disposition cannot be ascertained directly; it is only to be ascertained by the opinion formed concerning the man, which must be founded either on personal experience or on the expression of opinion by others, whose opinion again ought to be founded on their personal experience. The question between us is whether the court is at liberty to receive a statement of the disposition of a prisoner, founded on the personal experience of the witness, who attempts to give evidence and state that estimate which long personal knowledge of an acquaintance with the prisoner has enabled him to form. I think that each source of evidence is inadmissible. You may give in evidence the general rumour prevalent in the prisoner's neighbourhood, and according to my experience, you may also have the personal judgment of those who are capable of forming a more real, substantial guiding opinion than that which is to be gathered from general rumour. I have never seen a witness examined to character without an enquiry being made into his personal means of knowledge of the character ..... Suppose a witness to character were to say—'This man has been in my employ for twenty years, I have had experience of his character; but I have never heard a human being express an opinion of him in my life. For my own part, I have always regarded him with the highest esteem and respect, and have had abundant experience that he is one of the worthiest men in the world.' The principle the Lord Justice (Cockburn, C. J.) has laid down, would exclude his evidence; and that is the point where I differ from him. To my mind personal experience gives cogency to the evidence; whereas such a statement as—'I have heard some person speak well of him' or 'I have heard general report in favour of the prisoner,' has a very slight effect in comparison."

*Wills, J.:* "I apprehend that the man's disposition is the principal matter to be enquired into and that his reputation is merely accessory, and admissible only as evidence of disposition.....The judgment of the particular witness is superior in quality and value to mere rumour. Numerous cases

6. Underhill, p. 437.

7. (1865) 34 L. J. M. C. 57.

8. Wharton, Criminal Evidence, Vol. I,

page 468—witness drawing own inference from absence of discussion

9. (1865) 34 L. J. M. C. 57.

may be put in which a man may have no general character—in the sense of any reputation or rumour about him—at all, and yet may have a good disposition. For instance, he may be of a shy, retiring disposition and known only to a few ; or again, he may be a person of the vilest character and disposition, and yet only his intimates may be able to testify that this is the case. One man may deserve that character (reputation) without having acquired it, while another man may have acquired without deserving it. In such case, the value of the judgment of a man's intimates upon his character becomes manifest. In ordinary life, when we want to know the character of a servant, we apply to his master. A servant may be known to none but members of his master's family ; so the character of a child is known only to his parents and teachers, and the character of a man of business to those with whom he deals. .... According to the experience of mankind, one would ordinarily rely rather on the information and judgment of a man's intimates than on general report, and why not in a court of law?"

In the body of section 110, Cr. P. C., the words 'by habit' have been used instead of the words 'by disposition'. But, in reality, this difference in phrasology does not make any difference in the nature and complexion of the evidence of disposition and specific instances that is offered in bad livelihood cases, where the fact that a person is a habitual offender or a dangerous character may be proved by evidence of general repute and evidence of bad character is itself a fact in issue and a previous conviction will be relevant as evidence of bad character and the word 'character' would include both reputation and disposition. A man's habit is nothing but his disposition as habit like disposition also means a general tendency to perform certain actions. The Model Code of Evidence defining evidence of habit or custom to prove behaviour states in rule 307 : Habit means a course of behaviour of a person regularly repeated in like circumstances. Custom means a course of behaviour of a group of persons regularly repeated in like circumstances. Evidence of a habit of a person is admissible as tending to prove that his behaviour on a specified occasion conforms to the habit. Evidence of a custom of a group of persons is admissible as tending to prove that their behaviour on a specified occasion conforms to the custom.

It is easy to appreciate the value of habit formation from the ethical and the moral side. Habits of ease are acquired more readily than habits of work. Not only can concentrated attention to practice and precept build up a habit formation as a shield against evil, but the hereditary or customary mode of life becomes so ingrained that it is more satisfactory to continue that always than to force a change. The man who has been vicious all his life is hardly free to become virtuous, and the virtuous is in a kind of bondage to righteousness. No one can over-estimate the ethical importance of habit. So, in legal actions, habit is considered only from the popular standpoint of a certain action continued until it becomes habitual. The customary conduct of a person acquired from frequent repetitions and proof of bad habits and good habits is permitted when material to the issue.

It has long been known that bodily characteristics and facial expressions are an index of character. Mental traits that control our behaviour are subjective and unknown to the observer except as they are portrayed by such outward signs. These signs are of great importance and this fact has been capitalised by philosophers, prophets, fortune-tellers and charlatans through ages past. In our country, this has developed into a science under the name and

style of Samudrikalakshana and in America an interesting study has been made by Norris A. Brisco in Fundamentals of Salesmanship, important portions of which have been extracted and discussed in McCarty's Psychology of the Lawyer, Ch. VII. In this study every part of human anatomy has been laid under contribution and character analysis deduced therefrom. This is the basis also for the provisions in the Civil Procedure Code for studying the demeanour of witnesses. The study of bodily characteristics and facial expressions as index of character is at a stage where we cannot say how much is true and how much fancy which even modern science has not been able to reveal with any degree of accuracy. Physical expression has a language of its own; sometimes it is easy to read; sometimes it is difficult to understand; sometimes it is entirely deceptive. Psychology has accumulated considerable data but the practical application to every-day problems is still largely in the future.

(d) *Conclusion.* Evidence of the existence of a bad character or good character wherever they are relevant and admissible is not by itself proof of or defence to a crime, but when proved it should be taken into consideration in connection with all the other evidence in the case and be given such weight under all the facts and circumstances of the case as it merits.<sup>10</sup> Evidence of good character, however, is not merely collateral evidence but may in itself raise such a doubt as to require the acquittal of the accused.<sup>11</sup> But if the accused is found guilty beyond a reasonable doubt he must be convicted in spite of his otherwise good character.<sup>12</sup> Previous good character does not license one to commit a crime.<sup>13</sup>

A bad general reputation can be proved but not rumours or suspicions. It is not open to give evidence of particular facts showing bad character or disposition.<sup>14</sup> The section allows as admissible the evidence of general reputation and of general disposition but not of particular facts or of traits.<sup>15</sup>

In connection with character evidence, forming the basis of the *badmashi* sections,<sup>16</sup> evidence of suspicion, be it "suspicion by police" or "suspicion by the member of the public", is regarded as a good piece of evidence to show the habit and disposition of a man. This evidence along with other evidence may be the basis of an order in a case under Section 110, Cr. P. C. Section 117 (4), Cr. P. C., states that the fact that a person is a habitual offender or a desperate or dangerous character may be proved by evidence of general repute or otherwise. Evidence of bad character is itself a fact in issue.<sup>17</sup> A previous conviction is relevant as evidence of bad character.<sup>18</sup> The extent and nature of this evidence of suspicion proving habit and disposition-character evidence in short—have been clearly analysed in two Government publications: U. P. Government Pamphlet on Bad Livelihood Cases, 1925 edition, and Rule 290 of Police Regulations, Bengal, (1943), Vol. I.<sup>19</sup>

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|---|------------------------------|--|
| 10. See Mangal Singh v. State of M.B.,<br>A.I.R. 1957 S.C. 199 : 1957 Cr L.J.<br>325.     | 15. Ibid.                    | L.R. 794.  |
| 11. Habeed Muhammad v. State of Hyd-<br>erabad, A.I.R. 1954 S.C. 51 : 55 Cr.<br>L.J. 338. | 16. Ss. 109 and 110, Cr.P.C. | Explanation 1 read with S. 5.  |
| 12. Wharton, Criminal Evidence, Vol.<br>I, p. 491.  | 17. S. 54, Evidence Act,     | S. 54, Explanation 1.  |
| 13. Underhill's Criminal Evidence, Vol.<br>I, p. 429.                                     | 18. S. 54, Explanation 1.    | See Deb's Law of Bad Livelihood,<br>Ch. XVI (S.C. Sarkar & Sons) and<br>Justice Ramaswami's Magisterial and<br>Police Guide, Vol. II, Ch. 26 (M.<br>L.J. publication). |
| 14. Harbhajan Singh v. State of Pun-<br>jab, A.I.R. 1961 Punj. 215 : 63 P.                | 19                           |  |

The word 'suspicion' means in this connection nothing more nor less than subjective impressions based upon personal knowledge of the existence of something evil or wrong or hurtful as contradistinguished from precise knowledge of demonstrable and provable facts based upon clear evidence. Therefore evidence of suspicion is subject to all the limitations of this class of evidence. Bacon has said : "Suspicious among thoughts, are like bats among birds, they ever fly by twilight." "Many mischievous are daily at work to make men of merit suspicious of each other."<sup>20</sup> "Nature itself after it has done an injury, will ever be suspicious ; and no man can love the person he suspects."<sup>21</sup> "Suspicious always haunt the guilty mind. The thief doth fear each bush an officer."<sup>22</sup> "And oft though wisdom wakes, suspicion sleeps. At wisdom's gate and to simplicity, Reigns her charge while goodness thinks no ill, where no ill seems."<sup>23</sup>

The evidence of suspicion in order to prove disposition of habit must fall broadly under the following five heads : (a) suspicion in specific cases, (b) association with proved bad characters, (c) suspicious movements, acts and conduct not consistent with honest living, (d) inadequate means of livelihood and sudden fluctuations in fortune, and (e) other pointers.

(a) In a bad livelihood case, that the accused has been arrested several times, put on trial and acquitted on account of the tampering of the prosecution witnesses, or that witnesses were afraid to come and give evidence and that his name had been mentioned in the F.I.R., though charges could not be laid for the above reasons and that his name had been mentioned in the final reports (referred charge-sheets) as the person suspected, are all instances which indicate the character and disposition of the suspect. Of course, it is difficult to lay down any rule as to the number of such instances which go to make up the requisite aggregate establishing habit or disposition. The U. P. Government Pamphlet on Bad Livelihood Cases suggests that the police should not, as a rule of prudence, launch a prosecution unless there are at least three such instances. But the safe rule is the aggregate made of such similar instances as cease to be isolated facts and become evidence of habit and character.

In regard to (b), the association must be with proved bad characters and not with reported bad characters and secondly, the association must be for the purpose of committing one or more of offences mentioned in the various clauses of section 110, Cr. P. C. and this association should also be shown to be habitual and not casual. If this association can be proved by the evidence of joint prosecution, arrest, suspicion, conviction and even discharge or acquittal in specific cases, this batch conviction or batch suspicion would afford good corroborative evidence of association.

In regard to (c), it is not possible to catalogue such movements, acts and conduct excepting that the decided cases have relied upon such facts as the suspect's absence from home at nights without any ostensible reason, disappearance from the village or locality just before or after the occurrence of a crime of the nature charged, making himself scare on hearing about the arri-

20. Pope.

also "suspicion" in Murray's New English Dictionary, Vol. IX, p. 260;

21. Southey.

Dr. Johnson's Dictionary; Shorter Oxford English Dictionary, p. 2094;

22. Shakespeare King Henry VI, Act V,  
s. 6.

Webster, p. 1454.

23. Milton, Paradise Lost, Line 686. See

val of the police to investigate the case in which he is suspected,<sup>24</sup> sleeping by day when others are working, loitering about places where crowds collect especially in the case of habitual pickpockets, recovery of implements of house-breaking in such suspect's house, attempt to destroy or conceal evidence of crime.<sup>25</sup>

(d) Evidence regarding means of livelihood will throw considerable light on the character of the suspect and therefore evidence that the suspect could not have maintained himself honestly and that he must be living on the fruits of crime would be an important piece of evidence establishing disposition or habit. Therefore, special attention should be paid to the income of the suspect and the number of persons depending on him, the manner of his living, namely, beyond his own source of income and sudden unexplained wealth and indulgence in extravagant luxuries.

(e) One other significant circumstance would be the occurrence of crimes, coinciding with the suspect's visits to the place of occurrence and the cessation of crime whenever the suspect was absent from the locality or was in remand.

The pieces of evidence of disposition will establish the bad character of the accused which, as already stated, is itself a fact in issue in section 110, Cr. P. C. proceedings.

**2. Principle.** In suits in which damages are claimed, the amount of the damages is a fact in issue.<sup>1</sup> Therefore, if the character of the plaintiff is such as to affect the amount of damages which he ought to receive such character becomes relevant for the purpose of the determination of that fact in issue. "To deny this would", as is observed in Starkie on Evidence, "be to decide that a man of the worst character is entitled to the same measure of damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honourable merchant, a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable quantum of injury sustained, a knowledge of the party's previous character is not only material, but seems to be absolutely essential."<sup>2</sup> As to the reasons for the definition given of the term 'character', see Notes post.

**3. Character as affecting damages.** In a suit for damages, evidence of the character of the plaintiff, if it affects (that is, increases or diminishes<sup>3</sup> the amount of damages which he ought to receive, is relevant under this section. According to the section, the person whose character is made relevant is the person who is to receive the damages. In England, evidence impeaching the previous general character of the wife or daughter, in regard to chastity, is admissible in a petition by the husband for damages on the ground of adultery, or in an action by the father for seduction. And, in these cases, not only is evidence of general bad character admissible in mitigation of damages, but

24. Illustrations (h) and (f) to section 8 of the Evidence Act.

25. See U. P. Government Pamphlet on Bad Livelihood Cases, 1925 Ed., p. 8.

1. v. ante.

2. Cited with approval in Scott v. Sampson, (1882) 8 Q.B.D. 491: 51 L.J.Q.B. 380: 46 L.T. 412: 46 J.P. 408: 30 W.R. 541.

3. Norton, Ev., 233; Taylor Ev., s. 356.

the defendant may even prove particular acts of immorality or indecorum.<sup>4</sup> But, in such a suit for damages for adultery or seduction, evidence of the character of the wife or daughter will not be admissible under the present, though perhaps it may be so under the twelfth section of this Act, because, in such cases, the character is that of a third person and the person who is to receive the damages is not the person whose character would affect the amount of damages to be recovered.<sup>5</sup>

**4. Mitigation of damages.** Character may be admissible in mitigation of damages, in the following, amongst other, cases :

(a) *Breach of promise of marriage.*<sup>6</sup> Promises must be kept to persons of bad character as well as by those of good character. But when a woman claims that her character has been damaged, and her feeling crushed by such breach of promise, then in mitigation of damages it may be shown that she had no character to be hurt by the breach and no feelings that would be particularly shocked.

(b) *Defamation.* It has been much discussed, whether, in an action for defamation, evidence impeaching the plaintiff's previous general character, and showing that, at the time of the publication, he laboured under a general suspicion of having been guilty of the charge imputed to him by the defendant, is admissible as affecting the question of damages.<sup>7</sup> It seems, however, to be now clear that evidence may be given to show that the plaintiff had, before the publication, a general bad character without reference to whether report has credited him with having committed the particular offence laid to his door by the defendant. "In every case of slander or libel, the defendant, without justifying that the words published were true in substance and in fact, may say that, whether they were or not, the plaintiff had a bad reputation."<sup>8</sup> The English rule, as gathered from the case-law, has been stated to be that, in civil cases, the fact that a person's general reputation is bad, may, it seems, be given in evidence in reduction of damages; but evidence of rumours that his reputation was bad, and evidence of particular facts and circumstances showing that his disposition was bad, cannot be given in evidence.<sup>9</sup> And it has been held that evidence of bad character is admissible in mitigation of damages, but that evidence of suspicions or rumours of bad character is not.<sup>10</sup> The plaintiff's gene-

4. Taylor, Ev., s. 356; and cases there cited. Compensation in such cases is in reality sought for the pain which the defendant has caused the plaintiff to suffer by disgracing the latter's family and ruining his domestic happiness. The damages should, therefore, be commensurate with this pain, which must vary according as the character of the seduced wife or daughter had been previously unblemished or otherwise.
5. The person whose character is in question is therein assumed to be the same as the person who claims damages.
6. Taylor, Ev., s. 358; Wharton, Ev., s. 52.
7. See Phipson, Ev., 11th Ed., 238; Wood v. Durham, 21 Q.B.D. 501.
8. Per Manisty, J., in Wood v. Earl of Durham, (1888) 21 Q. B. D. 501 and Taylor, Ev., s. 359.
9. Steph. Dig. Art. 57. See Scott v. Sampson, (1882) 8 Q.B.D. 491, in which all the older cases are examined in the judgment of Cave, J., Wharton, Ev., s. 53 followed in Woods v. Cox, (1888) 4 Times L.R., 655.
10. The Englishman, Ltd. v. Lajpat Rai, (1910) 37 C. 760.

ral character is in issue in this section and the defendant may show that the plaintiff's reputation has sustained no injury, because he had no reputation to lose.

(c) *Petition for damages for adultery.* The husband's general character for infidelity may be proved, for, in such a case, he can hardly complain of the loss of that society upon which he has himself placed so little value.<sup>11</sup>

5. **In aggravation of damages.** In aggravation of damages the plaintiff cannot, according to the English rule, give evidence of general good character, unless counter-proof has been first offered by the defendant; for, until the contrary appears, the presumption of law is already in his favour.<sup>12</sup>

6. **Meaning of the word "character".** The Act includes in the term 'character' both reputation and disposition, and thus departs from the English law, according to which character is confined to reputation only. The subject is considered at length in *R. v. Rowton*,<sup>13</sup> The Indian Legislature has adopted the opinion of Erle, C. J., and Wills, J., in that case, who held that evidence of character extended to disposition as well as reputation; and of Taylor,<sup>14</sup> who says that the ruling of the majority in this case rests more upon authority than reason.<sup>15</sup>

7. **"Reputation".** There is a distinction between 'character' and 'reputation', 'character' signifying the reality, and reputation what merely is reported, or understood from report to be the reality about a person.<sup>16</sup>

Reputation of a man's character is the inference or estimate from the sum total of a man's actions and qualities drawn or formed by persons who are acquainted with him or among whom he resides and with whom he is chiefly conversant or the circle in which he moves; it is the prevailing opinion formed by those with whom he associates and who would have the best opportunity of knowing his habits and general behaviour. It is generally understood that the 'place' or 'community' with reference to which reputation evidence is tendered should relate to the neighbourhood where he dwells or moves, but having regard to modern conditions, it is impossible to define "neighbourhood" or "community" with any degree of accuracy.<sup>17</sup> It is not necessary that the witnesses who speak to the general reputation of a person must be residents of the same place and a stranger could find out what the general repute of a person is, and he is competent to testify to that effect.<sup>18</sup>

'Reputation' means what is thought of a person by others, and is constituted by public opinion; it is the general credit which a man has obtained

11. Taylor, Ev., s. 358.

12. Taylor, Ev., s. 362; *Jones v. James*, 18 L.T.N.S. 243; *Narracott v. Narracott*, 33 L.J.P. & M. 61—it is suggested that it may be that this rule will be affected by the above section.

13. (1865) Le. & Ca. 520 : 10 Cox.C. C. 25.

14. Taylor, Ev., s. 350; see Steph. Dig., pp. 178, 179.

15. Norton, Ev., 334.

16. Per Duyfec, C.J., in *State v. Wil-*

son

15 R.I. 180: I All. 415 (Amer.);

see *Wigmore*, Ev., s. 1608, *et seq.*

17. *In re Perme Maila Rai*, A.I.R. 1938 Mad. 591; I.L.R. 1938 Mad. 720: 177 I.C. 586; 39 Cr.L.J. 898: 1938 M.W.N. 313: 47 L.W. 428, per Venkataramana Rao, J.

18. *In re Perme Maila Rai*, A.I.R. 1938 Mad. 591; *Sahdeo Singh v. Emperor*, A.I.R. 1942 Oudh 356: 198 I.C. 547: 43 Cr.L.J. 398: 1942 O.W.N. 39.

in that opinion.<sup>19</sup> When a man swears that another has a good character in this sense, he means that he has heard many people, though he does not particularly recollect what people speak well of him, though he does not recollect all that they said.<sup>20</sup> One consequence of the view of the subject taken by English law is "that a witness may with perfect truth swear that a man who to his knowledge has been a receiver of stolen goods for years has an excellent character for honesty, if he has had the good luck to conceal his crimes from his neighbours. It is the essence of successful hypocrisy to combine a good reputation with a bad disposition. The case is seldom, if ever acted on in practice. The question always put to the witness to character is: 'What is the prisoner's character for honesty, morality or humanity?' as the case may be: nor is the witness ever warned that he is to confine the evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction."<sup>21-22</sup> Reputation is the sum total of the rumours and talks about a man accepted and believed by those who know him well. The evidence of reputation is made up partly of the belief of the deponent and partly of what he heard from others of their beliefs. Distinction between reputation and rumour is well marked though it may be difficult to say generally where a rumour ends and reputation begins. How many instances of rumour build up a reputation and how long it takes for rumours to ripen into reputation cannot be laid down by any hard and fast rule.<sup>23</sup> Though reputation is, in one sense, hearsay evidence, yet what a man learns of a man's reputation is a fact.<sup>24</sup>

*Hearsay and reputation.* The distinction between admissible evidence of reputation and inadmissible hearsay evidence can be stated thus: If the evidence is of those persons who are living in the locality; where the reputation is prevailing and where people talk of their beliefs about him, and who themselves believe it, it is admissible. But, if the evidence is of a man who does not know about the reputation himself but has heard it from others, it will be hearsay. In other words, the evidence of those who know the man and his reputation is admissible. Evidence of those who do not know the man, but have heard of the reputation is not admissible.<sup>25</sup>

8. "Disposition". "Disposition" comprehends the springs and motives of actions, is permanent and settled, and respects the whole frame and texture of the mind.<sup>1</sup> When a man swears that another has a good character in this sense, he gives the result of his own personal experience and observa-

19. Taylor, Ev., s. 350; Wharton, Ev., s. 49. "It is possible for a man to have a fair reputation who has not in reality a good character although men of really good character are not likely to have a bad reputation" Crabb's Synonyms. See Isri Pershad v. R., (1895) 23 C. 621.
20. Steph. Dig., p. 181.
- 21-22. Steph. Dig., p. 179.
23. Firangi Rai v. Emperor, A.I.R. 1938 Pat. 189 : 143 I.C. 687 : 34 Cr.L.J. 643 : 14 P.L.T. 482 followed in Baso Rai v. Emperor, A.I.R. 1948 Pat. 84 : 229 I.C. 474 : 48 Cr.L.J. 409 ; 13 B.R. 381. See also In re Kottamiddu Ranga Reddi, A.I.R. 1920 Mad. 534 : I.L.R. 43 Mad. 450 : 55 I.C. 722 : 21 Cr.L.J. 354 : 38 M.L.J. 17 : 1920 M.W.N. 398 : 11 L.W. 331.
24. In re Perne Maila Rai, A.I.R. 1938 Mad. 591 : 177 I.C. 586 : 39 Cr.L.J. 898 : I.L.R. 1938 Mad. 720 : 1938 M.W.N. 313 : 47 L.W. 428; Raghubar Dayal v. Emperor, A.I.R. 1934 All. 735 : 152 I.C. 120 : 36 Cr.L.J. 33.
25. Firangi Rai v. Emperor, A.I.R. 1938 Pat. 189 : 143 I.C. 687 : 34 Cr.L.J. 643 : 14 P.L.T. 482 followed in Baso Rai v. Emperor, A.I.R. 1948 Pat. 84 : 229 I.C. 474 : 48 Cr.L.J. 409 ; 13 B.R. 381. See also In re Kottamiddu Ranga Reddi, A.I.R. 1920 Mad. 534 : I.L.R. 43 Mad. 450 : 55 I.C. 722 : 21 Cr.L.J. 354 : 38 M.L.J. 17 : 1920 M.W.N. 398 : 11 L.W. 331.

1. Crabb's Synonyms, ib., 6th Ed., 203.

tion or his own individual opinion of the prisoner's character as is done by a master who is asked by another for the character of his servant.<sup>2</sup> From this section it thus appears that there are two forms in which a question as to character may be put to a witness. So if an accused be charged with theft, a witness to character might be asked either, 'What was the general reputation of the accused for honesty?' or he might be asked, 'Was the accused generally of an honest disposition?' These two questions differ very widely. The witness would answer the first question from what was generally known about the accused in the neighbourhood where he lived; but he would or might, answer the second from his own special knowledge of the accused.<sup>3</sup>

**9. Both must be general.** The evidence of general reputation and general disposition is relevant in a criminal proceeding and can be given. "Disposition" means the inherent qualities of a person. "Reputation" means the general credit of the person amongst the public. There is a real distinction between reputation and disposition. A man may be reputed to be a good man but in reality he may have a bad disposition. The value of evidence as regards disposition of a person depends not only upon the witnesses' perspicacity but also on their opportunities to observe a person as well as the person's cleverness to hide his real trials. But a disposition of a man may be made up of many traits, some good and some bad, and only evidence in regard to a particular trait with which the witness is familiar can be of some use. But the character evidence is weak evidence. It cannot outweigh the positive evidence in regard to the guilt of a person. It may be useful in wrongful cases to tilt the balance in favour of the accused or it may also afford a background for appreciating his reactions in a given situation. It must give place to acceptable positive evidence.<sup>4</sup> In either case, evidence may be given only of general reputation and general disposition. Both lie in the general habit of the man rather than in particular acts or manifestations. When it is said that the reputation must be general, it is meant "that the community as a whole must be agreed on this opinion in order that it may be regarded as a reputation. If the estimates vary and public opinion has not reached the stage of definite harmony, the opinion cannot be treated as sufficiently trustworthy. On the other hand, it must be impossible to exact unanimity, for there are always dissenters. To define precisely that quality of public opinion thus commonly described as general is therefore a difficult thing—there is on this subject often an attempt at nicety of phrase which amount in effect to mere quibbling, because the witness will not ordinarily appreciate the discriminations. Such requirements of definition should be avoided as unprofitable."<sup>5</sup> Where evidence of character is offered, it must be confined to general character; evidence of particular acts, as of honesty, benevolence, or the like are not receivable. For, although the common reputation in which a person is held in society may be undeserved and the evidence in support of it must, from its very nature, be indefinite, some inference varying in degree according to circumstances, may still fairly be drawn from it, since it is not probable that a man who has uniformly sustained a character for honesty or humanity will

2. Taylor, Ev., s. 350.

3. Markby, Ev. 45, 46. In the leading case R. v. Rowton, (1865) Le. & Ca. 520, there was, as already stated, a difference of opinion amongst the Judges as to which of these two was the proper form of question; strong reasons are given

in favour of both; and no doubt this is why the Act admits both.—ib.

4. Bhagwan Swarup v. State of Maharashtra, (1964) 2 S.C.R. 378 : (1964) 2 S.C.J. 771 : A.I.R. 1965 S.C. 682.

5. Wigmore, Ev., s. 1612.

forfeit that character by the commission of a dishonest or a cruel act. But the mere proof of isolated facts can afford no such presumption. 'None are all evil,' and the most consummate villain may be able to prove, that on some occasion he has acted with humanity, fairness or honour.<sup>6</sup> This is specially so in actions for libel; and the rule is that only general reputation could be proved but not particular facts or traits, showing bad character or disposition grounded on rumours and suspicions.<sup>7</sup> Negative evidence such as "I never heard anything against character of the man" is cogent evidence of good character because a man's character is not talked about, till there is some fault to be found with it.<sup>8</sup>

The words and figures inserted in the Explanation by Act III of 1891 were so inserted because by Section 54, in certain cases, a previous conviction which is a particular act may be relevant when the bad character is itself a fact in issue.<sup>9</sup>

6. Wigmore, Ev., s. 351.

7 Harbhajan Singh v. State of Punjab, A.I.R. 1961 Punj. 215 : 1961 (1) Cr.L.J. 710.

8. R. v. Rowton, (1865) Le & Ca 520, 535, 536; Wigmore, Ev., s. 1614

9. v. ante notes to Ss. 53, 54.

## PART II

## ON PROOF

## SYNOPSIS

1. Introductory. 2. The rules with regard to proof summarised.

**1. Introductory.** One of the main features in the Act consists in the distinction drawn by it between the relevancy of facts and the mode of proving facts<sup>10</sup> which is effected by the evidence of witnesses, inspection, presumptions and judicial notice, and which is, subject to a few exceptions, generally the same in civil and criminal cases. Its first part deals with the relevancy of facts, or with the answer to the question, "what facts may you prove?", while the present part proceeds to enact rules as to the manner in which a fact, when relevant, is to be proved.<sup>11</sup> "This introduces the question of proof. It is obvious that, whether an alleged fact is a fact in issue or a collateral fact, the Court can draw no inference from its existence till it believes it to exist, and it is also obvious that the belief of the Court in the existence of a given fact ought to proceed upon grounds altogether independent of the relation of that fact to the object and nature of the proceeding in which its existence is to be determined. The question is whether A wrote a letter. The letter may have contained the terms of a contract. It may have been a libel. It may have constituted the motive for the commission of a crime by B. It may supply proof of an *alibi* in favour of A. It may be an admission or a confession of crime. But, whatever may be the relation of the fact to the proceedings, the Court cannot act upon it unless it believes that A did write the letter, and that belief must obviously be produced, in each of the cases mentioned, by the same or similar means. If, for instance, the Court requires the production of the original, when the writing of the letter is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime. In short, the way, in which a fact should be proved, depends on the nature of the fact and not on the relation of the fact to the proceeding. The instrument by which the Court is convinced of a fact is evidence. It is often classified as being either direct or circumstantial. We have not adopted this classification. If the distinction is that direct evidence establishes a fact in issue, whereas circumstantial evidence establishes a collateral fact, evidence is classified, not with reference to its essential qualities, but with reference to the use to which it is put, as if paper were to be defined not by reference to its component elements, but as being used for writing or for printing. We have shown that the mode in which a fact must be proved depends on its nature, and not on the use to be made of it. Evidence, therefore, should be defined, not with reference to the nature of the fact which it is to prove, but with reference to its own nature. Sometimes, the distinction is stated thus: direct evidence is a statement of what a man has actually seen or heard. Circumstantial evidence is something from which facts in issue are

10. See Proceedings in Council on the Evidence Bill, 31st March, 1871.

mittee on the Evidence Bill (*Gazette of India*, July 1, 1871).

11. Draft Report of the Select Com-

to be inferred. If the phrase is thus used, the word 'evidence' in the two phrases (direct evidence and circumstantial evidence) opposed to each other, has two different meanings. In the first, it means testimony; in the second, it means a fact which is to serve as the foundation for an inference. It would indeed be quite correct, if this view is taken, to say circumstantial evidence must be proved by direct evidence. This would be a most clumsy mode of expression, but it shows the ambiguity of the word 'evidence', which means either (a) words spoken or things produced in order to convince the Court of the existence of facts, or (b) facts of which the Court is so convinced which suggest some inference as to other facts. We use the word 'evidence' in the first of these senses only, and so used it may be reduced to three heads: (a) oral evidence; (b) documentary evidence; (c) material evidence."<sup>12</sup>

In the first place, the fact to be proved may be one of so much notoriety that the Court will take judicial notice of it; or it may be admitted by the parties. In either of these cases no evidence of its existence need be given. Chapter III, which relates to judicial notice, disposes of this subject. It is taken in part from Act II of 1855, in part from the Commissioners' draft bill, and in part from the Law of England. If proof has to be given of any facts, it may be so given by either oral, or documentary evidence. The Act accordingly proceeds in Chapters IV and V to deal with the peculiarities of each of these kinds of evidence.

With regard to oral evidence, it is provided that it must in all cases whatever, whether the fact to be proved is a fact in issue or a collateral fact, be direct. That is to say, if the fact to be proved is one that could be seen, it must be proved by someone who says he saw it; if it could be heard, by someone who says he heard it; and so with the other senses. It is also provided that, if the fact to be proved is the opinion of a living and producible person, or the grounds on which such opinion is held, it must be proved by the person who holds that opinion on those grounds. If, however, the fact to be proved is the opinion of an expert who cannot be called (which is the case in the majority of cases in this country) and if such opinion has been expressed in any published treatise, it may be proved by the production of the treatise. This provision taken in connection with the provisions on relevancy contained in Chapter II, sets the whole doctrine of hearsay in a perfectly plain light, for their joint effect is this:

- (a) the sayings and doings of third persons are, as a rule, irrelevant, so that no proof of them can be admitted;
- (b) in some excepted cases they are relevant;
- (c) every act done, or word spoken, which is relevant on any ground, must (if proved by oral evidence) be proved by someone who saw it with his eyes, or heard it with his own ears.

With regard to the chapters which relate to the proof of facts by documentary evidence and the cases in which secondary evidence may be admitted, the Act has followed, with few alterations, the previously existing law. The general rule that primary evidence must, if possible, be given, subject to certain exceptions in favour of "public documents". Chapter V further contains

12. Draft Report of the Select Committee (*Gazette of India*, July 1,

1871); see as to material evidence pp. 122, 123.

certain presumptions, which in almost every instance will be true as to the genuineness of certified copies, gazettes, books purporting to be published at particular places, copies of depositions, etc.<sup>13</sup> Two sets of presumptions will sometimes apply to the same document. For instance, what purports to be a certified copy of a record of evidence is produced. It must, by section 76, be presumed to be an accurate copy of the record of evidence. By section 80 the facts stated in its records itself as to the circumstances under which it was taken, e. g., that it was read over to the witness in a language which he understood, must be presumed to be true.<sup>14</sup> Lastly, Chapter VI deals with certain cases in which writings are exclusive evidence of the matters to which they relate.<sup>15</sup>

**2. The rules with regard to proof summarised.** (a) *Judicial notice-facts admitted.* Certain facts are so notorious in themselves, or are stated in so authentic a manner in well-known and accessible publications, that they require no proof. The Court, if it does not know them, can inform itself upon them without formally taking evidence. These facts are said to be judicially noticed. Further, facts which are admitted need not be proved..

(b) *Oral evidence.* All facts, except the contents of documents may be proved by oral evidence which must, in all cases, be direct. That is, it must consist of a declaration by the witness that he perceived by his own senses the fact to which he testifies.

(c) *Documents.* The contents of documents must be proved either by the production of the document, which is called primary evidence, or by copies or oral accounts of the contents, which are called secondary evidence. Primary evidence is required, as a rule, but this is subject to seven important exceptions in which secondary evidence may be given. The most important of these are (i) cases in which the document is in the possession of the adverse party, in which case the adverse party must in general (though there are several exceptions) have notice to produce the document before secondary evidence of it can be given; and (ii) cases in which certified copies of public documents are admissible in place of the documents themselves.

(d) *Presumptions as to documents.* Many classes of documents which are defined in the Act are presumed to be what they purport to be, but this presumption is liable to be rebutted.

(e) *Writings when exclusive evidence.* When a contract, grant, or other disposition of property is reduced to writing, the writing itself, or secondary evidence of its contents, is not only the best, but is the only admissible evidence of the matter which it contains. It cannot be varied by oral evidence except in certain specified cases.

It is necessary in applying these general doctrines in practice to go into considerable detail, and to introduce provisos, exceptions, and qualifications which are mentioned in the following Sections.<sup>16</sup>

13. Draft Report of the Select Committee (*Gazette of India*, July 1, 1871).

14. Steph. Introd. 170, 171.  
15. Ib.  
16. Steph. Introd. 170, 171.

## CHAPTER III

### FACTS WHICH NEED NOT BE PROVED

#### SYNOPSIS

- 1. General Rule.
- 2. Facts judicially noticeable.
- 3. Facts admitted.

**1. General Rule.** All facts in issue and relevant facts must, as a general rule, be proved by evidence, that is, by the statements of witnesses, admissions or confessions of parties, and production of documents. To this general rule there are two exceptions which are dealt with by this chapter, viz., (a) facts judicially noticeable; (b) facts admitted. Neither of these classes of facts need be proved.<sup>17</sup>

**2. Facts judicially noticeable.** Of the private and peculiar facts, on which the cause depends, the Judge is (as in trial by jury, the jury are) bound to discard all previous knowledge; but it is in the nature of things that many general subjects to which an advocate calls attention should be of so universal a notoriety as to need no proof.<sup>18</sup> Certain facts are so notorious in themselves, or are stated in so authentic a manner in well-known and accessible publications, that they require no proof. The court, if it does not know them, can inform itself upon them without formally taking evidence. These facts are said to be judicially noticed.<sup>19</sup> "Universal notoriety" is a term which is vague and scarcely susceptible of definition. "It must depend upon many circumstances; in one case perhaps upon the progress of human knowledge in the fields of science, in another upon the extent of information on the state of foreign countries, and in all such instances upon the accident of their being known or having been publicly communicated." "Still more must the limits vary (in reality, though perhaps not so apparently) according to the extent of knowledge and previous habits of the Judge. One, who had made chemistry his study, would not need the accumulated opinions of scientific chemists; one, to whom a foreign language was familiar, would read a document without translations, or comments; one, who had resided in India, would hear and speak of the customs there, as matters of course. Other Judges might, with proper diffidence, require evidence on which they could rely; but, after all, it is obvious that there are many subjects on which, were it not for the learning of the Judge, any quantity of evidence would fail of supplying the defect."<sup>20</sup> The list of matters made judicially noticeable by section 57 is not complete.<sup>21</sup> It may be doubted whether an absolutely complete list could be formed, as it is practically impossible to enumerate everything which is so notorious in itself, or so distinctly recorded by public authority, that it would be superfluous to prove it.<sup>22</sup>

17. Ss. 56, 58.

18. Gresley, Ev., 395; Wharton, Ev., s. 276, *et seq.*

19. Steph. Introd. 170. See Wigmore, Ev., s. 2565.

L. E.—184

20. Gresley, Ev., 395, 396 and v. *Pas-sim*; ib. 395—420.

21. v. notes to S. 57 post.

22. Steph. Dig., p. 179.

The English Courts take judicial notice of numerous facts, which it is therefore unnecessary to prove. Theoretically all facts which are not judicially noticed must be proved; but there is an increasing tendency on the part of Judges to import into cases heard by them their own general knowledge of matters which occur in daily life.<sup>23</sup>

**3. Facts admitted.** Facts admitted need not be proved.<sup>24</sup> And obviously so, for a Court has to try the questions on which the parties are at issue, not those on which they are agreed.<sup>25</sup> Facts may be so admitted (a) by agreement at the hearing, or (b) before the hearing, or (c) by the pleadings.<sup>1</sup>

(a) and (b). It often happens that it is advisable for each party to waive the necessity of proof, and to admit certain facts insisted upon by the other, but insufficiently proved by the pleadings. This may be either for the purpose of mutually avoiding the expense and delay of a commission for examining witnesses or for the sake of respectively purchasing advantages by concessions, or of saving some expense to the estate; or there may be a mixture of these and other motives.<sup>2</sup> Formal proof of a document, even when it is required to be proved in a certain way, may be waived by the party whose interest it may affect, although such waiver does not affect the legal character of the document or its validity.<sup>3</sup> There is no provision in the Indian Law of Procedure as in England, for enabling one party in a suit to call upon the other to admit a fact, other than the genuineness of a document<sup>4</sup> and in the event of the other party not doing so to throw upon him the expense of the proof. Some such provision might be a useful addition to the Code, and a clause to this effect was proposed when the Code of 1877 was drafted. It was, however, probably, considered, to be too much in advance of the general intelligence, and Order X, Rule 1 of the Code now provides that at the first hearing the Court shall ascertain from the parties what facts they respectively admit or deny.<sup>5</sup> There is, however, nothing to prevent such a notice being given. And if the parties either upon such notice, or without such notice, agree in writing to admit a fact the latter need not be proved.<sup>6</sup> If the party to whom such a notice is given does not agree to admit the fact in question, the Court may possibly, where the circumstances so warrant, take that matter into consideration in dealing with the costs of the suit or application.

(c). The function of admissions made on the pleadings, is to limit the issues and therewith the scope of the evidence admissible.<sup>7</sup> But the effect given in the English Courts to admissions on the pleadings has always been greater than that given to admissions in the less technical pleadings in the Courts in India.<sup>8</sup> The function of pleadings in narrowing the issues and limiting the number of facts which it is necessary to prove is, in India, mainly

23. Powell, Ev., 9th Ed. p. 146. In San Hla Baw v. Mi Khorow Nissa, A.I.R. 1918 L.B. 66 : 45 I.C. 734, it was held that the Judge was justified in alluding to his experience of the plaintiff's litigation in his Court.

24. S. 58 post.

25. Burjorji v. Muncherji, (1880) 5 B. 152.

1. S. 58 post.

2. Gresley, Ev., 47.

3. Baijnath Singh v. Brijraj Kuar, 1922 Pat. 514: I. L. R. 2 Pat. 52: 68 I.C. 383: 4 P. L. T. 239.

4. As to which see Civ. Pro. Code, O. XII, r. 2.

5. Cunningham, Ev., s. 205.

6. S. 58 post.

7. Wills, Ev., 3rd Ed., 154

8. v. notes to S. 58 post.

fulfilled by the procedure which regulates the settlement of issues.<sup>9</sup> Where, however, by any rule of pleadings, in force at the time, a fact is deemed to be admitted by the pleadings, it is unnecessary to prove such fact.<sup>10</sup> The Court may, however, in all these cases in its discretion, require the facts admitted to be proved otherwise than by such admissions.<sup>11</sup>

*56. Fact judicially noticeable need not be proved.* No fact of which the Court will take judicial notice need be proved.

s. 3 ("Fact")  
s. 3 ("Court.")

s. 3 ("Proved.")

### SYNOPSIS

1. Principle.

2. "Need not be proved."

1. **Principle.** See Introduction, ante.

2. **"Need not be proved".** According to the definition contained in the third section "a fact is said to be proved when after considering the matters before it, the Court believes it to exist". Such matters are those brought before the Court by the parties or otherwise appearing in the particular proceedings. In the case of the facts dealt with by this section, the Judge's belief in their existence is induced by the general knowledge acquired otherwise than in such proceedings and independently of the action of the parties therein. So, the Court can take judicial notice of the fact that many of the industrial workers are illiterate.<sup>12</sup> This section and the last two paragraphs of the next come to this: With regard to the facts enumerated in Section 57, if their existence comes into question, the parties who assert the existence or the contrary need not in the first instance produce any evidence in support of their assertions. They need only ask the Judge to say whether these facts exist or not, and if the Judge's own knowledge will not help him, then he must look the matter up; further, the Judge can, if he thinks proper, call upon the parties to assist him. But in making this investigation the Judge is emancipated entirely from all the rules of evidence laid down for the investigation of facts in general. He may resort to any source of information which he finds handy, which he thinks helps him. Thus, he might consult any book or obtain information from a bystander. Where there is a jury, not only the Judge, but the jury also, must be informed as to existence or non-existence of any fact in question. In the cases mentioned in Section 57, therefore, the Judge must not only inform himself, but he must communicate his information to the jury<sup>13</sup> and when he relies on any document or book of reference under this section, he should also inform the parties during the trial and so give them a chance to contradict its authority.<sup>14</sup> This section combined with Section 57 (1) has been held by the Allahabad High Court in *Gaya Din v*

9. v. notes to S. 58 post.

10. S. 58.

11. S. 58.

12. Kesoram Cotton Mills, Ltd. v. Gangadhar, (1964) 2 S. C. R. 809; A. I. R. 1964 S.C. 708.

13. Murkby's Evidence Act, s. 40. See

generally as to Judicial Notice, Wharton, Ev., ss. 276-340.

14. Weston v. Peary, 40 C. 898; 23 I.C. 25; 18 C. W. N. 185, per Woodroffe, J.; see Durga v. Ramdoyal, (1910) 38 C. 153.

*State*<sup>15</sup> to authorise the Court to take judicial notice of the signature of the District Magistrate in a sanctioning order and presume that it was a genuine one.

A Government Notification issued in exercise of statutory powers is a statutory provision of which judicial notice can be taken independently.<sup>16</sup>

57. *Facts of which Court must take judicial notice.* The Court, shall take judicial notice of the following facts :—

<sup>17</sup>[ (1) All laws in force in the territory of India.]

(2) All public Acts passed or hereafter to be passed by Parliament<sup>18</sup>[of the United Kingdom], and all local and personal Acts directed by Parliament<sup>19</sup>[of the United Kingdom] to be judicially noticed.

(3) Articles of War for<sup>20</sup>[the Indian] Army,<sup>21</sup>[Navy or Air Force].

<sup>22</sup>[ (4) The course of proceeding of Parliament of the United Kingdom, of the Constituent Assembly of India, of Parliament and of the Legislatures established under any laws for the time being in force in a Province or in the States.]

(5) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland.

(6) All seals of which English Courts take judiciale notice : the seals of all the Courts in<sup>23</sup>[India], and of all Courts out of<sup>24</sup>[India], established by the authority of<sup>25</sup>[the Central Government or the Crown Representative]: the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by<sup>1</sup>[the Constit-

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| <p>15. A. I. R. 1958 All. 39; 1958 Cr. L. J. 9; State v. Gurdev Singh Harnam Singh, A. I. R. 1956 Pepsu 11; State v. Sagar Mal, A. I. R. 1951 All. 515; Gaya Din v. State, A. I. R. 1958 All. 39; Dhanpat v. State, A. I. R. 1960 All. 40; Raghbir Singh v. State of Haryana, (1968) 70 P. L. R. 318 (322).</p> <p>16. Tek Chand v. Firm Amar Nath, A. I. R. 1972 Punj. 46 ('50).</p> <p>17. Subs. by the A. O. 1950, for the former clause which had been subs. by the A. O. 1935 for the original clause.</p> <p>18. Ins. by the A. O. 1950.</p> <p>19. ib.</p> <p>20. Subs. by the A. O. 1950, for "Her Majesty's".</p> | <p>21. Subs. by the Repealing and Amending Act, 1927 (10 of 1927), S. 2 and Sch. II, for "or Navy".</p> <p>22. Subs. by the A. O. 1950, for the original cl. (4), as amended by the A. O. 1937 and 1948.</p> <p>23. Subs. by Part B States (Laws) Act, 1951, for the "States" which had been substituted for "Provinces of India" by the A. O. 1950.</p> <p>24. Subs. by Part B States (Laws) Act, 1951, for the "States" which had been substituted for "Provinces of India" by the A. O. 1950.</p> <p>25. Subs. by the A. O. 1937, for "the G. G. or any L. G. in Council".</p> <p>1. Subs. by the A. O. 1950 for "any Act of Parliament or other".</p> |
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tution or an Act of Parliament of the United Kingdom or an] Act or Regulation having the force of law in <sup>2</sup>[India].

(7) The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any <sup>3</sup>[State] if the fact of their appointment to such office is notified in <sup>4</sup>[any official Gazette] :

(8) The existence, title, and national flag of every State or Sovereign recognised by <sup>5</sup>[the Government of India]<sup>6</sup>.

(9) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the <sup>7</sup>[official Gazette].

(10) The territories under the dominion of <sup>8</sup>[the Government of India].<sup>9</sup>

(11) The commencement, continuance, and termination of hostilities between <sup>10</sup>[the Government of India]<sup>11</sup> and any other State or body of persons.

(12) The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorized by law to appear or act before it.

(13) The rule of the road, <sup>12</sup>[on land or at sea].

2. Subs. by Part B States (Laws) Act, 1951, for the "States" which had been substituted for "Provinces of India" by the A. O. 1950.
3. Subs. by the A. O. 1950, for "Province" which had been subs. by the A. O. 1948 for "part of British India."
4. Subs. by the A. O. 1937, for "the Gazette of India, or in the official Gazette of any L. G."
5. Subs. by the A. O. 1950 for "the British Crown".
6. See also the Code of Civil Procedure, 1908 (V of 1908), S. 84 (2), under which every Court is required to take judicial notice of the fact that a foreign State has, or has not, been recognised by His Majesty or the Central Government.
7. Subs. by the A. O. 1937, for "the Gazette of India, or in the official

- Gazette of any L. G."
8. Subs. by the A. O. 1950, for "the British Crown."
9. See also the Code of Civil Procedure, 1908. (V of 1908), S. 84 (2), under which every Court is required to take judicial notice of the fact that a foreign State has, or has not, been recognised by His Majesty or the Central Government.
10. Subs. by the A. O. 1950, for "the British Crown".
11. See also the Code of Civil Procedure, 1908 (V of 1908), S. 84 (2), under which every Court is required to take judicial notice of the fact that a foreign State has, or has not, been recognised by His Majesty or the Central Government.
12. Ins. by the Indian Evidence (Amendment) Act, 1872 (18 of 1872), S. 5.

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

- s. 3 ("Fact".)
- s. 3 ("Court".)
- s. 3 ("Proved".)
- s. 37 (Presumption as to books of re-
- ference).
- s. 114 (The Court may presume the existence of certain facts.)

Wharton, Ev., ss. 276-340; Taylor, Ev., ss. 4-21; Steph., Dig., Art. 58; Best, Ev., ss. 253, 254; Phipson, Ev., 11th Ed., 23-34; Wills, Ev., 2nd Ed., 19-27; Roscoe, N. P. Ev., 80-84; Powell, Ev., 9th Ed., pp 146-149; Gresley, Ev., 395-420; Wigmore, Ev., s. 2565 et seq.

### SYNOPSIS

- 1. Scope.
- 2. Matters that shall be judicially noticed.
- Clause (1): Laws in force in India;
  - Notifications.
  - Rules.
  - Non-statutory and customary laws.
  - Foreign Laws.
  - Law Reports.
- Clause (2): Statutes.
- Clause (3): Articles of war.
- Clauses (4) and (5): Proceedings of Parliament and Sign Manual.
- Clause (6): Seals.
  - Seals of Notaries Public.
  - Registration.
- Clause (7): Accession, etc., of public officers.
- 8. Clause (8):
  - National flag.
  - Status of foreign Sovereign.
  - Existence of State or Sovereign.
- 9. Clause (9): Divisions of time, etc.
  - Public Holidays.
- 10. Clauses (10) to (12).
- 11. Clause (13): Rules of the road.
- 12. Matters that may be judicially noticed.
- 13. Books or documents of reference:
  - Personal knowledge of Judges.
  - Refreshing memory of Judges.
  - Sections 57 and 60.
- 14. Summary.
- 15. -Police dogs.
- 16. -Bloodhounds and Police dogs.
- Modus operandi.

1. Scope. It has been pointed out<sup>13</sup> that the list given in this section of the facts of which the court shall take judicial notice is far from complete, and that Anglo-Indian Courts take judicial notice of the ordinary course of nature,<sup>14</sup> the meaning of English words<sup>15</sup> and all other matters which they are directed by any Act to notice<sup>16</sup> such as in Bengal, list of landholders

13. Whitely Stokes, Anglo-Indian Codes, Vol. II p. 887.

14. Taylor, Ev., s. 16 e.g. that a man is not the father of a child, where non-access is already proved until within six months of the woman's delivery. Nor is it necessary to prove the course of the heavenly bodies, or the like, ib. With respect to this criticism, it may, however, be observed that course matters which might appear to have been omitted are dealt with by Sec.

114 (presumptions), post e.g., the common course of natural events.

15. ib.; so in R. v. Woodward, 1 Moo. C.C. 323, the Judges held that they were bound to notice that beans were a kind of pulse.

16. So a Court must take judicial notice of the fact that a foreign State or the head of a State has or has not been recognized by the Central Government, C. P. Code, Sec. 87-A (2).

who have not made road-cess returns (Beng. Act IX of 1880, Section 19); in Madras, bye-laws framed by the Commissioner of Police (Mad. Act III of 1862, Section 5; see now Act III of 1888); in Bombay, notifications in the Gazette (Bom. Act X of 1866, Section 4; see now Act III of 1886); in Oudh, the list of Talukdars and grantees published by the Chief Commissioners (Act I of 1869, Section 10; see now Act XXXVIII of 1920).<sup>17</sup> With regard to the corresponding provisions of Act II of 1855, it was held that the section did not forbid the Courts to take notice of any facts other than those mentioned, and that Courts might and would take judicial notice of, generally speaking, all those facts, at least, of which English Courts take judicial notice.<sup>18</sup> Facts of which judicial notice may be taken are not limited to those of the nature specifically mentioned in clauses (1) to (13) of this section. These are mentioned because as regards them, the Court is given no discretion. They must be recognised by the Courts. As to others the Courts have a wide discretion and may notice many facts which they cannot be required to notice. Thus a Court can take judicial notice of "notorious facts," but the question whether a particular fact is a "notorious fact" may be a matter of opinion and somewhat controversial. The Court cannot smuggle into the evidence its own opinion of controversial situation disguised as notorious facts.<sup>19</sup> The Court must determine, in each case, whether the fact is of such well-known and established character as to be the proper subject of judicial notice. A proclamation of emergency is a matter of general information of which a Court can take judicial notice.<sup>20</sup> A matter of public history may be such a fact.<sup>21</sup> The tendency of modern practice is to enlarge the field of judicial notice; and the importance of the penultimate paragraph is this—that it indicates both an approval of this principle as also the kind of subjects of which (in application of such principle) judicial notice may be taken. The Indian case-law and practice appear to have also proceeded on a liberal application of the power to take judicial notice.<sup>22</sup> Consequently, the rule of exclusion should not be applied in construing statutes, when the application of the rule is likely to lead to injustice.<sup>23</sup>

That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. This is because the Court assumes that the matter is so notorious that it will not be disputed. But the opponent is not prevented from disputing the matter by evidence, if he believes it disputable.<sup>24</sup> In *Devichand Festimall and Co. v. The Collector*,<sup>25</sup> the counsel for the department explained that in 1957 smuggling of gold was on such an extensive scale that the Court would be justified in taking judicial notice of the fact, and contended, in view of illustration (a) to Section 114, that the Court would be justified in presuming that the petitioners were concerned in the unlawful importation of the gold. The Court observed that there was no warrant for presuming

17. See Whitley Stokes, op. cit.

18. R. v. Nabawip, 1 B. L. R. (O. Cr.) 15 at pp. 27, 28.

19. Abida Khatoon v. State of U. P., A. I. R. 1963 A. 260.

20. S.C. Mills v. Sales Tax Officer, A. I. R. 1965 A. 86.

21. Surendra Mohan v. Saroj Ranjan, A. I. R. 1961 C. 461 (F.B.).

22. 'The Englishman, Ltd. v. Lajpat Rai,

I. L. R. 37 Cal. 760; 6 I.C. 81; 14

C. W. N. 713. See also Phipson, Ev., 9th Ed., 19; R. v. Nabawip, 1 B. L. R. (O. Cr.) 15 at pp. 27, 28.

23. Jit Singh v. Managing Committee, (1960) 1 Punj. L. R. 803.

24. Wigmore, s. 2567.

25. A.I.R. 1960 M. 281; 73 I.W. 13; (1960) 1 M.L.J. 75.

that the gold was imported in 1957, or at any particular time, and that there was no scope for the application of any such presumption.

In England, the Court will judicially notice public, constitutional or International matters affecting the Government of Great Britain and its relations with other States, in order that the Court and the Executive may take the same view and act in unison in dealing with such matters. For such purpose, the Court should inquire of the Executive and thereby acquire the information, and the information so received is conclusive.<sup>1</sup> So, a statement to the Court by the Attorney-General that the defendant was a member of the staff of the German Ambassador was held to be conclusive.<sup>2</sup>

The precedents of former Judges, in declining to notice or assenting to notice specific facts, do not restrict the present Judge from noticing a new fact, provided only that the new fact is notorious to the community.<sup>3</sup>

**2. Matters that shall be judicially noticed. Clause (1) : Laws in force in India.** Under the first clause, judicial notice has to be taken of "all laws in force in the territory of India". This expression has not been defined in this Act or in the General Clauses Act, 1897. But the following definitions of the terms "law" and "existing laws" given in the Constitution, though for the purposes of the Constitution, have great relevancy here. Article 13(1) (a) of the Constitution defines 'law' as including "any Ordinance, Order, Bye-law, Rule, Regulation, Notification, custom or usage having in the territory of India the force of law". The term 'existing law' has been defined in Article 366(10) of the Constitution thus: "Existing Rule or Regulation passed or made before the commencement of this Constitution by any Legislature, Authority or person having power to make such Law, Ordinance, Order, Bye-law, Rule or Regulation." It is pertinent to note that Article 372 of the Constitution speaks of the continuance of "all the laws in force in the territory of India". In *Edward Mills Co. Ltd. v. State of Ajmer*,<sup>4</sup> their Lordships of the Supreme Court have pointed out that there is no material difference between an "existing law" as defined in Article 366(10) and a "law in force"; that the words "law in force" as used in Art. 372 are wide enough to include not merely a legislative enactment but also any regulation or order which has the force of law; and that an order must be a legislative and not an executive order before it can come within the definition of law. In order to come within the definition of law, an order must be one in the nature of a legislative provision, and if it is not made by the Legislature it must necessarily be one made in the exercise of a power delegated in that behalf, and not a mere executive order.<sup>5</sup> Orders issued in strict compliance with an Act

1. Daff Development Co., Ltd. v. Government of Kelantan, 1924 A. C. 797 : 93 L.J.C.H. 343 : 131 L.T. 676 : 40 T.L.R. 566 : 68 S.J. 559; but see Kunwar Bishwanath Singh v. Commr. of Income-tax, Central and United Provinces, A.I.R. 1942 All. 295 at 299 : I.L.R. 1942 All. 398 : 201 I.C. 209; 1942 A.L.J. 543 : 1942 A.W.R. (H.C.) 354 : (1942) 10 I.T.R. 322.
2. Engelke v. Musmann, 1928 A. C. 433 See also The Fagernes, (1927) P. 311.
3. Wigmore, s. 2583.
4. A.I.R. 1955 S.C. 25 : (1955) 1 S.C.R. 735; 1955 S.C.J. 42: (1955) S.C.A. 24: (1955) 1 M.L.J. (S.C.) 1.
5. State v. Gopal Singh, A.I.R. 1956 M.B. 138 (F.B.); Shripad Amrit Dange v. Harsidhbhai Divatia, 1948 Bom. 20 : 49 Bom.L.R. 468, reversed on Appeal in Mahomed Yasin Nurie v. Shripat Amrit Dange, A.I.R. 1949 Bom. 19 : 50 Bom.L.R. 471 on another point; Moolchand v. Emperor, A.I.R. 1948 All. 281.

of the Legislature by the Government or by authority or persons duly authorised by the Government and duly notified in the manner provided by the Act have been held to be part of Indian law of which judicial notice is required to be taken under this clause.<sup>6</sup> Judicial notice has to be taken of the law in force on any particular date and such law alone has to be applied to any case irrespective of whether any party referred to it or not; for instance, the application of the Railways (Amendment) Act, 1961 (Act 39 of 1961) which effected many changes in the Railways Act, 1890 (4 of 1890).<sup>7</sup> The authorisation of all Food Inspectors to institute prosecution for offences under the Prevention of Food Adulteration Act, 1954, as a law in force of which the Court can take judicial notice.<sup>8</sup>

*Notifications.* It was held in some cases that Government notifications do not come under this section,<sup>9</sup> but, it has been pointed out by their Lordships of the Supreme Court in *State of Bombay v. F. N. Balsara*,<sup>10</sup> that a notification issued, in exercise of powers conferred by a specific provision in an Act of the Legislature, has the force of law as if made by the Legislature itself. After this authoritative pronouncement of the Supreme Court, the question, whether a notification issued by the Government or any competent authority in the exercise of delegated power of legislation, can be judicially noticed, cannot be doubted, and it must be held that such a notification is a part of the law itself and, therefore, judicial notice of the notification can be taken under Section 57, Evidence Act.<sup>11</sup> In *Ramji v. Puncham Singh*,<sup>12</sup> the notifications related to orders of the Ruler of Gwalior State and they were published in various issues of the Government Gazette. It was held that proof of these notifications was not necessary. Indeed, it is not necessary that notifications

49 Cr.L.J. 352 : 1948 A.L.J. 81 :  
1948 A.W.R. (H.C.) 106; Sham Lal v. Muni Lal, (1972) 74 P.L.R. 67 : A.I.R. 1972 Punj. 199 [by-laws framed by Municipal Committee in exercise of powers conferred by cl. (e) of section 188 of the Punjab Municipal Act, 1911].

6. Public Prosecutor v. Illur Thippayya, A.I.R. 1949 Mad. 459; I.L.R. 1949 Mad. 371 : 50 Cr.L.J. 641 : (1948) 2 M.L.J. 649 : 1949 M.W. N. 103 : 63 L.W. 270.

7. Union of India v. Rajasthan Supplying Agencies, A.I.R. 1968 A.P. 327 (328).

8. State of Kerala v. V. P. Enadeen, 1971 Ker.L.T. 19 (F.B.) (20, 21) : 1971 M.L.J. (Cr.) 89.

9. Collector of Cawnpore v. Jugal Kishore, A.I.R. 1928 All. 355 : 107 I.C. 578; Mathura Das v. The State, A.I.R. 1954 Nag. 296 : I.L.R. 1954 Nag. 578 : 55 Cr.L.J. 1479.

10. A.I.R. 1951 S.C. 318; 329 : 1951 S.C.R. 682 : 1951 S.C.J. 478 : 52 Cr.L.J. 1361 : 53 Bom.L.R. 982 : (1951) 2 M.L.J. 141; State of Mysore v. F. Louis, (1970) 1 Mys:L.J. 425

(428) (judicial notice taken in appeal); Executive Officer v. Devassy, 1970 Ker.L.J. 1011 : 1971 Ker.L.R. 33 : 1971 M.L.J. (Cr.) 302 : 1970 Ker.L.T. 991 (993) (F.B.) overruling Sreedharan v. State of Kerala, 1969 Ker.L.T. 689 and distinguishing Chacko Pyli v. State of Kerala, 1966 Ker.L.T. 102; Chandrasekharan v. State, 1966 Ker.L.T. 638 and Executive Officer v. Bharatan, 1967 Ker.L.T. 161.

11. State v. Gopal Singh, A.I.R. 1956 M.B. 138 (F.B.); Tekchand v. Firm Amar Nath, A.I.R. 1972 Punj. 46; I. L. R. (1974) Cut. 1062; Abdul Rahman v. State of Mysore, 1972 Cr.L.J. 406 : (1971) 2 Mys.L.J. 422 : 1971 M.L.J. (Cr.) 420; Chattanatha Karayalar v. E. O. Puthalam Panch, 1971 Mad.L.W. (Cr.) 122; Executive Officer v. V. P. Dewassy, 1970 Ker.L.T. 991; I.L.R. 1970 Guj. 942; D. T. Co. (Pr.) Ltd. v. C.I.T., Patiala, 76 Punj.L.R. 259 : 1974 Rajdhani L.R. 323.

12. A.I.R. 1959 M.P. 269 : 1959 M.P.L.J. 505.

should be tendered as exhibits in the case, for the Court has to take judicial notice of them.<sup>13</sup> The Court can take judicial notice of orders and notifications of a State Government published in the Government Gazette and presume their genuineness under Section 81.<sup>4</sup> It cannot leave the counsel to point out the appropriate legislation when a law came into force or ceased to be operative. It should take judicial notice of all Gazette notifications and make a further probe into the matter and find out the date on which the Amending Act came into force or ceases to be operative.<sup>15</sup> It may be noted that the observations of Sulaiman, J., in *Collector of Kanpur v. Jugal Kishore*,<sup>16</sup> that judicial notice of a Government notification under Section 57, Evidence Act, could not be taken by the Court were made a relation to a notification, issued by the Government in the exercise of its executive authority. That was a case, where the question was, whether judicial notice could be taken of a notification issued under U. P. Court of Wards Act taking over superintendence of the property of a certain person and declaring him as a ward under the Act. Clearly, such a notification is not in the nature of a legislative provision made in the exercise of any delegated power of legislation. It is nothing but an executive order. No judicial notice can be taken of notification of executive order.<sup>16-1</sup>

*Rules.* It has been held, that rules or bye-laws made by a Municipality, in regard to water rates and purporting to have the force of law, can be taken judicial notice of by the Court.<sup>17</sup> The Rules of Business (of the Government of Maharashtra) made under Article 166 (3) of the Constitution are statutory rules of which judicial notice can be taken.<sup>18</sup> Similarly rules framed under the proviso to Article 309 can be taken judicial notice of<sup>18-1</sup>

*Non-statutory and customary laws.* As in England,<sup>19</sup> this clause is not confined to statutory laws and includes personal and customary laws, recognised and enforced in India.<sup>20</sup> When a particular custom is of general prevalence and is commonly recognised, it is open to a Court to take judicial notice of such custom having the force of law under this clause, and it is therefore not necessary that there should be evidence produced in each case to establish such a custom.<sup>21</sup> As their Lordships of the Privy Council observed

13. *State of Bihar v. Sitaram*, A.I.R. 1964 Pat. 477.

14. *State v. Nilam Das*, A.I.R. 1952 H.P. 75; see also *Jamshedpur Notified Area Committee v. C. L. Mahaton*, A.I.R. 1965 Pat. 176.

15. See *Mazhar Ali v. Hakimuddin*, A.I.R. 1965 Pat. 489 : 1965 B.L.J.R. 420.

16. A.I.R. 1928 All. 355 : 107 I.C. 578.  
16-1. *Executive Officer v. V. P. Devassy*, 1970 Ker.L.T. 991.

17. *Committee of Management of Hyderabad v. Seth Ramchand Lownkiram*, A.I.R. 1923 Sind 1 : 87 I.C. 258 : 16 S.L.R. 98; *Sham Lal v. Munni Lal*, A.I.R. 1972 Punj. 199 : 74 Punj.L.R. 67.

18. *Management of the Advance Insurance Co., Ltd. v. Shri Gurudasmal*,

Superintendent of Police, I.L.R. 1969 Delhi 426 : A.I.R. 1969 Delhi 330 (348).

18-1. I. L. R. (1971) Cut. 1038.

19. See *Phipson*, Ev., 11th Ed., pp. 24-25; *Taylor*, Ev., s. 5; *Goodeve*, Ev., s. 310, as to mercantile custom, see *Taylor*, Ev., s. 5; *Faizulla v. Ramkanal*, (1868) 2 B.L.R. 7, 9.

20. But see *Baqridi v. Rahim Bux*, A.I.R. 1926 Oudh 352 : 93 I.C. 332 : 13 O.L.J. 512, where it was opined that it is possible that "laws" in section means "statutes".

21. *Nihalchand v. Mst. Bhagwan Dei*, A.I.R. 1935 All. 1002 : 159 I.C. 683 : 1935 A.L.J. 1131 : 1935 A.W.R. 1109; *Ujagar Singh v. Jco. A.I.R. 1959 S.C. 1041.*

in the well-known *Pittapur* case<sup>22</sup>: "when a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case." "Material customs must be proved in the first instance by calling witnesses acquainted with them until the particular customs have, by frequent proof in the Courts, become so notorious that the Courts take judicial notice of them."<sup>23</sup> That a custom has been held to have been proved in a previous suit, between different parties, does not affect the parties in a subsequent suit. But when several suits have been brought and a custom has been repeatedly proved, the Courts may take judicial notice of the fact that a certain class of people are governed by the custom.<sup>24</sup> It has been held by the Privy Council that the Mahomedan law of pre-emption has long been judicially recognized as existing among the Hindus of Bihar.<sup>25</sup> In other cases, customs must ordinarily be proved. So while the Courts will take judicial notice of the general recognised principles of Hindu law, the Court will, not, it has been said, take judicial notice of what the Hindu law is with regard to Hindu custom, which must always be proved.<sup>1</sup>

The judgment of the Privy Council in the case of *Collector of Madura v. Moottoo Ramalinga*,<sup>2</sup> gives no countenance to the conclusion that, in order to bring a case under any rule of law laid down by recognised authority for Hindus generally, evidence must be given of actual events to show that, in point of fact, the people subject to that general law, regulate lives by it. Special customs may be pleaded by way of exceptions, which it is proper to prove by evidence of what is actually done. But, to put one who asserts a rule of law under the necessity of proving that in point of fact the community living under the system of which it forms part is acting upon it, or defeat him by assertions that it has not been universally accepted or acted upon, would go far to deny the existence of any general Hindu law, and to disregard the broad foundations which are common to all schools, though divergencies have grown out of them.<sup>3</sup> As by the Bengal Civil Courts Act<sup>4</sup> the Legislature has enacted

- 22. *Gangadhara Rama Rao v. Rajah of Pittapur*, A.I.R. 1918 P.C. 81 at p. 83; 45 I.A. 148; I.L.R. 41 Mad. 778; 47 I.C. 354; 16 A.L.J. 833; 20 Bom. L.R. 1065; 28 C.L.J. 428; 23 C.W.N. 173; 35 M.L.J. 392; 1918 M.W.N. 922; 5 P.L.W. 267, followed in *Hemraj v. Mathra Das*, A.I.R. 1952 Punj. 197; I.L.R. 1952 Punj. 207; 54 P.L.R. 112.
- 23. *Effuah Amissah v. Effuah Krabah*, A.I.R. 1936 P.C. 147; 162 I.C. 461; 44 T.W. 73; 1974 Rev. L.R. 414 (Punj.).
- 24. *Shivil Hasan v. Datu Mavji*, 12 B.H.C. 281; *Gangabai v. Shavar Malila*, I.B.H.C. 71; *In re Chennoweth*, (1902) 2 Ch. 488; 86 L.T. 890; 50 W.R. 663; 71 L.J. Ch. 739; 18 T.L.R. 702; *Matthews Re, Ex parte Powell*, (1876) 1 Ch. D. 501; 34 L.T. 224; 24 W.R. 378; 45 I.J. Rec. 100; *Edelstein v. Schuler*, (1902) 2 K.B. 144; 87 L.T. 204; 50 W.R. 403; 71 L.J.K.R. 572; 7

- C.C. 172; 18 T.L.R. 507; *George v. Davies*, (1911) 2 K.B. 445; 104 L.T. 648; 55 S.J. 481; 80 L.J.K. B. 924; 27 T.L.R. 415. See also *Tulsidas v. Fakir Mahomed*, A.I.R. 1926 Sind 161; 93 I.C. 321.
- 25. *Jadu Lal v. Janki*, 39 C. 915 (P.C.); see also *Jadulal v. Janki*, (1908) 35 C. 575.
- 1. *Juggut v. Dwarka*, (1882) 8 C. 582 587, per Garth, C. J., the custom may be of such antiquity and so well known that the Court will take judicial notice of it. See *Gokul v. Radho*, (1888) 10 A. 374, 383; *Jadu v. Janki*, (1908) 35 C. 575, as to the methods of ascertaining the general law, see *Bhagwan Singh v. Bhagwan Singh*, (1899) 21 A. 412, 423 (P.C.).
- 2. (1868) 12 Moo. I.A. 397.
- 3. *Bhagwan Singh v. Bhagwan Singh*, (1899) 21 A. 412, 423, 424 (P.C.).
- 4. Act VII of 1887, S. 37.

that the Mahomedan law shall be administered with reference to all questions regarding any religious usage or institution, the Courts must take judicial cognizance of the Mahomedan Ecclesiastical law, and the parties are relieved of the necessity of proving that law by specific evidence.<sup>5</sup>

To ascertain the law, the Courts may refer to appropriate books or documents of reference. Sworn translations of little known Sanskrit works embodying Hindu law together with the *fatwas*, or opinions, of pundits versed in that law, have thus been referred to.<sup>6</sup>

Under the last paragraph of the section, the Court is given the discretion to refuse to take judicial notice of any fact unless such person calling upon the Court to take any judicial notice of such fact produces any such book or document as it may be necessary to enable it to do so.<sup>7</sup>

*Foreign Laws.* The Court may take judicial notice of a publication containing a foreign law, if it is issued under the authority of the foreign government concerned and may accept the law as set out in such publication as a law in force in the particular foreign country at the relevant time. But such a publication cannot be evidence that what is contained in it is the whole law. What the whole law of a foreign country, at a particular point of time is, cannot, therefore, be proved except by calling in an expert, as provided for in Section 45, Evidence Act.<sup>8</sup>

*Law Reports.* With regard to law reports, under the provisions of the Indian Law Reports Act,<sup>9</sup> no Court is bound to hear cited, or to receive or treat as an authority binding on it, the report of any case decided by any of the High Courts (established under 24 and 25 Vict., c. 104) on or after the day on which the Act came into force, other than a report published under the authority of the Governor-General in Council. But the Act does not prevent a High Court from looking at an unreported judgment of other Judges of the same Court.<sup>10</sup>

**3. Clause (2): Statutes.** Statutes are either public or private. Public Statutes apply to the whole community and are noticed judicially though not formally set forth by a party claiming an advantage under them. They require no proof, being supposed to exist in the memories of all, though for certainty of recollection, reference may be had to a printed copy. Private or local and personal Acts operate upon particular persons and private concerns only. The Courts were formerly not bound to judicially notice them, unless as was customary, a clause was inserted that they should be so noticed. The effect of this clause was to dispense with the necessity of pleading the Act specially. Since, however, the commencement of the year 1851, this clause has been omitted, the Legislature having enacted that every Act made after that date shall be deemed a public Act and be judicially noticed as such, unless

5. R. v. Ramzan, (1885) 7 A. 461.
6. Collector of Madura v. Moottoo Ramalinga, (1885) 12 Moo. I.A. 397; see the penultimate paragraph of S. 57 post..
7. Public Prosecutor v. Illur Thippayya, A.I.R. 1949 Mad. 459.

8. Jagdish Chandra Sinha v. Commissioner of Income-tax, West Bengal, A.I.R. 1956 Cal. 48, 51.
9. Act XVIII of 1875, s. 3.
10. Mahomed v. Nazar, 28 C. 289: 5 C.W.N. 326.

the contrary be expressly declared.<sup>11</sup> As to the presumptions which exist in the case of Gazettes, newspapers and private Acts of Parliament, see Section 81 post.

**4. Clause (3) : Articles of War.** The Court must judicially notice the Articles of War for the Indian Army, Navy or Air Force. The Articles of War for the Indian Army are contained in the Indian Army Act XLVI of 1950, those for the Indian Navy in the Indian Navy Act, 1957 (62 of 1957), and those for the Air Force in the Indian Air Force Act XLV of 1950.

**5. Clauses (4) and (5) : Proceedings of Parliament and Sign Manual.** The course of proceedings of Parliament and of the Indian Legislatures is also the subject of judicial notice under this Act. The course of proceedings of Parliament may be proved by the Journals of the Houses or reports purporting to be printed by order of Government.<sup>12</sup> As regards the reports of debates, they can only be evidence of what was stated by the speakers in the Legislative Assembly, and are not evidence of any facts contained in the speeches.<sup>13</sup> There should be some indications on the record when, and in what circumstances, the specified statements were made. The court should also be careful to avoid the impression of mixing up proof of the making of the statements and of the truth of the statements themselves.<sup>14</sup>

The court is bound to take notice of the prerogative of the Legislative Assembly issued by the Governor and the regularity of the actions connected therewith.<sup>15</sup>

So also, it has been held in England that the Courts will notice the law and custom of Parliament, and the privileges and course of proceedings of each branch of the Legislature<sup>16</sup> as also the stated days of general political elections; the date and place of the sittings of the Legislature; and, in short, "all public matters which affect the Government of the country".<sup>17</sup> So also, both English and Indian tribunals notice the accession (as also in the case of English Courts, the demise) of the Sovereign,<sup>18</sup> the Royal Sign Manual and matters stated under it.<sup>19</sup>

**6. Clause (6) : Seals.** "The English Courts take judicial notice of the following seals: The Great Seal of the United Kingdom, and the Great Seals of England, Ireland and Scotland respectively; the Queen's Privy Seal and Privy Signet, whether in England, Ireland or Scotland; the Wafer Great Seal, and the Wafer Privy Seal, framed under the Crown Office Act, 1877, the

11. Taylor, Ev., ss. 1528, 1525.

12. Englishman, Ltd. v. Lajpat Rai, (1910) 37 C. 760.

13. Rt. Hon. Gerald Lord Strickland v. Carmelo Mifsud Bonnici, A.I.R. 1935, \* C. 84; 153 I.C. 1; 1935 A.W.R. 440; 41 L.W. 665; 1935 O.W.N. 327; 37 P.L.R. 118.

14. Emperor v. Choudhry Mohammad Hassan, A.I.R. 1940 Esh. 298, 302; 209 I.C. 468.

15. State of Punjab v. Satya Pal Dang, (1969) 1 S.C.R. 478; 1969, 2 S.C.A. 299; (1969) 2 S.C.J. 409; 1969 Um. N. P. 60; A.I.R. 1969 S.C. 903 (912).

16. Englishman, Ltd. v. Lajpat Rai, *supra* as to proof of the proceedings of Legislatures, see S. 78, cl. (2) post.

17. Taylor, Ev., s. 18; Taylor v. Barclay, 2 Sim. 211.

18. Taylor, Ev., s. 18.

19. *Ibid.* S. 16; Mighell v. Jahore (Sul.) (1911) 1 Q.B. 149.

Seal, and Privy Seal of the Duchy of Lancaster ; the Seal and the Privy Seal of the Duchy of Cornwall ; the seals of the old superior Courts of Justice ; and of the Supreme Court, and its several divisions ; the seals of the old High Court of Admiralty, whether for England or Ireland ; of the prerogative Court of Canterbury and of the Court of the Vice-Warden of the Stannaries ; the seals of all Courts constituted by Act of Parliament, if seals are given to them by the Act amongst which are the seals of the Courts for Divorce and Matrimonial Causes in England ; of the Court for Matrimonial Causes and Matters in Ireland ; of the Central Office of the Royal Courts of Justice and of its several departments ; of the Principal Registry, and of the several District Registries of the Supreme Court of Judicature ; of the Principal Registry, and of the several District Registries of the old Court of Probate in England and of the present Court of Probate in Ireland ; of the old and new Courts of Bankruptcy ; of the Insolvent Debtors' Court, now abolished ; of the Court of Bankruptcy and Insolvency in Ireland (which since the 6th of August, 1872, has been called 'The Court of Bankruptcy in Ireland') ; of the Landed Estates Court, Ireland ; of the Record of Title Office of that Court ; and of the County Courts : Courts of law also judicially notice the seal of the Corporation of London. Various statutes<sup>20</sup> render different other seals admissible in evidence without proof of their genuineness.<sup>21</sup> Many bodies are by particular Statutes created corporations and given a seal for, instance County Councils, yet in each such case the seal must be formally proved in the absence of statutory provision that judicial notice shall be taken of it.<sup>22</sup>

*Seals of Notaries Public.* According to English law, the seal of a foreign or colonial Notary Public will not generally be judicially noticed, although such a person is an officer recognised by the whole commercial world.<sup>23</sup> The present clause, however, draws no distinction between domestic and foreign Notaries Public. And so the official seal of a British Notary Public has been judicially recognised.<sup>24</sup> If this provision was restricted to the seals of notaries appointed in India only and was not extended to those appointed in foreign countries, it would become impossible to carry on business with foreign countries ; Courts can take judicial notice of seals of notaries of foreign countries also.<sup>24-1</sup> The other seals of which Indian Courts are required to take judicial notice will be found mentioned in this clause. They will not, however, take notice of any seal which is not distinctly legible.<sup>25</sup>

*Registration.* In *Kristo Nath Koondoo v. T. F. Brown*,<sup>1</sup> a registered power-of-attorney was admitted under Section 57 of this Act without proof, the

20. See Taylor, Ev., s. 6, where these Statutes will be found collected.

21. ib., s. 6.

22. ib., s. 14.

23. ib., there have been decisions to a contrary effect; ib., a distinction must be drawn between cases of judicial notice of seals and those in which, (whether his seal be or be not noticeable) the powers of the Notary Public with respect to the certification of documents are in question. So according to the law of England, the mere production of certificate of Notary Public stating that a deed had been executed before him would not in any way

dispense with the proper evidence of the execution of the deed. Nye v. Macdonald, L.R.P.C. 381, 343.

24. In the goods of Henderson, (1895)

22 C. 491, 494; and see Performing Right Society, Ltd. v. Indian Morning Post Restaurant, A.I.R. 1939 Bom. 347; I.L.R. 1939 Bom. 295: 184 I.C. 673: 41 Bom.L.R. 530 and cases cited in S. 82 post.

24-1. National & Grindlay's Bank v. World Science News, A.I.R. 1976 Delhi 263.

25. Jaker v. Raj. (1882) 10 G.L.R. 469, 476.

1886) 14 C. 176, 180.

Registering Officer being held to be a Court under the third section of the Act. But this decision has been dissented from in a later case, in which it was pointed out that mere registration of a document is not itself sufficient proof of its execution.<sup>2</sup>

**7. Clause (7) : Accession, etc. of public officers.** And so the Court will take judicial notice of the posting, name and signature of District Magistrate,<sup>3</sup> Chief Secretary to Government,<sup>4</sup> Deputy Commissioner of Police,<sup>5</sup> Sub-Registrar,<sup>6</sup> Food Inspector,<sup>6-1</sup> or any gazetted officer. The provisions of this clause are in advance of, and more extensive than, those of the English law according to which it has been said to be doubtful whether the Courts would recognise the signatures of the Lords of the Treasury of their official letters.<sup>7</sup> So the Court, prior to the passing of this Act, took judicial notice of the fact that a person was a Justice of the Peace<sup>8</sup> and of the signature of a jailor under the sixteenth section, Act XV of 1867 (Prisoners' Testimony Act).<sup>9</sup> But this clause requires that the facts of the appointment to office be notified in the Gazette. So where the Court was asked to presume that A was *Kazi* or *Sudder Ameen* of Chittagong in 1820, it was said,—“there is no evidence that any person named A held such appointment in July, 1820. We think that we cannot take judicial notice of this fact under the seventh clause, Section 57 of the Evidence Act, for there is nothing to show that A was gazetted to the appointment of *Sudder Ameen* in or about that year. The Gazette of India was not in existence, and was not introduced until Act XXXI of 1863 was enacted, and we are not shown that there was, in the year 1820 or thereabouts, any official gazette in which the appointments of *Sudder Ameens* were usually notified; or that this particular appointment was notified in any such gazette”, and the Court accordingly refused to take judicial notice of the appointment.<sup>10</sup> The clause does not apply to non-gazetted officers.<sup>11</sup> The applicability of the section is not, however, contingent on the exhibition of the Gazette containing a notification of the appointment of the officer whose signature is in question.<sup>12</sup> Under this section, the following could be taken judicial notice of: (i) Signature (though indecipherable) followed up by the initial D. M. (District Magistrate), authorising sanction to prosecute under the Arms Act;<sup>13</sup> (ii) the regulation of entry into Pakistan by Indian nationals would be only by permits;<sup>14</sup> (iii) the explosive situation between India and Pakistan on both sides

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- 2. Salimatum v. Koylashpoti, (1890) 17 C. 903.
- 3. State v. Gurdeo Singh, A.I.R. 1965 Pepgu 11.
- 4. Cholancheri v. R., A.I.R. 1923 Mad. 600 : 72 I.C. 515 : 24 Cr.L.J. 403 : 44 M.L.J. 557 : 1923 M.W.N. 290 : 17 L.W. 615; Kali Prasad Upadhyaya v. Emperor, A.I.R. 1945 Pat. 59 : I.L.R. 23 Pat. 475 : 218 I.C. 340 : 46 Cr.L.J. 460 : 11 B. R. 295.
- 5. B. Walvekar v. King-Emperor A. I.R. 1926 Cal. 966 : I.L.R. 53 Cal. 718 : 96 I.C. 264 : 30 C.W.N. 713.
- 6. Radha Mohun Dutt v. Nripendra Nath Nandy, A.I.R. 1928 Cal. 154 : 105 I.C. 422 : 47 C.L.J. 118.
- 6-1. State of Kerala v. V. P. Inadeen, A.I.R. 1971 Ker. 193 : 1971 Ker. L.T. 19 : 1971 Ker.L.J. 177 : 1971 M.L.J. (Cr.) 89.
- 7. Taylor, Ev., s. 14.
- 8. R. v. Nabadwip, 1 B.L.R.O. Cr. (1868) 15, 27 28, 33, 34 : 15 W.R. Cr. 75, note.
- 9. Tamur v. Kalidas, (1869) 4 B.L.R.O.C.J. 51. See now Act III of 1900 (The Prisoners Act).
- 10. Jakir v. Raj, (1882) 10 C.L.R. 469, 475, 476.
- 11. See Emperor v. Dhanka Amra, A.I.R. 1914 Bom. 41 : 24 I.C. 169 : 15 Cr.L.J. 433 : 16 Bom.L.R. 261.
- 12. Cholancheri v. R., *supra*.
- 13. Dhanpat v. State, A.I.R. 1960 All. 40 : I.L.R. (1959) 2 All. 185 : 1960 Cr.L.J. 19.
- 14. Hari Singh v. Dewani Vidyavati, A.I.R. 1960 J. & K. 91.

of the Radcliffe line in August, 1947;<sup>15</sup> (iv) appointment of the Drug Inspector under the Drugs Act,<sup>16</sup> (v) the Notification under section 20 (1) authorising all Food Inspectors to institute prosecution for offences under the Prevention of Food Adulteration Act, 1954, as constituting the function of a Food Inspector, being a person filling a public office,<sup>17</sup> (vi) the signature of Collector of Customs on sanction under section 137. Customs Act and consent to prosecute and on document empowering all officers of customs to search,<sup>17-1</sup> and (vii) authority to record confessional statement by a Magistrate of the Taluqa.<sup>17-2</sup>

Where the question of proof of sanction by a public officer arises, the production of the original document containing the sanction signed by the public officer is in itself sufficient to prove the sanction and no other evidence is necessary. It is even sufficient to produce a duly certified copy of the sanction.<sup>18</sup> Judicial notice of the sanction can be taken under the provisions of this clause.<sup>19</sup> And it can be taken at any stage of the case.<sup>20</sup>

**8. Clause (8): National flag.** Clauses (8) to (12) are in general accordance with the English law.<sup>21</sup> Under the eighth clause, the existence, title and National flag of every State or Sovereign recognised by the Government of India will be recognised.

*Status of foreign sovereign.* "The status of a foreign Sovereign is a matter, of which the Courts of this country take judicial cognizance, that is to say, a matter which the Court is either assumed to know or to have the means of discovering without a contentious enquiry, as to whether the person cited is or is not, in the position of an independent sovereign. Of course, the Court will take the best means of informing itself on the subject, if there is any kind of doubt, and the matter is not as notorious as the status of some great monarch such as the Emperor of Germany."<sup>22</sup>

*Existence of State or Sovereign.* The existence of a State recognised by the Central Government is a fact which requires no evidence and does not need

- 15. Ghaki Mal v. Great American Insurance Co., A.I.R. 1960 Punj. 523 : 62 Punj.L.R. 241.
- 16. Ramlagan Singh v. State of Bihar, A.I.R. 1960 Pat. 249 : 1959 B.L.J. R., 568 : 1960 Cr.L.J. 845.
- 17. Abdulla Haji v. Food Inspector, I. L.R. (1967) 2 Ker. 340 : 1967 Ker. L.J. 613 : 1967 Ker.L.T. 19 : 1967 Cr.L.J. 1719 (F.B.); obiter in State of Kerala v. Evadeen, 1971 Ker.L.T. 19 (20, 21) (F.B.).
- 17-1. Abdul Rahman v. State of Mysore, 1972 Cr.L.J. 406 : (1971) 72 Mys. L.J.T. 422 1971 M.L.J.(Cr.) 420.
- 17-2. Abdul Rahman; In re, 1973 M.L.J. (Cr.) 646 Kant.
- 18. State v. Sagarmal, A.I.R. 1951 A. 515.
- 19. Ibid. See also Qasim Ali v. Rex, 1950 A.L.J. 660; Dhanpat v. State, I.L.R. (1959) 2 A. 185 ; A.I.R. 1960 A. 40.
- 20. Ramlagan Singh v. State of Bihar, A.I.R. 1960 Pat. 243 : 1959 B.L. J.R. 568 : 1960 Cr.L.J. 845.
- 21. Taylor, Ev., ss. 14, 16, 17 18.
- 22. Mighell v. Sultan of Johore, (1894) 1 Q.B. 149, 161, per Kay. L.J. [In this case the person cited was the Sultan of Johore, and the means which the Judge took of informing himself as to his status (and which was held to be a proper means) was by enquiry at the Colonial Office, v. post]; see Sultan of Johore v. Abubakar Tunku Aris Bendahar, 1952 A.C. 318, 340 (P. C.); (1952) 1 All.E.R. 1261 at 1266; Sayee v. Ameer Ruler Sadiq Mohammad Abbasi, Baahwalpur State, 1952 Q.B. 590 C. : (1952) 2 All. E. R. 64; Lachmi Narain v. Raja Pratap, (1878) 2 A. 1.

to be proved, of which the Court must take judicial notice, on the production of such documents as it might consider necessary to enable it to take notice of it.<sup>23</sup>

**9. Clause (9) : Divisions of time, etc.** Under the ninth clause the Bengali, Willaiti, Fasli, Sambat or Hindi, Hijri and Jalus bras will be judicially noticed in those districts in which they are current and reference may be made to the usual almanacs when occasion requires.<sup>24</sup>

**Public Holidays.** The Court is bound to take judicial notice of public holidays notified in the official Gazette,<sup>25</sup> and a party is entitled to presume that the Court would take such notice thereof.<sup>1</sup>

**10. Clauses (10) to (12).** If it be true that the Indian courts must take judicial notice of the territories of the dominion of the Government of India, then if there has been a cession of territory they must take notice of that, and they must do so independently of the Gazette, which is no part of the cession but only evidence of it.<sup>2</sup> The court can always take judicial notice of the extent of territory forming part of India. Where a particular territory is so declared the court must take judicial notice thereof. It would be however different matter where a foreign territory seized in combat.<sup>2-1</sup> The Court will take judicial notice of hostilities between the Government of India and any other State.<sup>3</sup> But the existence of war between foreign countries will not be judicially noticed.<sup>4</sup> It has been held that the Court might, for the purpose of taking judicial notice of hostilities between the Government and others, refer to a printed official letter from the Secretary to the Government of the Punjab to the Secretary to the Government of India, though it was observed that the letter was not evidence of the facts mentioned in detail by the writer.<sup>5</sup> Judicial notice can be taken of the fact that the territories of Goa, Daman and Diu became integrally and constitutionally part of India<sup>6</sup> as also of the fact that by the 19th of December, 1961, the aforesaid territories were completely liberated from Portuguese colonial rule.<sup>7</sup>

- 23. Chimanandas Tekchand v. Emperor, A.I.R. 1944 Sind 188 : I.L.R. 1944 Kar. 293 : 216 I.C. 50.
- 24. See Abdullah Shah v. Mohammad Yaqub, A.I.R. 1958 Lah. 554 : 178 I.C. 436 : 40 P.I.R. 848.
- 25. Gyan Singh v. Budha, A.I.R. 1933 Lah. 558 : I.L.R. 14 Lah. 240 : 34 P.L.R. 540; Tekchand v. Mst. Palto, A.I.R. 1920 Nag. 200 (2) : 56 I.C. 926 : 16 N.L.R. 198; Rainji v. Panchanam, A.I.R. 1959 Madh. Pra. 269; Inayatullah v. Diwanchand, A.I.R. 1959 Madh. Pra. 58.
- 1. Jai Narayan v. Bajrang Bahadur Singh, A.I.R. 1920 Oudh 80 : 56 I.C. 826.
- 2. Damodar v. Deoram, (1876) 1 B. 367, 404, per Lord Selborne. See S. 113 post; R. v. Bottrill, *Ex parte*, Kue Chenmneister, 1947 K.B. 41

- C.A.: (1946) 2 All E.R. 434 (certificate of Secretary of State); Re Grotrian, Cox. v. Grotrian, (1955) 1 All E.R. 788 (declaration in London Gazette). See Masihan v. Chief Commissioner, A.I.R. 1962 S.C. 797 : (1962) 2 S.C.R. 401.
- 2-1. S. R. Bhansali v. Union of India, A.I.R. 1973 Raj. 49 : 1972 W.L. N. 495.
- 3. S. 57, cl. (11).
- 4. Dolder v. Huntingfield, 11 Ves. 292.
- 5. R. v. Amiruddin, (1871) 7 B.L. R. 68, 70.
- 6. Rev. Mons Sebastias Francisco v. State, 1968 Cr.L.J. 316 : A.I.R. 1968 Goa 17 (20).
- 7. Cipriano v. Union of India, 1969 Lab.I.C. 942 : A.I.R. 1969 Goa 76 (81).

**11. Clause (13) : Rule of the road.** The custom or rule of the road on land in England, which is followed in this country, is that horses and carriages should respectively keep on the near or left side of the road except in passing from behind when they keep to the right.<sup>8</sup> At sea, the general rule is that ships and steamboats, on meeting, "end on, or nearly end on in such a manner as to involve risk of collision," should port their helms, so as to pass on the port, or left side of each other, next, that steamboats should keep out of the way of sailing ships; and next that every vessel overtaking another should keep out of its way.<sup>9</sup>

Though the date of the establishment of a Telephone Exchange in the City of Calcutta is not such as to attract Section 57 (13), still it can be proved by a competent officer therein or by an affidavit.<sup>10</sup>

**12. Matters that may be judicially noticed.** It has already been said that facts of which judicial notice may be taken are not limited to those of the nature specifically mentioned in clauses (1) to (13) of the section. Besides the matters mentioned in these clauses, there are numerous others which are considered too notorious to require proof; such matters are therefore "judicially noticed". "Any matter of such common knowledge that it would be an insult to intelligence to require proof of it would probably be dealt with in this way."<sup>11</sup>

The range of things of which courts can take judicial notice is very wide. Particular instances arising in particular cases have been noticed in the following paragraphs. Attempt has, however, been made in some cases to classify them as follows :

- (a) historical facts,
- (b) geographical truths,
- (c) scientific inventions,
- (d) socio-economic conditions at a given time,
- (e) natural phenomena,
- (f) axiomatic truth,<sup>11-1</sup>
- (g) common affairs of life in general knowledge of people,
- (h) religious history, and
- (i) prevalence of a religious belief and distinction between the ideas of two sects.<sup>11-2</sup>

8. See Taylor, Ev., s. 5.

9. ib., and for the regulations for preventing collisions at sea, v. ib., note 7; see also Abbott's Merchant Shipping, 13th Ed., p. 832, *et seq.*; ib., 14th Ed., 908, etc.

10. Sourendra Basu v. Saroj Ranjan, A.I.R. 1961 Cal. 461: 1961 (2) Cr.L.J. 204 (F.B.).

11. Cockle's Cases and Statutes on Evidence, 8th Ed., p. 13; Inayatullah v. Diwanchand, A.I.R. 1959 M.P.

58; Madho Singh v. State of Bihar, A.I.R. 1978 Pat. 172: 1978 Pat. L.J.R. 96: 1978 B.L.J.R. 32: 1978 B.L.J. 1: 1978 B.B.C.J. (H.C.) 86 (F.B.).

11-1. State of Orissa v. Balaram Panda, A.I.R. 1974 Orissa 114: (1973) 2 Cut. W. R. 1338; 39 Cut. L. T. 1094.

11-2. Lalai Singh Yadav v. State of U.P., 1976 Cr.L.J. 98: 1975 A.L.J. 601 (F.B.).

The Court is entitled to take judicial notice of facts of general knowledge such as that land values differ very materially in different towns in which municipalities are established under the Bombay Municipal Boroughs Act 18 of 1925, that different types of mills require different types of buildings and that their relative values do not vary according to the floor area and that some mills and factories are new and some are old and the value of a building decreases with age.<sup>12</sup> In the case of a customary easement the court can take judicial notice of a well-established custom by virtue of this section which is not exhaustive.<sup>13</sup> As judges must bring to the consideration of the questions they have to decide their knowledge of the common affairs of life, it is not necessary on the trial of an action to give formal evidence of matters with which men of ordinary intelligence are acquainted, whether in general, or in relation to natural phenomena, and whether in peace or war.<sup>14</sup> Thus, the Court takes judicial notice of the usual period of gestation.<sup>15</sup> And the Court can take judicial notice of the fact that the Central Government of India is located in New Delhi.<sup>16</sup> It can take judicial notice also of the rules of the executive business of the Government.<sup>17</sup> In the economic fields, Courts have taken notice of such notorious facts as the world economic depression during certain years,<sup>18</sup> steady rise of prices of land between 1954 and 1961,<sup>18-1</sup> general appreciation of value recognised by Court decisions in assessing market value in land acquisition.<sup>18-2</sup> Sambhalpur in Orissa being a surplus district as regards rice,<sup>19</sup> and the custom of bankers charging interest on amounts overdrawn.<sup>20</sup> Similarly, in the political field, the Courts have taken judicial notice of current political movements such as the disturbances in India in 1942,<sup>21</sup> and even the fact that a certain political movement was prejudicial to the public safety and peace.<sup>22</sup> And in the communal field, the Court can take judicial notice of communal disturbances, such as those in August and September of 1947, after partition.<sup>23</sup> Though the courts can take judicial notice

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12. Lokamanya Mills, Barai, Ltd. v. Barai Municipal Council, 69 Bom. L.R. 656 : 1967 Mah.L.J. 1025 : A.I.R. 1968 Bom. 229 (241) (assessment of mills and factories on the basis of floor area).
13. Syed Habib Hussain v. Kamal Chand, I.L.R. (1969) 19 Raj. 784 : 1968 Raj.L.W. 580 : A.I.R. 1969 Raj. 31 (35) (right of privacy in Jaipur); Baqridi v. Rahim Bux, A.I.R. 1926 Oudh 352; Gokul Prasad v. Radho, (1887) 10 All. 358.
14. Halsbury's Laws of England, 3rd Ed., Vol. 15, p. 389.
15. Preston-Jones v. Preston-Jones, (1951) A.C. 391 : (1951) 1 All E.R. 124.
16. P. N. Films Ltd. v. Union of India, A.I.R. 1955 Bom. 381 : I.L.R. 1955 Bom. 346 : 57 Bom.L.R. 753.
17. Kamla Kant v. Emperor, A.I.R. 1944 Pat. 354 : I.L.R. 23 Pat. 252.
18. Ram Tarak Singha v. Saligram Singha, A.I.R. 1944 Cal. 153 : I.L.R. (1944) 2 Cal. 192 : 212 I.C. 567.
- 18-1. M/s M. Properties (P) Ltd. v. C.I.T., 1971 Tax L.R. 845 (Cal.).
- 18-2. State of Orissa v. Dhunda, A.I.R. 1978 Orissa 74.
19. Sheonath v. State, A.I.R. 1953 Orissa 53 : 54 Cr.L.J. 544.
20. U. P. Union Bank, Ltd. v. Dina Nath Raja Ram, A.I.R. 1953 A. 637 : I.L.R. (1954) 1 All. 268.
21. Kedar v. Emperor, A.I.R. 1944 All. 94 : 212 I.C. 309 : 45 Cr.L.J. 573 : 1944 A.L.J. 87; In re A Pleader, A.I.R. 1943 Mad. 475 : I.L.R. 1944 Mad. 8 : 208 I.C. 222 : (1943) 1 M.L.J. 396 : 1943 M.W.N. 459 : 56 I.L.W. 320 (F.B.); Jubba Mallah v. Emperor, A.I.R. 1944 Pat. 53 : I.L.R. 22 Pat. 662 : 212 I.C. 266 : 45 Cr.L.J. 606; Union of India v. Natabarlal, I.L.R. 1962 Cut. 395 : A.I.R. 1963 Orissa 66; Khaka Mal v. Great American Insurance Co., Ltd., A.I.R. 1960 Punj. 523 : 62 P.L.R. 241; Hari Singh v. Vidyawati, A.I.R. 1960 J. & K. 91.
22. Narayan Chandra Ganguli v. Harish Chandar Saha, A.I.R. 1933 Cal. 185 : 144 I.C. 935 ; 34 Cr.L.J. 865.
23. Shiv Nath v. Union of India, A.I.R. 1965 S.C. 1666.

of partition of India, the communal disturbances at that time and the consequent insecurity of life and property of Hindus in Pakistan and their migration to India, no judicial notice can be taken that goods pledged with pawn brokers were looted or taken by custodian; such facts have to be proved like any other fact.<sup>23-1</sup> Judicial notice was taken of the fact that on 18th March, 1974 the whole Patna town was surcharged with tense atmosphere so much so that the High Court and other offices had to be closed and curfew imposed.<sup>23-2</sup> In social field judicial notice was taken of the fact that Harijans are socially, educationally and economically backward.<sup>23-3</sup> And the Courts can take judicial notice of even such facts as that there is a flourishing colony of Satsangis at Agra, and there are centres in most of the big cities in U.P., including Allahabad,<sup>24</sup> that the originals of telegrams are destroyed after a period of three months,<sup>25</sup> and that the State Government of Madras had been appealing to people to help the State in putting down corruption and promising to protect them from being proceeded against as accomplices.<sup>1</sup> The Allahabad High Court has held, that the Courts can also take judicial notice of the fact that communal frenzy, when worked up, gives rise to violence, even if it be not advocated.<sup>2</sup> The Calcutta High Court took judicial notice of the fact that in 1966-67 there had been for the district of 24 Parganas a Public Prosecutor appointed generally by the State Government under Section 492 (1), Cr. P. C., 1898.<sup>3</sup> That many rich persons doing money-lending or paddy-lending business do so without certificates to avoid payment of income-tax or that persons having sufficiently large yield of paddy can afford to have much more than the quantity of gold in question, can be the subject of judicial notice.<sup>4</sup> Though press reports are not admissible in evidence in the absence of affidavits by the correspondents or the reporters,<sup>5</sup> the Court can take judicial notice of the notorious fact from the press reports that Gheraos and the Government attitudes towards them met with adverse reception in many quarters.<sup>6</sup>

The maxim *expressio unius exclusio alterius* is not applicable to this section, as the list mentioned in the section is not exhaustive of the facts of which the courts may take judicial notice.<sup>7</sup> It will not be possible to compile a complete list of the facts of which Courts can take judicial notice, because we cannot enumerate everything which is so notorious in itself or so distinctly recorded by public authority that it would be superfluous to prove it. In fact, as already mentioned, a tendency in modern practice is to enlarge the field of judicial notice, and the penultimate paragraph of this section indicates both

- 23-1. Gopal Singh Hira Singh v. Punjab National Bank, A.I.R. 1976 Delhi 115.
- 23-2. Ram Bahadur v. State of Bihar, 1974 Pat. L.J.R. 414 : 1974 B.B.C.J. 534.
- 23-3. State of Orissa v. Balaram Panda, A.I.R. 1974 Orissa 114 : (1975) 2 Cut.W.R. 1338 : 39 Cut.L.T. 1094.
24. Commissioner of Income-tax v. Radhaswami Satsang Sabha, A.I.R. 1954 All. 291 : I.L.R. (1953) 2 All. 758: 25 I. T. R. 472.
25. Bishambhar Nath Tandon v. King-Emperor, A.I.R. 1926 Oudh 161 : 90 I.C. 706 : 2 O.W.N. 760.
1. Public Prosecutor v. Audinarayana, A.I.R. 1953 Mad. 481; 54 Cr.I.J. 1004 : (1953) 1 M.L.J. 75.
2. Mohammed Ishaq v. State of U.P., I.L.R. (1957) 2 All. 42 A.I.R. 1957 All. 782.
3. Raj Kishore Rabidas v. State, A.I.R. 1969 Cal. 321 (394).
4. /The State v. Pareswar Ghasi, 33 Cut.L.T. 1193 (1197).
5. Nageswara Rao v. State of A.P., (1960) 1 S.C.R. 580 : A.I.R. 1959 S.C. 1376.
6. Jay Engineering Works, Ltd. v. State of W. Bengal, 72 C. W. N. 441 : A.I.R. 1958 Cal. 407 (445) (S.B.).
7. The Egg. Jumna Ind. v. I. J. I. R. 37 C. W. N. 76.

an approval of this practice as also the kinds of subjects of which judicial notice may be taken. The Indian case-law and practice make it evident that our Courts have liberally applied the power to take judicial notice. Thus, our Courts have taken judicial notice of facts, like invariable delay of twenty-four hours between the arrival of a registered letter at its destination and its distribution by the post office; the records of specified Courts and Sub-Registrar's offices having got destroyed during civil commotions in particular years; particular districts having been the scene of frequent and recent dacoities and particular parts of the country having been surplus rice areas; that food materials are being adulterated;<sup>7-1</sup> that a number of bakeries are running in Bangalore City under license from the City Corporation;<sup>7-2</sup> that a sixty-year old man confined to bed for 3½ years would require some more time before being able to move about<sup>7-3</sup> and the like.

The court can take judicial notice of a decree for judicial separation produced by the husband, as provided by Section 489(2), Cr. P. C., 1898 [now Section 127(2) of Cr. P. C., 1973] in refusing grant of maintenance to the wife.<sup>8</sup>

The courts have also taken judicial notice of facts which, though not mentioned in this section, have been judicially noticed by the English Courts<sup>9</sup> and of which a succinct and accurate summary is given in Phipson on Evidence, 11th edition, pp. 32, 33 as follows :

"The Court will take judicial notice of facts which are notorious—e.g., the ordinary course of nature; the standards of weight and measure;<sup>10</sup> the public coin and currency,<sup>11</sup> and its difference of value in early and modern times;<sup>12</sup> the course of post, the stamps of post-offices on letters, and the fact that postcards are unclosed documents whose contents are visible to those dealing with them, and so have been read and published;<sup>13</sup> the meaning of common words and phrases, e. g., of 'nominal rent' in a modern statute,<sup>14</sup> or that beans are a species of pulse;<sup>15</sup> the existence of the Universities of Oxford and Cambridge, and the fact that they are national institutions for the advancement of learning and religion;<sup>16</sup> the difference of time in places east and west of Greenwich;<sup>17</sup> the Almanac annexed to the Common Prayer Book as being part of the law of the land<sup>18</sup>—e.g., the number of days in a given month<sup>19</sup> or that a certain day of a month was a Sunday, though not, it has been said, matters therein contained—e.g., the time of sunset or sunrise on a particular day.<sup>20</sup> Nowadays, however, Courts in referring to the Almanac have as little

7-1. G. Lal v. Commissioner of Police, Hyderabad, 1974 Cr.L.J. 1411.

7-2. T. N. Shankar Rao v. S. A. Wajid, (1971) 2 Mys. L. J. 29; 1971 Rev. L.R. 714; 1971 Rev.C.J. 782.

7-3. Dhaba Naik v. Sali Dei, (1973) 39 C.L.T. 63.

8 Ravendra Kaur v. Achant Swarup, 1965 A.W.R. (H.C.) 89; 1966 Cr.L.J. 47; A.I.R. 1966 All. 133 (1964).

9. R. v. Nabawip, 1 B.L.R.Cr. 15.

10. Hockin v. Cooke, 4 T.R. 314; O'Donnell v. O' Donnell, 13 L. R. 226.

11. Kearney v. King, 2 B. & Ald. 301 (But not of Irish money).

12. Bryant v. Foot, I.R. 3 Q.B. 497.

13. Robinson v. Jones, 4 L.R. Ir. 391; Huth v. H., (1915) 3 K.B. 32, 39.

14. Camden v. Inland Rev. Comms. (1914) 1 K. B. 641 (C.A.) (expert evidence on the point being inadmissible).

15. R. v. Woodward, 1 Moo.C.C. 323.

16. Oxford Rate, (1857) 8 E. & B. 184.

17. Curtis v. March, 3 H. & N. 866.

18. Collier v. Nokes, 2 C. & K. 1012; Tutton v. Darke, 5 H. & N. 647.

19. Hanson v. Shackleton, 4 Dowl. 48.

20. Collier v. Nokes; Tutton v. Darke, supra.

thought of any particular edition as in referring to the Bible or Aesop's Fables. Under the Definition of Time Act, 1880, expressions of time in legal documents are to be construed with reference to Greenwich mean time but by the Summer Time Acts, 1922 to 1925, during the period of 'summer time' they are to be construed with reference to that time. The Courts have also noticed that the streets of London are crowded and dangerous;<sup>21</sup> that boys are naturally reckless and mischievous;<sup>22</sup> that cats are ordinarily kept for domestic purposes;<sup>23</sup> that people who go to hotels do not like having their night disturbed;<sup>24</sup> that venereal disease may lie dormant for a long time;<sup>25</sup> that gestation ordinarily lasts for particular periods, but not what the limits for extraordinary periods of gestation;<sup>1</sup> that television was a common feature of domestic life and almost entirely for recreational purposes. But the courts did not notice that rabbit coursing is necessarily a nuisance;<sup>2</sup> or that in Soviet Russia trade is a state monopoly.<sup>3</sup> The circumstance that a fact has been proved in a case does not enable the Courts to take judicial notice of it in other cases."<sup>4</sup>

Drought in the western part of Orissa during a particular period as a notable event of which the court can take notice and on that ground grant extension of time for payment of a money decree by instalments.<sup>5</sup> In considering the case for revision of wages the Court can take judicial notice of the facts that commodity prices have soared high, the general level of wages has gone up, in some industries there have been revisions already and in some others Wage Boards have been appointed to revise or fix wages.<sup>6</sup> The Court can take judicial notice of the social and educational backwardness of the Mallahs in Bihar and the extracts from the District Gazetteers<sup>7</sup> as of the low attainments in life of hill tribes while recording the confession of an accused person belonging to such tribes.<sup>7-1</sup> The fact that a late fee is generally charged from members of a club who use the club premises beyond the scheduled time, may be taken judicial notice of.<sup>8</sup> The court can take judicial notice of notorious facts like that of the holocaust in India on both sides of the border and the crossing thereof by the vast mass of humanity uprooted from their hearth, home and occupation, leading to the famous Liaquat Ali Agreement,<sup>9</sup>

21. Dennis v. White, (1916) 2 K.B. 1, 6.
22. Clayton v. Hardwick Colliery Co., 32 T.L.R. 159, H.L.; Williams v. Eady, 10 T.L.R. 41; Robinson v. W. H. Smith & Son, 17 T. L. R. 235; Sullivan v. Creed, (1904) 2 Ir. R. 317.
23. Nye v. Niblett, (1918) 1 K.B. 23.
24. Andreae v. Selfridge, (1938) Ch. 1 at p. 8.
25. Glenister v. Glenister, (1945) P. 30.
1. Preston-Jones v. Preston-Jones, (1951) A.C. 391.
2. Ayers v. Hanson, 56 S.J. 735.
3. Rendal, (A.S.) v. Arcos, (1936) 1 All E.R. 623; reversed on other grounds, (1937) 3 All E.R. 577.
4. Lazard v. Midland Bank, (1933) A.C. 298.
5. Golaprai Jain v. Gouranga Maher, 35 Cut.L.T. 648 : A.I.R. 1969 Orissa 266 (267).
6. Kamani Metals & Alloys, Ltd. v. Workmen, (1967) 2 S.C.R. 463 : (1967) 1 S.C.W.R. 730 : 32 F.J.R. 64 : 15 Fac.L.R. 1 : (1967) 2 Lab. L.J. 55 ; 11 Law Rep. 507 : A.I.R. 1967 S.C. 1175 (1177).
7. Chait Ram v. Sikander Choudhary, I.L.R. 47 Pat. 142 : 1968 B.L.J.R. 103 : A.I.R. 1968 Pat. 337, 339 (F.B.).
- 7-1. Pati Soura v. State, (1970) 36 Cut. L.T. 774 (779).
8. State of A.P. v. K. Satyanarayana, (1968) 2 S.C.R. 387 : 1968 S.C.D. 365 : (1968) 2 S.C.J. 325 : (1968) 1 S.C.W.R. 225 : (1968) 2 Andh.W.R. (S.C.) 50 : 1968 Cr.L.J. 1009 : (1968) 2 M.L.J. (S.C.) 50 : 1968 Mad.L.J. (Cr.) 516 : 1968 M.L.W. (Cr.) 109 : A.I.R. 1968 S.C. 825 (828).
9. United Bank of India, Ltd. v. Narayan Chandra Ghose, 74 C.W.N. 150 (153, 155).

so also of wide scale disturbances in August, 1947.<sup>10</sup> The partition of Bengal in 1947 is a matter of public history and in consequence it was common knowledge that there was a great rise in land value, particularly in Calcutta, of which the court could take judicial notice.<sup>11</sup> Again, when it is a matter of common knowledge and of public history that the entire property of company is mortgaged to the World Bank, the court can take judicial notice of the fact that a particular sale-deed of the company is in custody of the World Bank.<sup>12</sup> In a suit claiming compensation from the Union of India for damage caused by rainwater to a consignment sent by railway, the court is entitled to take judicial notice of the consignment having been booked for carriage by the railway during the monsoon season.<sup>13</sup> Judicial notice can be taken of the well known fact that by Rule 225 of the Printing Manual of the Government of Madras, old and obsolete rubber stamps should be returned to the Government Press, Madras, on receipt of new ones.<sup>14</sup> The existence of serious difficulties in obtaining foreign exchange can be judicially noticed.<sup>15</sup> It is common knowledge that in rural areas people generally retire at night and the court can take judicial notice of such habit to infer that if any of them are found at midnight in a mob, they had joined it for nothing but to aid and assist the mob in its common object.<sup>16</sup>

*Judicial notice not taken.* The following were held not to be matters for taking judicial notice for which proof was required like any other fact :

- (1) that F.I.R. was sent to the Public Prosecutor and the Magistrate,<sup>16-1</sup>
- (2) that the land on which a railway track is laid belongs to the Government.<sup>16-2</sup>

**13. Books or documents of reference.** "No evidence of any fact of which the Court will take judicial notice need be given by the party alleging its existence; but the Judge upon being called upon to take judicial notice thereof may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such book of reference."<sup>17</sup>

The penultimate paragraph of the section is in accordance with the English law, so far as it enables the Court to refer to appropriate books or documents of reference upon matters it is directed to take judicial notice of<sup>18</sup> but

10. Ishar Dass v. Chetni Bai, (1970) 72 P. L. R. 17.
11. Prabodh Chandra v. Pashupati, 71 C.W.N. 649 (652, 653).
12. P. Bhaskaran v. Indian Iron & Steel Co., Ltd., 71 C.W.N. 302 (307)
13. Obiter in Union of India v. Sheo Prasad Fulchand, A.I.R. 1967 Pat. 328 (330).
14. Parasuraman, In re, 1969 M.J.W. (Cr.) 68 (71).
15. Messrs. Cekop v. Asian Refractories, Ltd., 73 C.W.N. 192 (210).
16. State v. Chaitu Kisan, 32 Cut.L.T. 695 (708, 709).
- 16-1. Bir Singh v. State of U. P., A.I.R. 1978 S.C. 59.
- 16-2. Manik v. Divisional Superintendent, 1971 Lab.I.C. 912 (Bom.).
17. Stephen's Digest, Art. 62 cited with approval in McQuaker v. Goddard, (1940) 1 K.B. 687 : 109 L.J.K.B. 678 : 162 L.T. 232 : 56 T.L.R. 409 : 84 S.J. 203 : (1940) 1 All E.R. 471.
18. Taylor, Ev., s. 21; see as to reference upon such matters, R. v. Amiruddin, (1871) 7 B.L.R. 63, 70.

is in advance of such law, in so far as it permits the Court to refer to such books and documents on matters of public history, literature, science or art. For, in England, while the Courts may refer to such books and documents upon matters which are the subject of judicial notice, they may not consult them for any other purpose.<sup>19</sup> By the introduction of the words "and also on all matters of science or art," it is not meant that the Court is to take judicial notice of all such matters. It has been said that if this be so the provisions as to expert evidence in Section 45 and as to the use of treatises in Section 60, would be unmeaning, and that what perhaps is meant is that though the parties must obey the law as laid down in Sections 45 and 60, the Court may resort for its aid to appropriate books without any restriction.<sup>20</sup> These words will also include reference to matters of science or art which are of such notoriety as to be the subject of judicial notice. The Court will take notice of the demonstrable conclusions of science as of the movements of the heavenly bodies, the gradations of time by longitude, the magnetic variations from the true meridian, the general characteristics of photography, etc., but conclusions dependent on inductive proof, not yet accepted as necessary, will not be judicially noticed. Thus, the Court has refused<sup>21</sup> to take judicial notice of the alleged conclusion that each concentric layer of a tree notes a year's growth.<sup>22</sup>

The Courts can for the purpose of this section refer to statements in books and journals about local affairs though the authors of such statements may be living.<sup>22-1</sup>

The Courts have under the present section, or the corresponding provisions of Act II of 1855<sup>23</sup> referred or permitted reference to Mill's Political Economy,<sup>24</sup> Tod's Rajpootana,<sup>25</sup> Malcolm's Central India,<sup>1</sup> Buchanan's Journey in Mysore,<sup>2</sup> Elphinstone's History of India,<sup>3</sup> Herrington's Analysis,<sup>4</sup> Minutes made by Sir John Shore and Lord Cornwallis,<sup>5</sup> Malthus,<sup>6</sup> Thomasons Direc-

19. Collier v. Simpson, 5 C. & P. 74.

20. Markby, Ev., Art. 49.

21. Patterson v. McCausland, 3 Bland (Ind.), 69 (Amer.).

22. Wharton, Ev., s. 385.

22-1. Madho Singh v. State of Bihar, A.I.R. 1978 Pat. 172 (F.B.); 1978 Pat.L.J.R. 96; 1978 B.L.J.R. 32; 1978 B.L.J. 1; 1978 B.C.C.J. (I.I. C.) 86.

23. S. 11 (All Courts and persons aforesaid, may, on matters of public history, literature, science, or art refer, for the purposes of evidence, to such published books, maps, or charts as such courts or persons shall consider to be of authority on the subject to which they relate) and see S. 6 ib. (In all cases in which the Court is directed to take judicial notice, it may resort for its aid to appropriate books or documents of reference).

24. Thakoorance v. Bisheshur, 3 W.R. (Act X Rulings) 29 at p. 40; Ishore v. Hills, (1862) W.R. (Sp. No.) 48,

51.

Thakoorance v. Bisheshur, *supra* at p. 56. "The three greatest and best authorities on the modern Native States: Tod's Rajpootana for the North of India, Malcolm's Central India for the Centre, and Buchanan's Journey in Mysore for the South", per Phear, J.; Maharana v. Vadilal, (1894) 20 B. 61, 72.

1. ib.

2. ib.

3. ib., 31, 55; Sultan v. Ajinodin, (1892) 17 B. 431; Forester v. Secretary of State, (1872) 18 W.R. 354.

4. Thakoorance v. Bisheshur, *supra*, at pp. 31, 84.

5. ib., 33 84; Hills v. Ishore Ghose, W.R. (Sp. No.) 131; Ishore v. Hills, W.R. (Sp. No. 48); s.c. 1 Hay. 350.

6. Thakoorance v. Bisheshur, 3 W.R. (Act X Rulings) 29 at pp. 91, 92, 101; Ishore v. Hills, W.R. (Sp. No.) 48, 52.

tions for Revenue Officers in the North-Western Provinces,<sup>7</sup> Wilson's Glossary,<sup>8</sup> the Institute of the Civil Law,<sup>9</sup> Domat,<sup>10</sup> Lord Palmerston's speech in the debate on the relinquishment of the Protectorate of the Ionion Islands,<sup>11</sup> the speech of Lord Thurlow in the debate in the House of Lords on the cessions made at the peace of Versailles reported in the History of Parliament,<sup>12</sup> British and Foreign State Papers, Herslet's Commercial Treaties,<sup>13</sup> Grant's Observations on the Revenue of Bengal,<sup>14</sup> Colebrooke's Remarks on the Husbandry of Bengal,<sup>15</sup> Maine's Ancient Law,<sup>16</sup> A Memoir on the Land Tenure and Principles of Taxation in Bengal published by a Bengal Civilian in 1832,<sup>17</sup> Taylor's Medical Jurisprudence,<sup>18</sup> Wigram on Malabar Law and Custom, Logan's Treatise on Malabar and Glossary,<sup>19</sup> Chever's Medical Jurisprudence,<sup>20</sup> Lyon's Medical Jurisprudence, Playfair's Science and Practice of Midwifery,<sup>21</sup> Shakespeare's Dictionary,<sup>22</sup> Morley's Glossary inserted in his Digest,<sup>23</sup> Minutes of Sir Thomas Munro,<sup>24</sup> Clark's Early Roman Law,<sup>25</sup> Aitchison's Treatise,<sup>1</sup> Grant Duff's History of the Mahrattas,<sup>2</sup> a Portuguese work by Era Antonio de Goneca published at Coimbra in 1606, the Indian Orientalis Christiana, by Father Paulinus, Houghl's History of Christianity in India,<sup>3</sup> Fergusson's History of Architecture,<sup>4</sup> Hunter's Imperial Gazetteer of India,<sup>5</sup> the Duncan Records, Wynyard's Settlement Report, Robert's Settlement Report,<sup>6</sup> McCulloch's Commercial Dictionary,<sup>7</sup> Smith's Wealth of Nations,<sup>8</sup> Science of Public Finance by Findlay Shirras,<sup>9</sup> Simcox's Primitive Civilization,<sup>10</sup> Wilk's

7. Thakoorane v. Bisheshur, 3 W.R. (Act X Rulings), at pp. 102, 114.
8. ib., 103; Sultan v. Ajmodin, (1892) 17 B. 443, 444; Cherukunneth v. Vengunat, (1894) 18 M. I; Jivandas v. Framji, (1870) 7 Bom. H.C.R. 45; Rangasami v. Ghana, (1898) 22 M. 264.
9. Thakoorane v. Bisheshur, *supra*, at p. 104; see observations of Sir Barnes Peacock on the Civil Law, *ib.*
10. ib., Jotindramohun v. Ganendramohun, (1872) 18 W.R. 364.
11. Damodar v. Deoram, (1876) 1 B. 367 (P.C.); 3 I.A. 102.
12. ib., 386.
13. ib., 387, 394, 395.
14. Hills v. v. Ishore Ghose, W.R. (Sp. No.) 131.
15. ib.
16. Ishore Ghose v. Hills, W.R. (Sp. No.) 48, 49.
17. ib.
18. Hatim v. R., (1882) 12 C.L.R. 86; Hurry v. R., (1883) 10 C. 140, 142; R. v. Dada, (1889) 15 B. 452, 457; R. v. Kader, (1896) 23 C. 604; Tikam v. Dhan, (1902) 24 A. 445.
19. Cherukunneth v. Vengunat, (1894) 18 M. I; Augustine v. Medlycott, (1892) 15 M. 241; Ramasami v. Nagendravayan, (1895) 19 M. 31.
20. R. v. Dada, (1889) 15 B. 452.
21. Tikam v. Dhan, (1902) 24 A. 445.
22. Gajraj v. Achaibar, (1893) 16 A. 191, 194.
23. Jivandas v. Framji, (1870) 7 Bom. H.C.R. 45, 56.
24. Sultan v. Ajmodin, (1892) 17 B. at p. 447.
25. Jotindramohun v. Gyanendramohun, (1872) 18 W.R. 366.
1. Sultan v. Ajmodin, (1892) 17 B. at p. 439.
2. Damodar v. Deoram, (1876) 1 B. 388, 389, 395, 397, 430, 431, 433, 454, 456, 458; Lachmi v. Raja Pratap, (1878) 2 A. I at p. 17.
2. Sultan v. Ajmodin, 17 B. at p. 439.
3. Augustine v. Medlycott, (1892) 15 M. 241.
4. Secrecy of State v. Shanmugaraya, (1893) 20 I.A. 84.
5. *ib.*, 83, arg.; his description of the estuary of the River Hugli was referred to by the Court in the salvage action. In the matter of the Drachenfels, (1900) 27 C. 866.
6. Bejai v. Bhupendar, (1895) 17 A. 460.
7. Hormasji v. Pedder, (1875) 12 Bom. H.C.R. 206.
8. *ib.*, 207.
9. Empress Mills, Nagpur v. Wardha Municipality, 1950 Nag. 169 : I.L.R. 1950 Nag. 403 (F.B.).
10. Ramasami v. Nagendravayan, (1895) 19 M. at p. 33.

History of Mysore,<sup>11</sup> Buchanan Hamilton's Eastern India, Rajendra Lal Mitra's Budha-Gaya;<sup>12</sup> Prinseps Tables,<sup>13</sup> Koch and Schaell Histoire des Traites de Paix,<sup>14</sup> Dumont's Corps Diplomatique,<sup>15</sup> Russell's Tribes and Castes and Crooke's,<sup>16</sup> Castes and Tribes and Lall's Book on Customs in Kumaun,<sup>17</sup> Kattywar Local Calendar and Directory,<sup>18</sup> Borrodaile's Caste Rules,<sup>19</sup> Lord Mahon's History of England,<sup>20</sup> Smollett's History,<sup>21</sup> Hallam's Middle Ages,<sup>22</sup> Maudsley's Responsibility in Mental Disease, and Bucknill and Tuke's Psychological Medicine,<sup>23</sup> Crookes on Castes and Tribes of the N. W. P. and Oudh,<sup>24</sup> Srinivasa Ayyangar's Progress in the Madras Presidency and Arbuthnot's Selections from the Minutes of Sir Thomas Munro,<sup>25</sup> Dubois' Hindu Manners, Customs and Ceremonies,<sup>1</sup> Thurston's Castes and Tribes of Southern India,<sup>2</sup> Russell's Castes and Tribes and Shirring's Hindu Tribes and Castes,<sup>3</sup> Risley's Tribes and Castes of Bengal and Crooke's Tribes and Castes of the North-Western Provinces,<sup>4</sup> Ethnoven's Tribes and Castes of Bombay,<sup>5</sup> F. F. Lyall's Report of the Cess Revaluation Operations in the Muzaffarpur District,<sup>6</sup> Sifton's Settlement Report of Hazaribagh,<sup>7</sup> Atkinson's Gazetteer and Settlement Reports of Alighur,<sup>8</sup> Balfour's Cyclopaedia of India, Thomas' Report of Chank and Pearl Fisheries, Thurston's Notes on Pearl and Chank Fisheries and Marine Fauna of the Gulf of Mannar, Emerson's Tennant's "Ceylon"; Cosmos Indico Pleustes; Abu Zaid's "Voyages Arabes", Nelson's "Manual of the Madura Country",<sup>9</sup> Hunter's Statistical Account of Bengal—Stirling's Account—Geographical, Statistical and Historical—of Orissa,<sup>10</sup> N. Barraclough's History of Hydraulic Stowing in India,<sup>11</sup> the Oxford New Dictionary<sup>12</sup> and the Dictionaries generally<sup>13</sup> and other similar books

11. Fakir v. Tirumala Chariar, (1876) 1 M. 213.
12. Jaipal v. Dharmapala, (1895) 23 C. 74.
13. Forester v. Secretary of State, 18 W.R. 354.
14. Damodar v. Deoram, (1876) 1 B. 393.
15. Ib.; 436.
16. Nathulal v. Rangoba, 1952 Nag. 133 : I.L.R. 1952 Nag. 597 : 1952 N.L.J. 190.
17. In the matter of Shyamlal Shah, 1925 All. 648 : 86 I.C. 729.
18. ib. 454, 455.
19. Verabhai v. Hirabhai, (1903) 7 C.W.N. 716.
20. Lachmi v. Raja Pratap, (1878) 2 A. 21 in which also it was held that histories, firmans, treaties and replies from the Foreign Office could be referred to.
21. ib., 15.
22. ib., 23, 24.
23. R. v. Kader, (1896) 23 C. 608.
24. Mariam v. Muhammad, 28 C.L.J. 306 : 48 I.C. 561 : A.I.R. 1918 C. 363.
25. Venkatanarsimha v. Dandamudi, (1897) 20 M. 302.
1. Ramasami v. Vegidasami, (1898) 22 M. 113.
2. Subramanian Chettiar v. Kumarappa Chettiar, 1955 Mad. 144 : (1955) 1 M.L.J. 355 : 68 L.W. 28 (not con-
- clusive).
3. Nathulal v. Rangoba, A.I.R. 1952 Nag. 133 : I.L.R. 1952 Nag. 597 : 1952 N.L.J. 190; Mahadeo v. Vyankammabai, A.I.R. 1948 Nag. 287 : I.L.R. 1947 Nag. 781; Mst. Jijibai v. Zabu, A.I.R. 1933 Nag. 274 : 30 N.L.R. 18.
4. Ishwari Prasad v. Raj Hari Prasad, A.I.R. 1947 Pat. 145 : I.L.R. 6 Pat. 506 : 196 I.C. 620 : 8 P.L.T. 34.
5. Mst. Jijibai v. Zabu, *supra*.
6. Sahdon Singh v. Balam Singh, A.I.R. 1937 Pat. 334 : 170 I.C. 61.
7. Somar Ram v. Budhu Ram, A.I.R. 1937 Pat. 463 : 171 I.C. 115 : 18 P.L.T. 575 : 1937 P.W.N. 446.
8. Garurdhwaja v. Saparandhwaja, (1900) 27 I.A. 238.
9. Anna v. Muttupupal, (1903) 27 M. 557.
10. Shyamanand v. Rama, (1904) 32 C. 6, 13.
11. Niimcha Coal Co., Ltd. v. Srinivasa Goenka, 70 C.W.N. 1108 (1116, 1117) (the author was a quondam Chief Inspector of Mines in India).
12. In re Dadabhai Jamsedji, (1899) 24 B. 293.
13. Ib., 295: The Coca-Cola Company of Canada, Ltd. v. Pepsi-Cola Company of Canada, Ltd., A.I.R. 1942 P.C. 40 : 202 I.C. 203 : 8 B.R. 889.

and documents of reference. When the lower Court relied on Sangunni Menon's History of Travancore as an authority with regard to certain alleged local usages, the High Court did not consider it regular to have relied on this book which had not been made an exhibit in the cause, without first having called the attention of the parties to it, and heard what they had to say about the matter to which the book referred.<sup>14</sup> In the case of *Sajid Ali v. Ibad Ali*,<sup>15</sup> the Privy Council adversely observed upon a judgment of a lower Court which appeared to them to have had the unsafe basis of speculative theory derived from medical books, and judicial dicta in other cases, and not to have been founded upon the facts proved in this. In *Dorab Ally v. Khaja Moheooddeen*,<sup>16</sup> the Privy Council held that the fact "that the Province of Oudh was not, when first annexed to British India; or at the date of the execution, annexed to the Presidency of Fort William, was, if not one of those historical facts of which the Courts in India are bound, under the Indian Evidence Act, 1872, to take judicial notice, at least an issue to be tried in the cause." In the undermentioned criminal trial, the Court took judicial notice of the fact that at the period when the offence of dacoity was alleged to have been committed, the district of Agra was notorious as the scene of frequent and recent dacoities.<sup>17</sup> And in *Ishri Prasad v. Lalli Jas*,<sup>18</sup> the Court said with reference to a document: "It is common knowledge, of which we are entitled to take notice, that the original records of the Agra Division were destroyed during the mutiny of 1857, and, therefore, under Section 56, clause (c) of the Indian Evidence Act, the copy is admissible as secondary evidence of the original".

*Personal knowledge of Judges.* Although a Judge may, in arriving at a decision, use his own general information and that knowledge of the common affairs of life which men of ordinary intelligence possess,<sup>19</sup> he may not act on his own private knowledge or belief regarding the facts of the particular case. If he has material facts to impart, he should be sworn as a witness.<sup>20</sup> He may not act on information gained in other cases,<sup>21</sup> or in conversation, in the absence of the parties, with a referee on a point arising out of the referee's report.<sup>22</sup>

There is a real but elusive line between the Judge's personal knowledge as a private man and his knowledge as a Judge. A Judge can take judicial notice of facts transpiring in Court,<sup>23</sup> but he cannot use from the Bench under the guise of judicial knowledge that which he knows only as an individual observer.<sup>24</sup> Where to draw the line between knowledge of notoriety and know-

- 14. *Vallabha v. Madhusudanan*, (1889) 12 M. 495, followed in *Tuni Oraon v. Leda Oraon*, A.I.R. 1916 Pat. 374: 36 I.C. 206: 1 P.L.J. 225; *Manu v. Abraham*, A.I.R. 1941 Pat. 146: 192 I.C. 290: 21 P.L.T. 1118: 7 B.R. 374. In this last case it was also made a point that the author of the work was alive and was not called as a witness.
- 15. (1895) 23 C. 1, 14.
- 16. (1878) 5 I.A. 116, 124: (1877) 3 C. 806, 811.
- 17. *R. v. Bholu*, (1900) 23 A. 124, 125.
- 18. (1900) 22 A. 294 at p. 302.
- 19. *Peart v. Bolckow Vaughan & Co.*,

- (1925) 1 K. B. 399.
- 20. *Palmer v. Crone*, (1927) 1 K. B. 804.
- 21. *Robinson v. R.*, 2 P. D. 75.
- 22. *Schooley v. Nye*, (1949) 2 All E. R. 950.
- 23. *Chatra Kumari v. Mohan Bikran Shah*, A. I. R. 1931 Pat. 114 at 121: 121 I. C. 337.
- 24. *Durga v. Ram Dayal*, 38 C. 153; 10 I. C. 955; and see *Lakshmayya v. Varadaraja*, (1912) 36 M. 168, a Judge can use general knowledge as in determining the value of evidence but not his knowledge of particular facts.

ledge of personal observation may sometimes be difficult, but the principle is plain.<sup>25</sup>

The Court may presume that any book to which it refers for information on matters of public or general interest, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.<sup>1</sup> In questions of public history, the Court can only dispense with evidence of notorious and undisputed facts.<sup>2</sup> In order to determine the meaning of names and terms used among Sikhs the Court is entitled to refer to works dealing with the history of the Sikhs and Sikhism and their analogical beliefs.<sup>3</sup> But before any judicial notice could be taken of any passages in books relating to the alleged tradition something more than the mere existence of the passages would have to be proved before the passages could be regarded as evidence of the existence of the tradition. It must be shown that the writer had any special knowledge of the alleged tradition, or that the tradition is a repetition of that given in the history.<sup>4</sup> Vernacular histories, which have never received any recognition as historical works of value and reliability relating to matters of public or general interest nor have been referred to in any well-known historical work, are inadmissible under this section.<sup>5</sup> The question, whether a particular village was granted to a particular person by a former ruler, is not a matter of public history.<sup>6</sup> Printed letters seventy-five years old are admissible as evidence of the history of a district but not as proof that certain missionaries lived or died at certain times.<sup>7</sup> The question of title between the trustees of a mosque, though an old and historical institution, and a private person, cannot be deemed a "matter of public history" within the meaning of this section, and historical works cannot be used to establish title to such property.<sup>8</sup>

In the case cited,<sup>9</sup> the accused was prosecuted and convicted under Section 495-A (1) of the Calcutta Municipal Act for selling adulterated *ghee*. The Assistant Analyst to the Corporation applied certain processes of analysis to the sample of *ghee* in question and obtained certain results from which he made the deduction that the *ghee* had been adulterated with certain percentages of foreign fat. No other expert witness was examined on either side and the defence contended that according to the standard works on the subject no such deduction could be made. Some of those works were put to the Analyst in cross-examination by the defence. The Magistrate allowed the defence to rely on this evidence and dealt with it as being in evidence in the judg-

25. Wigmore, Ev., s. 2569; for the case of a Judge giving his own personal experience, see *In re Dhunput*, 20 C. 796, and as regards his experience in his Court, see *San Hla Baw v. Mi Khoron*, 45 I.C. 734; 9 L. B. R. 169.
1. S. 87 post.
2. *Ambalam v. Bartle*, (1911) 36 M. 418; 13 I. C. 599; 24 M. L. J. 630; 1912 M. W. N. 152.
3. *Dayal Singh Charan Singh v. Tulsi-das Tarachand*, A. I. R. 1945 Sind 177; I. L. R. 1945 Kar. 224.
4. *Achal Singh v. Mahant Girdhari Dass*, A. I. R. 1937 Lah. 529; 171 I. C. 970.
5. *Md. Asad Ali Khan v. Sadiq Ali Khan*, A. I. R. 1948 Oudh 91, 95; I. L. R. 18 Luck. 346; 205 I. C. 433; 1942 A. W. R. (C.C.) 346; 1942 O. W. N. 657.
6. *Kishan Lal v. Sohanlal*, A. I. R. 1955 Raj. 45 : I.L.R. 1955 Raj. 191.
7. ib.
8. *Farzand v. Zafar*, 46 I. C. 119; *San Singh v. B. Rallia Ram*, A. I. R. 1930 Lah. 744; 126 I. C. 171; 31 P. L. R. 372.
9. *Granade v. Corporation of Calcutta*, 32 C. W. N. 745; 19 Cr. L. J. 755; 28 C. L. J. 32.

ment. Woodroffe, J., held that the Magistrate was not wrong in making use of the text-books, but that the use of scientific treatises may lead to error, if either those who use them are themselves not experts in the matter dealt with or not assisted by experts to whom passages relied on may be put; that, therefore, in the circumstances of the case, it would not be safe to rely on the books alone without the aid of an expert, and there should be a retrial. Chitty, J., held that the procedure adopted by the Magistrate was incorrect, if it were intended thereby to make these books and all their contents evidence in the case. The use of such books by the Court was regulated by Sections 57 and 60 of this Act. Books of reference may be used by the Court on matters *inter alia* of science, to aid it in coming to a right understanding and conclusion upon the evidence given. While treatises may be referred to, in order to ascertain the opinions of experts who cannot be called, and the grounds on which such opinions are held, the Courts should be careful to avoid introducing into the case extraneous facts called from text-books and also to refrain from basing a decision on opinions the precise applicability of which to the subject-matter of the prosecution it was impossible to gauge. The books may be usefully referred to in order to comprehend and appraise correctly the evidence of the expert who has made the analysis and has given his opinion on oath as to the result of such analysis, but it would be dangerous to base the decision of the Court solely on the evidence of books whether for a conviction or an acquittal. Smither, J., held that the Magistrate was right under Section 70 of this Act to admit the evidence of the text-books.

**14. Refreshing memory of judges.** The penultimate (in so far as it deals with matters the subject of judicial notice) and the last paragraph of Section 57 follow the English rule, according to which, where matters ought to be judicially noticed, but the memory of the Judge is at fault, he may resort to such means of reference as may be at hand. Thus, if the point be a date, he may refer to an almanac; if it be the meaning of a word, to a dictionary; if it be the construction of a Statute, to the printed copy.<sup>10</sup> But a Judge may refuse to take cognizance of a fact, unless the party calling upon him to do so produces at the trial some document by which his memory might be refreshed.<sup>11</sup> Thus, Lord Ellenborough<sup>12</sup> declined to take judicial notice of the King's Proclamation, the counsel not being prepared with a copy of the Gazette in which it was published; and in a case in which it became material to consider how far the prisoner owed obedience to his sergeant and this depended on the Articles of War, the Judges thought that these ought to have been produced.<sup>13</sup> It has been said that "with regard to rules of law the Judge stands in a somewhat different position to that in which he stands in regard to what, as opposed to law, are called the 'facts' of the case. The responsibility of ascertaining the law rests wholly with the Judge. It is not necessary for the parties to call his attention to it; and the last paragraph of the section is not applicable to it."<sup>14</sup> In many cases the Courts have themselves made the necessary enquiries, and that, too, without strictly confining their researches to the time of the trial. Thus, here the question was whether the Federal Republic

10. Taylor, Ev., s. 21.

270.

11. ib.; Public Prosecutor v. Illur Thip-payya, A. I. R. 1949 Mad. 459; I. L. R. 1949 Mad. 371; 50 Cr. L. J. 641; (1948) 2 M. L. J. 649; 1949 M. W. N. 103; 63 L. W.

12. Van Omeron v. Dowick, 2 Camp. 44.

13. Cited by Buller, J., in R. v. Holt, 5 T. R. 446.

14. Markby, Ev., Art. 50.

of Central America had been recognised by the British Government as an independent State, the Vice-Chancellor sought for information from the Foreign Office.<sup>15</sup> In another case, the Court of Common Pleas directed enquiry to be made in the Court of Admiralty as to the maritime law<sup>16</sup>; and the same Court also once made enquiry as to practice of the Enrolment Office in the Court of Chancery,<sup>17</sup> while Lord Hardwicke asked an eminent conveyancer respecting the existence of a general rule of practice in the latter's profession.<sup>18</sup> So, the Lord Chancellor made enquiry at the India House, upon which it appeared from the proceedings of the Governor-General of Bengal that a certain person was a Magistrate<sup>19</sup> and the Vice-Chancellor made enquiry of the United States Legation whether credit would be given in the Courts of America to a document in a particular shape with a view to its admission in evidence<sup>20</sup> and in the case cited enquiry was made at the Colonial Office as to the status of the Sultan of Johore.<sup>21</sup> So, a similar practice has been followed in the country, wherein application under the Civil Procedure Code, Section 380,<sup>22</sup> that the plaintiff be required to furnish security for the costs of a suit, it was necessary to determine whether the cantonments of Wadhwan and Secunderabad were within the limits of British India, the Bombay Court directed its Prothonotary to make enquiries from Secretariat,<sup>23-24</sup> and the Calcutta Court directed the Registrar of the Court to write to the Foreign Office to ascertain the circumstances under which the place came into existence as a British cantonment and the real character of its connection with the British Government.<sup>25-1</sup> It being suggested in the insolvency Court of Bombay that it was desirable to enquire what had been the practice of the High Courts at Calcutta and Madras, the Bombay High Court directed letters to be written by the Prothonotary to the officers of both these Courts, requesting them to give the required information.<sup>2</sup> In the case cited, it has been held that, under this section, the Canon Law can be invoked as a guide in deciding questions of temporal rights in the Roman Catholic Church.<sup>3</sup>

The Judge may admit evidence so as to refresh his memory.<sup>4</sup> He may receive even evidence as to facts judicially noticed to aid his memory and understanding.<sup>5</sup>

**15. Sections 57 and 60.** Opinions stated in Court by experts are relevant under section 45. If the expert is dead, etc., his opinion expressed in

- 15. Taylor v. Barclay, 2 Sim. 221. See also The Charkeih, 42 L. J. Adm. 17, cited in Lachmi v. Raja Pratap, (1878) 2 A. 1 at p. 21.
- 16. Chandler v. Grieves, (1812) 2 H.B. 606n.
- 17. Doe v. Llod, (1840) 1 M. & Gr. 685.
- 18. Willoughby v. Willoughby, (1787) 1 T.R. 772; see Taylor, *Ev.*, s. 21.
- 19. Hutcheson v. Mannington, 6 Ves. 823, 824.
- 20. In re Davis's Trusts, (1869) L.R. 8 Eq. 98.
- 21. Mighell v. Sultan of Johore, (1894) 1 Q. B. 149, 161: In reply a letter was sent, written by the Secretary of State for the Colonies. It was contended that the letter was not sufficient, but Kay, L. J., observed: "I confess I cannot conceive a more satisfactory mode of obtaining information on the subject than such a letter" and the statement was held to be conclusive.
- 22. Now represented by O. XXV, r. 1. Triccam v. The Bombay Baroda & Central India Railway Co., (1885) 9 B. 244, 247, Bayley, J.
- 23-24. 25-1. Hossain v. Abid, (1893) 21 C. 117, 178. See also Lachmi v. Raja Pratap, (1878) 2 A. 1 at p. 21.
- 2. In re Bhagwandas, (1884) 8 B. 511, 516.
- 3. Ambalam v. Barthe, (1913) 36 M. 418.
- 4. See McQuaker v. Goddard, (1940) 1 K. B. 687; Wharton's Criminal Evidence, Vol. I at p. 100.
- 5. Bowser v. State, 110 A. 854, and State v. Slothower, 56 Mon. 230.

any treatise may be proved under section 60 by the production of the treatise. On the other hand, when a court is asked to refer to work of science or art under section 57, it is not necessary to show that the presence of the author, etc., could be secured. Thus, there is an apparent conflict between sections 45 and 60 on the one hand and sec. 57 on the other. This conflict is, however, more apparent than real. *Section 60 deals with mere opinions but section 57 deals with matters which are part of established science or art and which are not in the stage of mere opinion.* Therefore, in matters of science or art, the Court taking judicial notice may refer to any standard work on the subject, whether its author be dead or alive. The law in this country seems to be the same as in England.

**16. Summary.** Thus, the process by which the Court recognises or accepts as true facts without proof being presented is called judicial notice. This process falls under two heads, (a) compulsory judicial notice (section 57), and (b) discretionary judicial notice (covered by section 56). The field of discretionary judicial notice covers (a) specific facts so notorious as not to be the subject of reasonable dispute, and (b) specific facts and propositions of generalised knowledge which are capable of immediate accurate demonstration by resort to easily accessible sources of indisputable accuracy. They fall generally under the heads of matters of common and general knowledge and scientific facts. The Court will take judicial notice of matters of common and general knowledge and scientific facts, because what less informed persons generally know a court of justice may be assumed to know, for neither justice nor law requires a court to be less informed than the rest of mankind. The tendency of modern practice is to enlarge the field of judicial notice. But the power of taking judicial notice should be exercised with caution. Care must be taken that the necessary common and general knowledge exists and any reasonable doubt should be resolved promptly in the negative. But this common and general knowledge must not be confused with the private knowledge of the facts in issue by the Judge. If a Judge has personal knowledge of the facts it is his duty to retire from the case and testify as a witness. The jury also exercise a species of judicial knowledge, or knowledge in the determination of facts submitted to them in the trial of issues, though the term 'judicial knowledge' is not used in their case but the rationale of justification is the same, namely, that jurors like judges are not, because of their judicial functions, compelled to strip themselves of the knowledge which they possess of matters commonly and notoriously known.

The scientific acts of which the court can take judicial notice are exhaustively enumerated in Wharton's Criminal Evidence, Vol. I, 12th edition, section 69. The court takes judicial notice of the laws of nature and well-known scientific developments but not of unique or obscure matters known only by a specially informed class of persons. Those facts also must be generally accepted as true and not still remain in the area of controversy. The court, for instance, will take judicial notice of the qualities and properties of matter, e. g., the fact that fruits and vegetables decay with lapse of time, etc. The courts will take judicial notice of those natural characteristics and behaviour patterns of people, which are so common that everyone may be regarded as having knowledge of their existence. Judicial notice will be taken of diseases and abnormalities which are of common knowledge. The court for instance will take notice, in regard to drugs and narcotics, that opium is not a commercially domestic product, that smoking opium is not a medical treatment, that

drug addict is nerve-racked and ill when he does not have the drug and approaches a normal condition only by its continued use. It will take similarly notice of intoxicating properties of well-known alcohol beverages such as whisky and brandy, and that bootleg liquor described under various labels has been illicitly, illegally and clandestinely made and that alcohol has a distinctive odour, that different persons have different susceptibilities to liquor, that intoxication increases the probability of being involved in an automobile accident or that a person will commit a crime. Criminal behaviour tends to show up in certain set patterns (*modus operandi* system below). The court may take judicial notice of these patterns when they are so common that they may be properly regarded as known to everyone. The courts may, thus, notice a particular city is the centre of illegal liquor traffic, that certain methods are employed by organised criminals, that thieves and receivers of stolen property frequently resort to pawnbrokers as an outlet for their ill-gotten gains and serial numbers or parts of stolen automobiles and bicycles are commonly changed to conceal their identity, that criminals may go to the movies to provide themselves with an *alibi* and that the protests of a defendant that his confession was obtained by improper methods are frequently false. Similarly, when methods of crime detection have attained a recognised accuracy, the court may take judicial notice of the validity of the method or system. Such notice is taken in the accuracy of the finger-print method of identification and that no two sets of finger-prints are exactly alike. Judicial notice will generally be taken of the results and significance of blood tests. Finally, the courts will take judicial notice of the habits and instincts of animals, as for instance, dogs of some varieties are remarkable for the acuteness of the sense of smell and that these trained dogs can trail a person even though the trail is crossed by others.<sup>6</sup>

This brings us to a topic of criminal evidence of the utmost importance in the criminal administration of justice and which deserves a detailed treatment, viz. evidential aspects of the use of Police Dogs in Crime Detection.<sup>7</sup>

*Police Dogs.* While dogs have served man for centuries in war and peace, an early account of a dog serving as a detective and pointing out his master's murderer dates from the reign of Pyrrhus (300-272 B. C.), King of Epirus (Ancient Greece) in the third century, B. C.

"A certain slave for some unknown reason had been done to death by two men, when they met him on a lonely road. His dog, who was with him and sole witness, remained by the body. The King passed that way on a royal progress, and, observing the animal by the side of the corpse, bade his charioteers

6. See the full discussion and the catena of decisions cited at the foot of Wharton, *Criminal Evidence*, Vol. I, Sec. 69 and following pages and p. 141 and following.

7. Sources consulted : Underhill, *Criminal Evidence*, Vol. I; Wharton, *Criminal Evidence*, Vol. II; Wigmore Ev., S. 117; The Madras Police Journal, The Special Centenary Number on Dogs by Sir F. V. Arul, I. P., D. I. G., p. 49 and foll; Police, a bi-monthly, published in

Springfield, Illinois U. S. A. May-June, 1960 number. The Dog in Law Enforcement, p. 52; Madras Police Dog Squad Manual; Chapman Samuel, *Dogs in Police Work*, published in Chicago Public Administration Service, 1313 East, 60th Street (1960); and the Bibliography of selected publications in various countries in Police Nov.-Dec. 1961, published by Charles C. Thomas, Springfield, Illinois, U. S. A.

halt. 'Bury the body', he commanded, 'and bring the dog to me.' Some time elapsed : the dog remained with his new master and accompanied him when he went to a review of his troops. As two of the soldiers marched smartly past, the animal flew at them with such fury that he left all but tore them to pieces. No further evidence was needed, for, in order to escape from the dog, the criminals confessed their guilt."

The broad, modern use of police dogs for law enforcement in England began shortly after the close of World War II. The extent of adoption is evident when one learns that in 1954, twenty-eight of the one hundred and twenty-six police forces in England and Wales (twenty country forces, seven city and borough forces and one hundred and forty in the Metropolitan force) used police dogs. Many of the forces contemplated expanding their dog programs.

Dogs were first used for police work in India on the North-West Frontier in 1941. After Independence the Madras Police were the first to form and train a Dog Squad consisting mostly of Alsatians. Fearless and intelligent, the Alsatian is admirably suited to assist policemen and watchmen to patrol large areas at night. It will scent, hear and see an intruder long before a man can do so and will hold him at bay until the handler, its human partner, arrives. Many big department stores in western countries are patrolled by dogs at night and the animals can be trained to bring a bell at certain points so that their position is indicated to a watchman. These dogs are trained to pull down and hold their quarry but not to bite except at the word of command or unless their handlers are attacked by the criminal. Police dogs are trained when they are about five or six months old and will be ready for work at the end of six months of training. Their proficiency will thereafter increase as they gain more and more experience. Their training covers the following subjects : (a) obedience, (b) watching an object or person, (c) tracing a hidden article by the sense of smell, (d) tracking, (e) arresting an escaping offender, (f) protecting the handler, (g) refusing food from strangers, and (h) jumping obstacles. Each dog has its own handler and the partnership is never disturbed. The handler will take the dog out for a run in the morning and in the evening, will feed it, bathe it, groom it and look after it continuously thereby establishing mutual confidence of a very high order. Of course only those constables who have a deep affinity for dogs are chosen as handlers. The Madras Police dogs are becoming increasingly useful in the investigation of crime. They have some sensational successes to their credit. The following statistics give some idea of their usefulness :

| Name of offence      | Total calls | 1957             |             | 1958             |             |
|----------------------|-------------|------------------|-------------|------------------|-------------|
|                      |             | Successful calls | Total calls | Successful calls | Total calls |
| Murder for gain      | 29          | 19               | 35          | 23               |             |
| Robbery              | 5           | 2                | 8           | 7                |             |
| Dacoity              | Nil         | Nil              | 3           | 1                |             |
| Burglaries           | 65          | 9                | 85          | 23               |             |
| Miscellaneous thefts | 17          | 5                | 5           | 1                |             |
| <b>Total ..</b>      | <b>116</b>  | <b>35</b>        | <b>136</b>  | <b>55</b>        |             |

Advertising to sensational successes there are instances in which the Police dogs picked up the scent after a delay of from 4 to 14 days. If this claim is made in western countries it will not be easily believed. The only rational explanation for this phenomenon is that criminals in India usually go bare-footed which means that perspiration exuding from the pores of the feet will be left on the ground the smell of which apparently lingers on for many days. These astonishing successes have had a tremendous impact on the rural population and there have been instances of culprits surrendering themselves or abandoning stolen property merely on hearing that the police dogs are about to arrive. There have even been two cases of criminals committing suicide after having been completely demoralised by the prospect of certain detection by the dogs. The fame of the Madras Police dogs has travelled round India with the result that many States have sent their handlers for being trained there. War-dogs of the Defence Department are also trained by the Madras Police.

*Bloodhounds and Police Dogs.* Evidence of trailing one accused of crime by bloodhounds is held to be admissible by the great weight of authority, though four States in America hold the opposite, and the Minnesota Supreme Court has indicated it would favour the minority rule. Such evidence, however, is not proof that the accused committed the crime, but is only a circumstance showing his presence at the scene of the crime prior to the time the dogs were put on his trail. Conduct of the dog in following such a trail which fairly points out the accused as author of such trail is admissible as a circumstance against the accused. The jury should be cautioned that a dog's performance is not infallible, should not be given undue weight, and that such evidence alone is not sufficient to convict, but requires corroboration.

Preliminary proof usually is required that the dogs must be of pure blood stock, characterized by acuteness of scent and power of discrimination to track human beings, and must be accustomed to do so; that by experience they have proved reliable and able to follow a trail from beginning to end, to the exclusion of all other trails that may intervene.

Proof of pedigree or breeding may be shown by oral evidence or certificate and such proof is not inadmissible as hearsay. A certificate of pedigree is a mere declaration of the line of ancestors. There is no difference between an oral statement of a line of ancestors and a certificate of his pedigree except in form. The one is no more hearsay evidence than the other; and neither is hearsay evidence in its technical sense.

It is a matter of common knowledge, of which Courts may take judicial notice, that bloodhounds are remarkable for acuteness of the sense of smell, enabling them to follow a trail even though crossed by others. All dogs, however, even of high breeding, do not possess this power alike, and therefore the qualities and training of the particular dog in question must be shown. The dogs must be put on the trail at the scene of the crime or some place where the evidence shows the culprit to have been, also the animals must have pursued this trail to the end and have made their customary sign of identification. This preliminary showing must be made by persons having actual knowledge of the facts. The evidence is then admissible and becomes a matter for the jury to weigh and give such credit as it deems proper. Without such preliminary showing, reversible error is committed in hearing bloodhound testimony. Such bloodhound evidence comes to naught when the trailing dogs make no

sort of demonstration when they encounter the accused on the trail they were following from the scene of the crime. But while competent as circumstantial evidence to be considered in connection with other proof, bloodhound testimony alone and unsupported is insufficient to support conviction, requiring corroboration.

Most courts admit evidence that the accused has been trailed by bloodhounds from the scene of the crime provided proper foundation has been laid showing the pedigree, training and experience of the dogs; the experience and training of the handlers; and the circumstances surrounding the case in question which suggest that such trailing has probative value.

Some jurisdictions, however, deny the admissibility of such evidence under any conditions.

Courts adhering to the view that such evidence is admissible concede that it is to be received with caution and is under no circumstances to be rewarded as conclusive evidence of guilt. It is generally held that this class of evidence is merely cumulative or corroborative, and not sufficient of itself to support a conviction.<sup>8</sup>

The Courts will take judicial notice of the habits and instincts of domestic animals and fowls concerning places of feeding and watering and their tendency to show familiarity with the surroundings to which (and their handler to whom) they have been accustomed. Also judicial notice will be taken that dogs of certain varieties such as bloodhounds are remarkable for the acuteness of their sense of smell thus enabling them to follow a trail even though it is crossed by others.<sup>9</sup>

"It has also been held that bloodhound evidence may be connected with the defendant by his admission."<sup>10</sup>

"It is conceded by most courts that the fact that a well-trained and well-treated bloodhound of good breed, after smelling a shoe or other article belonging to the doer of a crime, has tracked definitely to the accused, is admissible to show that the accused was the doer of the criminal act. Nevertheless in actual usage, this evidence is apt to be highly misleading, to the danger of innocent men."<sup>11</sup>

In a fairly ancient Indian case of doubtful value—*Said Ali v. R.*,<sup>12</sup> apparently in the circumstances of that case it was held that the behaviour of the dog was not admissible.

In Canada where the action of bloodhounds as evidence in a criminal case was neglected in some instances<sup>13</sup> there has been a further consideration given to the use of dogs and the admissibility of such evidence has been reviewed.<sup>14</sup>

8. Underhill, Vol. I, p. 249, S. 138; Wharton, Vol. II, S. 668, p. 596.

9. Wharton, *ibid.*, S. 583, p. 159.

10. *ibid.*, S. 403, p. 153.

11. Wigmore on Evidence, S. 177 and cases cited.

12. A. I. R. 1947 Pesh. 47.

13. *R. v. White*, 45 C.C.C. 328.

14. *R. v. Hawley*, 86 C.C.C. 183; *Popple, Canadian Criminal Evidence*, p. 157.

In a Scottish case,<sup>15</sup> the Appeal Court decided that evidence regarding the conduct of a police dog taken along with certain admissions and explanation of the accused were sufficient to justify conviction.<sup>16</sup>

*Modus operandi.* The *modus operandi* system is one that had been initiated in his own area by Major L. W. Atcherley, Chief Constable of the West Riding of Yorkshire, and has been initiated in several other places including India.

The following extract explaining the system is taken from R. B. Fosdick's "European Police System" (p. 346): "Major Atcherley's *modus operandi* system comprises the adoption of ten headings, each related to a phase of the method employed by the criminal in the perpetration of the crime. These headings are so arranged that they can be expressed in numerical figures and the crime can be accurately and minutely expressed in a formula. For example, a burglary is committed in Wakefield by an unknown person who pasted a piece of sticky flypaper over a window glass so that it would not fall when broken, then smashed the glass and slipped the latch. The formula for this crime and the necessary particulars are sent to the clearing house of the district. There by comparison it is shown that similar burglaries have been committed in exactly the same circumstances in other towns in the vicinity. Perhaps in one town the burglar was seen and a description obtained. Perhaps the police of another place knew his identity. Gradually by comparison and elimination, crime is linked with crime, offender with suspect, until finally the case is brought to a point where an arrest can be effected, and the Fingerprint Bureau employed to show connection with previous sentences. The ten headings are as follows:

1. **Class word**—kind of property attacked whether dwelling house, lodging house, hotel, etc.
2. **Entry**—the actual point of entry, front window, back window, etc.
3. **Means**—whether with implements or tools such as a ladder, jemmy, etc.
4. **Object**—kind of property taken.
5. **Time**—not only time of day or night but whether church time, market day, during meal hours, etc.
6. **Style**—whether criminal to obtain entrance describes himself as mechanic, canvasser, agent, etc.
7. **Tale**—any disclosure as to his alleged business or errand which the criminal may make.
8. **Pals**—whether crime was committed with confederates, etc.
9. **Transport**—whether bicycle or other vehicle was used in connection with crime.

15: Patterson v. Nixon, 1960 S. L. T. 220; 1960 Crim. L. R. 634.

16. See April 1961 Part of Criminal Law Review [ (1961) Crim. L. R. 209-280] at p. 242 and foll.

10. **Trade mark**—whether criminal committed any unusual act in connection with crime, such as poisoning a dog, changing his clothes, leaving a note for the owner, etc.<sup>17</sup>

58. *Facts admitted need not be proved.* No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings :

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

s. 3 ("Fact.")  
s. 3 ("Provided.")

s. 3 ("Court.")

Steph. Dig., Art. 50; Taylor, Ev., Sections 724-A, et seq., 783; Annual Practice, Order 32, Rules 1-5, Civ. Code, Order XI and Order XII, Order XVIII, Rule 5, Cresley, Ev., 47-51; (Admissions by agreement and waiver of proof) 456 et. seq., (Effect of the Admissions) 9-6; (Admissions in the Pleadings); Roscoe, Cr. Ev., 13th Ed., 115, 116; Roscoe, N. P. Ev., 72-75; Powell, Ev., 9th Ed., 420-430; Phipson, Ev., 11th Ed., 21-22.

### SYNOPSIS

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|--|--|
| 1. Principle.                            | 7. "Agree to admit at the hearing or .....before the hearing": |
| 2. Scope.                                | —Before the hearing.   |
| 3. Admissions for purpose of trial.      | —At the hearing.   |
| 4. Admissions in pleadings.              | —Documents marked on admission.                                |
| 5. Implied admissions:                   | 8. Admissions by agent or counsel.                             |
| —Proviso.                                | 9. Criminal cases.   |
| 6. Admissions varying terms of document. | 10. Probate and divorce cases.                                 |

1. **Principle.** Proof of such facts would ordinarily be futile. The Court has to try the questions on which the parties are at issue, not those on which they are agreed.<sup>18</sup> See Notes post, and Introduction ante.

2. **Scope.** The section normally relates to agreed statements of facts made between both parties to save time and expense at a trial.<sup>19</sup> Admissions are broadly classified into two categories : (a) Judicial admissions, and (b) Extra-judicial admissions.

Judicial admissions are formal admissions made by a party during the proceedings of the case. Extra-judicial admissions are informal admissions not appearing on the record of the case. Judicial admissions being made in the case are fully binding on the party that makes them. They constitute a

17. H. R. Warner and Munshi Safdar Husain, Practical Methods in Police Work, Allahabad. The Pioneer Press (1920).  
18. Burjorji v. Muncherji, (1880) 5 B. 143, 152. See also Sailendra v.

Satya, (1927) 6 C. L. J. 539.  
19. John Over v. Muriel, A. I. Over, 1925 Bom. 231; I. L. R. 49 Bom. 368; 91 I. C. 20; 27 Bom. L. R. 251 (S.B.).

waiver of proof.<sup>20</sup> They can be made the foundation of the rights of the parties.

Extra-judicial or informal admissions are also binding on the party against whom they are set up. Unlike judicial admissions, however, they are binding only partially and not fully,<sup>21</sup> except in cases where they operate as, or have the effect of, estoppel in which case again they are fully binding and may constitute the foundation of the rights of the parties.<sup>22</sup> This section deals with the subject of judicial admissions made for the purpose of dispensing with proof at the trial, which admissions must be distinguished from evidentiary admissions or those which are receivable as evidence in the trial.<sup>23</sup> A Court, in general, has to try the questions on which the parties are at issue, not those on which they are agreed.<sup>24</sup> Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other,<sup>25</sup> and "admissions which have been deliberately made for the purpose of the suit, whether in the pleading or by agreement, will act as an estoppel to the admission of any evidence contradicting them."<sup>1</sup> Thus the admission of defendant's *vakil* in Court was held to be evidence of the receipt of a certain sum of money, and to do away with the necessity for other proof.<sup>2</sup> So also, the admission of a fact upon the pleadings will dispense with proof of that fact.<sup>3</sup> Although a plaintiff, when the defendant denies his claim, is bound to prove his case by the document on which he relies, still if the defendant admits any sum to be due, that admission, irrespective of proof offered by the plaintiff, is sufficient to warrant a decree in the plaintiff's favour for the amount covered by the admission.<sup>4</sup> Here it must be remembered that it is permissible for a tribunal to accept part and reject the rest of any witness's testimony. But an admission in pleading cannot be so dissected, and if it is made subject to a condition, it must either be accepted subject to the condition or not accepted at all.<sup>5</sup> If a written statement contains an admission of certain facts which are favourable to the plaintiff but contains a denial of other facts favourable to the defendant or an assertion of other facts which are unfavourable to the plaintiff, the plaintiff must, if he wants to avoid himself of the admission, take not only the first set of facts as truly stated but also the second set of facts.<sup>6</sup>

20. Vide S. 58, Evidence Act.

21. See *Chandra v. Narpat Singh*, (1906) 29 A. 184 (P.C.); 34 I. A. 27.

22. Vide S. 31, Evidence Act; *Ajodhya Prasad Bhargava v. Bhawani Shanker Bhargava*, A. I. R. 1957 All. 1 at 11 (F.B.), per Beg. J. See also *John Over v. Muriel*, A. I. Over, 1925 Bom. 231; I. L. R. 49 Bom. 368; 91 I.C. 20; 27 Bom. L. R. 251 (S.B.); *Abdul Aziz v. Mariyam Bibi*, A. I. R. 1926 All. 710; I. L. R. 42 All. 219; 97 I. C. 176; 25 A. L. J. 48.

23. See Ss. 17, 18 et seq., ante, and see *Lakhichand v. Lalchand*, 42 B. 352; 45 I.C. 555; A. I. R. 1918 B. 161.

24. *Burjorji v. Muncherji*, (1880) 5 B. 143, 152.

25. Order XIV, rule 1, C. P. C.

1. *Cresley's Law of Evidence*, 457 cited in *Burjorji v. Muncherji*, supra.

2. *Kaleekannund v. Gireebala*, (1868) 10 W. R. 322.

3. *Burjorji v. Muncherji*, *supra*; see as to this case, post; but as to admissions not made in the pleadings, but in a deposition see *Ibrahim v. Parvata*, (1871) 8 Bom. A. C. 163. As to estoppel by pleading, see *Dinomony v. Doorga*, (1873) 12 B. L. R. 274, 276; *Luchman v. Kali*, (1873) 19 W. R. 292, 297. As to estoppel generally, see S. 115 post.

4. *Issur v. Nobodeep*, (1866) 6 W. R. 132.

5. *Motabhoj Mulla Essabhoj v. Mulji Haridas*, A. I. R. 1915 P. C. 2; 42 I. A. 103; I. L. R. 39 Bom. 899; 29 I. C. 223; 13 A. L. J. 529; 17 Bom. L. R. 460; 21 C. L. J. 507; 19 C. W. N. 713; 28 M. L. J. 589; 2 L. W. 524; 1915 M. W. N. 522.

6. *Fatechand Murlidhar v. Juggilal Kamlapat*, 59 C. W. N. 223; A. I. R. 1955 Cal. 465; *Calcutta National Bank, Ltd. v. Rangaram Tea Co., Ltd.*, A. I. R. 1967 Cal. 294 (309).

A written statement is not a pleading in confession and avoidance, by which the defendant is bound by the confession, and so compelled to prove the avoidance, if used as evidence against a defendant, the whole statement must be taken together.<sup>7</sup> Where admissions are made in an action, whether on the pleadings or otherwise, the other party may at any stage apply for such judgment or order as he may be entitled to on such admissions without waiting for the determination of any other question in the action.<sup>8</sup> A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered. It frequently happens that a party is prepared in a particular suit to deal with the case on a particular ground and to make an admission but that admission is not binding in any other suit, and certainly not for all time.<sup>9</sup> The admissions mentioned in this section take the place of witnesses called to prove the facts admitted, but in any case the Court may, in its discretion, require the facts, howsoever admitted, to be proved otherwise than by such admissions. When an admission, as frequently happens, is made at the hearing, the Judge's note is sufficient record of the fact. Generally as to what takes place before a Judge at a trial, civil or criminal, the statement of the presiding Judge, or his notes are conclusive. Neither the affidavits by bystanders, nor of jurors, nor the notes of counsels or of shorthand writers are admissible to controvert the notes or statement of the Judge.<sup>10</sup> It has been held that an admission in a civil case is conclusive, if made for the purpose of dispensing with the proof at the trial.<sup>11</sup> But an admission made by a party to a suit or his attorney that a certain fact exists and need not be proved, does not dispense with proof of the existence of that fact subsequent to the date of admission.<sup>12</sup> Where, in a previous suit, the allegations in the plaint as to a certain fact are denied by the defendant in his written statement, the failure to deny may be treated as an admission of that fact for the purposes of that suit, but, it is not an admission which is capable of being proved under Section 17 of this Act, for the purposes of a subsequent suit, as the absence of denial cannot be treated as a positive admission as contemplated by Section 17.<sup>13</sup> Admissions made in a suit have special value and binding force in view of the provision of this section, but of those made in other proceedings though relevant are not so, for though they might be relevant, they could be shown to have been incorrectly made or based on a misunderstanding.<sup>14</sup>

7. Sooltan Ali v. Chand Bibi, 9 Suth. W. R. 130.
8. Lancashire Welders v. Harland and Wolff, (1950) 2 All E. R. 1088; see also Order XII, Rule 6, C. P. C. and Order XXXIII, rule 6 of the English Rules.
9. Ramabai Shrinivas Nadir v. Government of Bombay, A. I. R. 1941 Bom. 144; 194 I. C. 431; 43 Bom. L. R. 232.
10. R. v. Pestonji, (1873) 10 Bom. H. C.R. 57, 81, where the cases are collected; Norton, Ev., 238. In an earlier case in the Calcutta High Court it was stated that a judgment deliberately recording the admission of a pleader must be taken as correct, unless it is contradicted by an affidavit; or the Judge's own admission that the record he made was wrong; Hur Dayal v. Heeralal, (1871) 16 W.R. 107.
11. Urquhart v. Butterfield, (1888) 37 Ch. D. 357; Harvey v. Croydon Union, (1884) 26 Ch. 249; Cresley, Ev., 458; Taylor, Ev., (1884), 783.
12. Lawson's Presumptive Ev., 189, citing McLeod v. Wakeley, 3 C. & P. 311.
13. See Mst. Diali v. Lachman Singh, A.I.R. 1946 Lah. 256 : 225 I.C. 329 ; 48 P.L.R. 21; Chandi v. Thomman, A.I.R. 1951 Trav-Co. 109 : I.L.R. 1951 T.C. 209 (F.B.).
14. Shriram Sardarmal v. Gouri Shankar, A.I.R. 1961 Bom. 136 : 62 Bom. L.R. 336.

If a witness admits having made a prior statement (before a committee of inquiry), proof of it is unnecessary under this section.<sup>15</sup>

**3. Admissions for purpose of trial.** Admissions for the purpose of a trial in civil cases may be divided into—

- (1) admissions on record, which are again—
  - (a) in the pleadings, either—
    - (i) expressly, or
    - (ii) impliedly,<sup>16</sup> or
  - (b) in the examination of a party under Order X, Rule 1, C.P.C.;<sup>17</sup> or
  - (c) in answers to interrogatories under Order XI, C.P.C., or
  - (d) pursuant to a notice under Order XII, C.P.C.; and
- (2) admissions by agreement between the parties or their agents—
  - (a) at the hearing, or
  - (b) before the hearing.<sup>18</sup>

**4. Admissions in pleadings.** Admissions in pleadings or judicial admissions, admissible under Section 58, made at or before the hearing of a case by the parties or their agents stand on a higher footing than evidentiary admissions. The former are fully binding on the party making them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand evidentiary admissions received at the trial are not conclusive and may be shown to be wrong.<sup>19-1</sup>

"Pleadings" means plaint or written statements<sup>19</sup> and an admission in pleadings means the admission of an averment by the opposite party.<sup>20</sup> But a denial, though in general terms, imposes on the plaintiff an obligation to prove the essential facts.<sup>21</sup> And in divorce cases, the Court does not usually decide the matter merely on the basis of the admissions of the parties. This is a rule of prudence and not a requirement of law; for, the parties might make collusive statements admitting allegations against each other in order to gain the common object that both desire for personal reasons. A decision on such admissions would be against public policy, and affect not only the parties to the proceedings but also their issues, if any, and the general interest of the society. The provisions, both of this section and of Order XVI of

15. U. Kasfaiah v. The State of Andhra Pradesh, 1972 M.L.J. (Cr.) 73 (75).

18 I. Phipson's classification for which see Phipson, Ev., 11th Ed., p. 21  
Nagindas Ram Das v. Dalpat Ram Ichcharam, (1974) 1 S.C.W.R. 219; A.I.R. 1974 S.C. 471.

16. See Order VIII, rule 5, C.P.C.

19. Order VI, rule 1, C.P.C.

17. Abdul Aziz v. Mst. Mariyam Bilbi, A.I.R. 1926 All. 710; 97 I.C. 176; 25 A.L.J. 48; Lakhchand Chatrabhuj v. Lalchand Ganpat Patil, I.L.R. 42 Bom. 352; 45 I.C. 555; 20 Bom.L.R. 354; A.I.R. 1918 B. 161.

20. Lutufallah v. Muhammad Sidik, A.I.R. 1946 Sind 117; I.L.R. 1946 Kar. 207; 223 I.C. 307.

18. This classification corresponds to 21. Hardayan v. Gangadhar, A.I.R. 1963 C. 500.

C. P. C., allow a party to apply to the Court for a judgment or order upon admissions of facts made either on the pleadings or otherwise. And the Court may make the judgment or order, if it thinks that the parties are not colluding.<sup>22</sup> The admission, however, must be clear and specific.<sup>23</sup> A party cannot be fastened with liability on the basis of a qualified admission.<sup>24</sup> An admission by the defendants in their written statement that the drug which they have prepared and sold under a different trade name, is the very drug in respect of which the plaintiffs have obtained their patent, makes it unnecessary for the plaintiffs to lead any evidence at all to prove infringement on the part of the defendants.<sup>25</sup> If the execution of a negotiable instrument is admitted and in the circumstances of the case that instrument is deemed as good as lost, the Court can adjudge the rights of the parties arising from it on the footing that the instrument had been executed and accepted, and the sureties respecting them were furnished in the manner set out in the plaint.<sup>1</sup>

**5. Implied admissions.** An admission may be implied. The doctrine of implied admission can only be invoked, when a party, on whom the burden lies, fails to allege facts in support of it, or when the facts specifically alleged by a party in support of his plea are not denied by the other party. It is invoked only against a party who was under an obligation to allege certain facts. The principle is, that the failure on the part of a party to discharge the burden which lies upon him gives rise to an assumption against the party on whom the burden lies, and not to an assumption in his favour.<sup>2</sup> Thus, where a suit is so conducted as to lead to the inference that a certain fact is admitted, the Court may treat it as proved, and a party in appeal cannot afterwards question it and recede from the tacit admissions.<sup>3</sup> And this is so, not only for the particular issue but for all purposes, and for the whole case.<sup>4</sup> So, where counsel, in his opening, states, though he does not subsequently prove, his client to be in possession of a certain document, this will after notice to produce, admit secondary evidence thereof from his adversary.<sup>5</sup> Where, in an action of salvage, the defendants admitted in their defence all the facts alleged in the various statements of claim, but not the inference sought to be drawn from them, it was held, that further evidence as to the salvage services was inadmissible, the Court being only concerned with the admitted facts.<sup>6</sup> And where neither party had objected when a case was made over to a Joint Subordinate Judge, it was held that they had, by this tacit admission, agreed to dispense with the proof of jurisdiction.<sup>6-1</sup> The

22. Mahendra v. Sushila, A.I.R. 1965 S.C. 364.

23. Marudanayagam v. Sola, A.I.R. 1965 M. 200 : 77 L.W. 697.

24. Ganga Ram v. Het Ram, A.I.R. 1965 Raj. 47 : 1964 Raj.L.W. 573 : Motahboj Mulla Essabhoj v. Mulji Haridas, I.L.R. 39 B. 399 : A.I.R. 1915 P.C. 2.

25. F. H. & B. Corporation v. Uni-chem Laboratories, A.I.R. 1969 Bom. 255 (264).

1. Agencia Commercial International Ltd. v. Custodian of B.N.U., A.I.R. 1970 Goa 11 (22).

2. Man Mohan v. Bahauddin, A.I.R. 1957 All. 575, 599.

3. Mohima v. Ram, (1875) 23 W.R. 174 : 15 B.L.R. 142, 155, following Stracy v. Blake, 1 M. & W. 168; Doe v. Roe, 1 E. & B. 279.

4. Bolton v. Sherman, 2 M. & W. 403.

5. Duncombe v. Daniel, 8 C. & P. 222, approved in Haller v. Worman, 2 F. & F. 165 : 3 L.T.N.S. 741; *contra*: Machell v. Ellis, 1 C. & K. 682, in which Pollock, C.J., declined to take the facts from the opening of counsel.

6. The Butshire, \*(1909) P. 170.

6-1. Baretto v. Rodrigues, (1910) 35 B. 24 : 12 Bom.L.R. 712 : 7 I.C. 950.

effect given in the English Courts to admissions on the pleadings was formerly greater than that given to admissions in the less technical pleadings in the Courts in India.<sup>7</sup> But now under the Code of Civil Procedure, Order VIII, Rule 5, "Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability : Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission."

This rule is taken from the English Order XIX, Rule 13; but that rule has been modified in accordance with this section.<sup>8</sup> Thus, where, in a suit for the recovery of money, the plaintiff relies in his plaint upon a letter written by the defendant to save the bar of limitation, and all that the defendant says in his written statement as to the letter is, "the suit is not saved by the letter put in from the bar of limitation," the letter must be taken as admitted and it need not be proved by the plaintiff.<sup>9</sup> But it has been held, that, in a mortgage suit, an alternative plea of payment does not amount to admission of the mortgage sufficient to relieve the plaintiff from proving the loss of the original deed, and to entitle him to sue upon a copy of it.<sup>10</sup> Where a plaintiff has admitted the copy of document filed by the defendant, although the original could be got at, the original need not be produced for purposes of formal proof.<sup>11</sup>

*Proviso.* The function of admissions made in the pleadings is to limit the issues and therewith the scope of the evidence admissible.<sup>12</sup> Where, in a suit for specific performance of an agreement, the defendant admitted in his written statement the terms of the agreement and its execution, the Court held that the plaintiff was not called upon to prove the execution of the agreement or to put it in evidence, and citing the case of *McGown v. Smith*<sup>13</sup> and Cresley on Evidence<sup>14</sup> remarked as follows :

"A Court, in general, has to try the questions on which the parties are to issue, not those on which they are agreed; and 'admissions which have been deliberately made for the purpose of the suit whether in the pleadings or by agreement, will act as an estoppel to the admission of any evidence contradicting them.' This includes any document that is by reference incorporated in the bill or answer.<sup>15</sup> The point is not in issue; and as to the counter statements of the parties, 'a plea or a special replication' admits every point that it does not directly put in issue. The same rule applies to an answer when it assumes the form of a demurrer or plea by submitting a point of law or by introducing new facts. Thus a submission that the defendants would not be in any way affected by the

7. *Amritolal v. Rajoneekant*, (1875) 15 B.L.R. 10, 23, (P.C.) per Sir B. Peacock; *Burjori v. Muncherji*, (1880) 5 B. 143, 152, per West, J., (Rules with regard to admissions by pleading must be applied with discretion in this country); *Norton, Ev.*, 115.

8. Order VIII, rule 5, C.P.C.

9. *Laxminarayan v. Chinniram*, I. L. R. 41 Bom. 89 : 38 I.C. 14 : A.I.

R. 1916 B. 103.  
10. *Sri Ram v. Ramlal*, 18 I.C. 787 : 11 A.L.J. 255; *Md. Zafar v. Zahur Husain*, 1926 All. 741 : 97 I.C. 82 : 24 A.L.J. 964.

11. *Vishram v. Irukulla*, A.I.R. 1957 Andh. Pra. 784.

12. *Wills, Ev.*, 101; ib., 3rd Ed., 154.

13. 26 L.J. Ch. 8.

14. *Law of Evidence*, 457.

15. *Cresley : Law of Evidence*, 457.

notice set forth in the bill precluded them from disputing the validity of this notice.<sup>16</sup> Such rules are to be applied with discretion in this country, where a strict system of pleading is not followed;<sup>17</sup> but here, as I suppose everywhere, the language of Lord Cairns hold true, 'that the first object of pleading is to inform the persons, against whom the suit is directed, what the charge is that is laid against them.'<sup>18</sup> The principle is equally valid as applied to either party in the cause. The Court is to frame the issues according to allegations made in the plaint or in the written statements tendered in the suit. But the issues, as they stand, were suggested by the defendant's counsel. They waive controversy as to the actual execution of the document, assume it to have been executed, and raise questions only that depend for their pertinence on that assumption. Under such circumstances the plaintiff is not, I think, called on to prove the execution of the document or to put it in evidence. If the document being pronounced absolutely invalid for some purpose on considerations of public policy it were sought to defeat the law through the effect usually given to an admission in pleadings, such an attempt could not be allowed to succeed, but for its proposed purposes in this case, it is not invalid."<sup>19</sup>

When documents are made merely inadmissible in evidence by statutory law for the non-payment of proper stamp duty thereon, it may be a question whether public policy requires the admission in pleadings of their contents to be rejected by the Courts; so, if the plaint in a case relies on a document and mentions its contents, but does not disclose that through want of proper stamp, through non-registration, through non-compliance with a statutory provision relating to attestation or through other similar defects, the writing is inadmissible in evidence and if the defendant does not set up in his defence that the document is so inadmissible and, on the other hand, admits the contents and the validity of the document, the Court might possibly act upon the defendant's admission in the plaintiff's favour notwithstanding that during the course of trial, the Court finds that the document is inadmissible in evidence through the existence of such defect or defects. The Courts are not usually inclined to treat enactments relating to revenue as involving such large and grave principles of public policy as govern enactments relating to registration and attestation of documents. But where a document is not merely made inadmissible in evidence wholly or for certain purposes as in the Registration Act, Section 49, clause (c) but the Legislature further enacts that a document not registered shall not affect any immovable property comprised therein, or that a transaction of a particular nature in respect of immovable property (generally or of a particular description) can be legally effected only by a document complying with the prescribed conditions as to attestation, registration, etc. (Sections 54, 59, 107, etc. of the Transfer of Property Act), such provisions must be deemed to have been enacted on high grounds of public policy and Courts should not be astute in creating loopholes for evading the plain intentions of the Legislature.<sup>20</sup> Such, for example,

16. Cresley, Ev., 457.

registered documents see S. 65, clause (b) post.

17. See next paragraph.

Kotamreddi Seethamma v. Vennelakanti Krishnaswamy, 35 I.C. 18; 31

18. Browne v. McClintock, 6 E. & I. App. at p. 453. M.L.J. 240: (1916) 2 M.W.N. 33.

19. Burjorji v. Muncherji, (1880) 5 B. 143, 152, 153, but as to admissions with respect to unstamped or un-

See also Alimane Sahiba v. Kolisetti Subbarayudu, 1932 Mad. 693: 139

is the provision in Section 35 of the Indian Stamp Act, which forbids an under-stamped instrument being "admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon". In consequence, it must be held that even though its execution might be admitted by the defendant, an unstamped or under-stamped document could not be admitted in evidence under Section 58. In other words, the admission of execution by the defendant, does not avail the plaintiff; and Section 58 cannot be used to override the prohibition in Section 35 of the Stamp Act.<sup>21</sup> This, it is submitted, is the correct view.<sup>22</sup> The Legislature in giving discretion to the Court in this connection does not, in any way, attempt to define under what circumstances the discretion is to be exercised. But, in a case, where a Court finds that a certain document would not be valid in law unless certain facts were provided, and it is doubtful whether those facts existed, it is competent for it to embark on an enquiry on the subject.<sup>23</sup> Although proof of a document may be waived, this does not affect the legal character of the document or its validity.<sup>24</sup>

It may be mentioned here, that even Rule 6 of Order XII, C. P. C., clearly invests the Court with a discretion as to the order or judgment which it would make on an admission. This implies that a Court is not bound to give judgment in accordance with an admission.<sup>25</sup> But under Order VIII, Rule 5 of C. P. C. there is no burden on parties to prove admitted facts unless the Court so requires whether expressly or by necessary implication.<sup>25-1</sup>

It has been held that Order VIII, Rule 5, C. P. C., applies only where a pleading has been put in by the defendant and that omission to file a written statement does not amount to an admission of the facts stated in the plaint.<sup>1</sup> The plaintiff is not relieved of the necessity of producing the best material in support of his case where no admission has been made by the defendant either

I.C. 486 : 63 M.L.J. 303 : 1932 M.W.N. 793: 36 L.W. 470 and Pon-nusami Chettiar v. Kailasam Chettiar, A.I.R. 1947 Mad. 422 : (1947) 2 M.L.J. 116; 1947 M.W.N. 568 : 60 L.W. 442, where it was held that the fact of a document being inadmissible on account of the Stamp Act was immaterial where execution of the document was admitted.

21. Achutaramana v. Jagannatha, A.I.R. 1933 Mad. 117 : 64 M.L.J. 79 : 140 I.C. 833; Yesodammal v. Janaki Ammal, I.L.R. (1968) 2 Mad. 382 : (1968) 1 M.L.J. 249 : 81 M.L.W. 2 : A.I.R. 1968 Mad. 294 (296, 297). The leading case on the point is Chenabasappa v. Lakshman Ranachandra, (1891) 18 Bom. 369.

22. See also Sohanlal v. Raghunath, 153 I.C. 1076 : A.I.R. 1934 Lah. 606; Pukhraj v. Jawerchand, A.I.R. 1957 Raj. 47 : 1958 Raj.L.W. 101.

23. Muniappa Chettiar v. Vellachamy Mannadi, 49 I.C. 278 : 1918 M.W.N. 853 : 9 L.W. 5. See also Shamu Patter v. Abdul Kadir Ravuthan, 39 I.A. 218 : I.L.R. 35 Mad. 607 : 16 I.C. 250 : 10 A.L.J. 259 : 14 Bom. I.R. 1034 : 16 C.L.J. 596 : 16 C.W.N. 1009 : 23 M.L.J. 321 : 1912 M.W.N. 935 (P.C.).

24. Baijnath Singh v. Brijraj Kuar, A.I.R. 1922 Pat. 514 : I.L.R. 2 Pat. 52 : 68 I.C. 383 : 4 P.L.T. 239.

25. Bhagwandin Tewari v. Sheoraj, A.I.R. 1931 Oudh 321 (2) : 132 I.C. 796 : 8 O.W.N. 762, following J.C. Galstaun v. E. D. Sassoon & Co., Ltd., 1924 Cal. 190 : 82 I.C. 348 : 27 C.W.N. 783.

25-1. Karnail Singh v. Jabbar Singh, 1975 M.C.C. 110 (Delhi) : 1974 Rev.L.R. 588.

1. Ross & Co. v. Scriven, A.I.R. 1917 Cal. 269(2) : I.L.R. 43 Cal. 1001 : 34 I.C. 235 : 20 C.W.N. 1192; Gobind Gorki v. Baldeoram, A.I.R. 1930 Pat. 293 : 126 I.C. 369; Narindar Singh v. King, A.I.R. 1928 Lab. 769 : 10 I.L.J. 339.

in his written statement or at the hearing.<sup>2</sup> But the Bombay High Court has construed the rule more strictly, and has held that, if there is no pleading by the defendant denying the allegations in the plaint, the Court may take the facts stated in the plaint as admitted, unless the Court in its discretion under the proviso requires any fact so admitted to be proved otherwise than by such admission.<sup>3</sup>

**6. Admissions varying terms of document.** So, a subsequent agreement by the mortgagee to take less than his due under a registered mortgage is an agreement modifying the terms of a written contract and, if it has to be proved, oral evidence is inadmissible under Section 92, proviso (4). Where, however, such an oral agreement is admitted in the pleading of the parties, the proof of the agreement is dispensed with by this section and the Court is bound to recognise and give effect to such agreement.<sup>4</sup>

**7. "Agree to admit at the hearing or.....before the hearing".** With regard to the facts admitted prior to the hearing, it is quite correct to say that they 'need not be proved', in the sense that no evidence need be given of them. Not only this need not be done, but it would not be allowed to be done.

*Before the hearing.* "Admissions in writing before the hearing in civil cases would come under consideration when the Judge is considering what issues are to be tried. Still, even then, they must be proved to be genuine, unless they are admitted in the presence of the Judge. The direction given to the Court by the last paragraph of Section 58 is controlled by the provisions of the C. P. C., which require the Judge to determine what issues are to be tried before the taking of evidence begins. If a Judge wishes to allow a party to withdraw his admission, he would have to amend the issues."<sup>5</sup>

*At the hearing.* "With regard to the facts admitted at the hearing, the expression 'at the hearing' is ambiguous. If it means before the evidence has begun to be taken, then what I have said already applies to it. If it means after the evidence has begun to be taken, then, in a civil case, no doubt the party or his pleader may, at any time, relieve his adversary from the necessity of proof; and the generality of the language used in this section would lead to the inference that this was so in a criminal trial also, though it is generally supposed to be otherwise, and on a criminal charge admissions made after a plea of not guilty can only be made use of as evidence."<sup>6</sup>

A party having once denied can, on a reconsideration, subsequently admit the genuineness of a document, and where its genuineness has been so admitted, the Court cannot be precluded from taking it into consideration.<sup>7</sup> Admissions at the trial do not include admissions in an appeal.<sup>8</sup>

2. Midnapore Zamindari Co., Ltd. v. Bijoy Singh Dudhuria, A.I.R. 1941 Cal. 1 : 193 I.C. 578 : 72 C.L.J. 14.
3. Shriram v. Shriram, A.I.R. 1936 Bom. 285 : I.L.R. 60 Bom. 788 : 1964 I.C. 189 dissenting from Ross & Co. v. Scriven, A. I. R. 1917 Cal. 269 (2) : I. L. R. 43 Cal. 1001; 34 I.C. 235; 20 C.W.N. 1192.
4. Malappa v. Naga, 42 M. 41 : 48 I. C. 158 ; A.I.R. 1919 M. 833; Ramchandra Sau v. Kailashchandra Patra, A.I.R. 1931 Cal. 667 ; I.L.R. 58

Cal. 532 : 133 I.C. 701; but see Jagannath v. Shankar, A.I.R. 1920 Bom. 115 (2) : I.L.R. 44 Bom. 55 : 54 I.C. 689 : 22 Bom.L.R. 39.

5. Markby, Ev., Art. 51.
6. Ibid.
7. Mst. Batul Bandi v. Sri Dhar, A. I.R. 1941 Oudh 189, 192 : 192 I. C. 259 : 1940 O.W.N. 1344.
8. Bansilal Gangaram Vani v. Emperor, A.I.R. 1928 Bom. 241 : I.L.R. 52 Bom. 686 : 112 I.C. 110 : 29 Cr.L.J. 990 : 30 B.L.R. 646.

In the case of admissions made before the hearing, the section requires that the admissions be in handwriting of the party or of his agent.

*Documents marked on admission.* Documents are either proved by witnesses or marked on admission. If execution is admitted no further proof of execution is necessary.<sup>8-1</sup> The contents of a document admitted in evidence without objection may not be conclusive evidence but all the same the contents are also admitted by such admission.<sup>8-2</sup> When they are marked on admission without reservation, the contents are not only evidence but are taken as admitted, the result being that the contents cannot be challenged either by cross-examination or otherwise.<sup>8-3</sup> In respect of documents marked on admission, dispensing with formal proof, the contents are evidence, although the party admitting does not thereby accept the truth of the contents and is free to challenge the contents by cross-examination or otherwise.<sup>9</sup>

**8. Admissions by agent or counsel.** A vakil's general powers in the conduct of a suit include the power to abandon an issue which in his discretion he thinks it inadvisable to press.<sup>10</sup> The section only deals with the authority of agents to make admissions of particular facts in the suit. There is a considerable difference between the case where a pleader by way of compromise purports to give up a right claimed by the client, or to saddle him with the liability that is not admitted, and the case where a pleader makes admissions as to relevant facts in the usual course of litigation, however much those admissions affect the client's interest. The power to bind by such admissions, which, in effect, is but dispensing with proof of the facts admitted, is one of the well-recognised incidents of a pleader's general authority.<sup>11</sup> To deny power so to bind the client or to do any similar act obviously necessary for the due conduct of litigation would so embarrass and thwart a pleader as in a great measure to destroy his usefulness. But no such undesirable results would follow from holding that in the absence of specific authority a pleader cannot bind by compromises strictly as such. A party is bound by an admission of facts made by his pleader at the trial.<sup>12-18</sup> But where a vakil upon a mistaken view of the law goes beyond and contravenes his instructions his erroneous consent cannot bind the client.<sup>14</sup> A party is not, however, bound by an admission on a point of law, nor precluded from asserting the contrary in order to obtain the relief to which upon a true construction of the law he

8-1. Pravin S. Shah v. Govind K. Sharma, 1974 Rajdhani L.R. 128 : 1974 Rev. Cas. 312 (Delhi).

8-2. Harnath Merhotra v. Dhanoo Devi, A.I.R. 1975 Cal. 98; (P.C.); Purushottama Reddiar v. S. Perumal, A.I.R. 1972 S.C. 608 : (1972) 1 S.C. 9 : (1972) 1 S.C.J. 469 : (1972) 1 M.L.J. 83 (S.C.); (1972) 2 S.C.R. 646: (1971) 46 Ele. L.R. 509.

8-3. A. Rahiman v. M. Wabber, 1973 Cr. L. J. 1682; 1973 A. C. J. 409; I.L.R. 1973 Mys. 332: (1973) 1 Mys.L.J. 376.

9. Lionel Edwards, Ltd. v. State of W. Bengal, A.I.R. 1967 C. 191, 194; 70 C.W.N. 452; Sanjay Cot-

ton Co. v. Om Prakash, A.I.R. 1973 Bom. 40.

10. Venkata v. Bashyakarlu, (1902) 25 M. 367. See also Mahadev v. Sunderbai, 3 Bom. L.R. 467.

11. See Mahadev v. Sunderbai, 3 Bom. L.R. 467.

12-13. See Kaleekanund v. Gireebala, (1868) 10 W.R. 322; Rajunder v. Bijai, (1839) 2 Moo. I. A. 253; Khajah v. Gour, (1868) 9 W. R. 375; Dossee v. Pitambur, (1874) 21 W. R. 332; Kower v. Sreenath, (1868) 9 W.R. 485; Berkeley v. Chittur, (1873) 5 N.W.P. 2.

14. Ram v. Brindabun, (1871) 16 W.R. 246.

may be entitled.<sup>15</sup> An erroneous admission by counsel or pleader on a point of law does not bind the party.<sup>16</sup>

**9. Criminal cases.** In a civil case, there is no doubt that the party or his pleader may, at any time, relieve his adversary from the necessity of proof; and the generality of the language used in this section might lead to the inference that this was so in a criminal trial also. But as to admissions before the hearing, it is certain that, in a criminal case, they can only be used as evidence, and for this purpose it does not signify whether they are in writing or not; and it is generally supposed that in a criminal charge admissions made after a plea of not guilty can also only be made use of as evidence.<sup>17</sup> In England, the rule has been stated to be that in a trial for felony the prisoner (and therefore also his counsel, attorney or *vakil*) can make no admissions so as to dispense with proof, though a confession may be proved as against him, subject to the rules relating to the admissibility of confessions.<sup>18</sup> In cases of felony, it is the constant practice of the Judges at the Assizes to refuse to allow even counsel to make any admission.<sup>19</sup> In a case also of indictment for a misdemeanour (perjury) where it appeared that the attorneys on both sides had agreed that the formal proof should be dispensed with and part of the prosecutor's case admitted, Lord Abinger, C. B., said : "I cannot allow any admission to be made on the part of the defendant unless it is made at the trial by the defendant or his counsel"; and the defendant's counsel declining to make any admissions the defendant was acquitted.<sup>20</sup> A plea of guilty only admits the offence charged and not the truth of the deposition.<sup>21</sup> Prior to this Act, the reported decisions are not uniform.<sup>22</sup>

It has been suggested that the section applies to civil suits only.<sup>23</sup> Though it is not in terms so strictly limited, the suggestion receives warrant from the phraseology employed, which is more suitable to civil than to criminal proceedings. It has been held that the rules of pleadings in suits do not apply to criminal trials.<sup>24</sup> The rules of evidence are subject to the general principles of jurisprudence that it is the duty of the prosecution to establish the case against the accused, and that they should not rely upon admissions made by him in the course of the trial for convicting him.<sup>25</sup> It is a well-established

15. Tagore v. Tagore, (1872) I.A. Sup. Vol. 47; Surendra v. Doorga, (1892) 19 I.A. 115; Gopee Lall v. Mst. Sree Chundraobee Buahoojee, (1872) 11 B.L.R. 391; 19 W.R. 12.
16. Maharani v. Duddh, (1899) 4 C.W.N. 274; Krishnaji v. Rajmal, 24 B. 360. For further discussion, see Vol. I, sec. 18 under Note 4, "Statement by Agents", sub-note (d).
17. Markby, Ev., Art. 51.
18. Steph. Dig., Art. 60.
19. Phips, Ev., 10th Ed., 391, n. 6; Wills Ev., 3rd Ed., 175; see Roscoe, Cr. Ev., 16th Ed., 115; 116.
20. R. v. Thornhill, 8 C. & P. 575, it will be observed that this was a case of admission before trial, the Judge assuming that an admission could be made at the trial by the defendant or his counsel.
21. R. v. Riley, 18 Cox. 285; Foucar v. Sinclair, 33 T.L.R. 318.
22. R. v. Kazim, (1872) 17 W.R. (Cr.)

23. Norton, Ev., 288.
24. Gaffar Baksh Khan v. Emperor, A.I.R. 1927 Pat. 408: 101 I.C. 187: 28 Cr.L.J. 411: 8 P.L.T. 393.
25. Annavi Muthiriyam v. Emperor, A.I.R. 1916 Mad. 851 (2): I.L.R. 39 Mad. 449: 28 I.C. 518: 16 Cr.L.J. 294: 28 M.L.J. 328: 1915 M.W.N. 229. See also cases cited therein.

principle of criminal law that a prisoner can consent to nothing.<sup>1</sup> Under the English law, Section 10 of the Criminal Justice Act, 1967, provides for proof by formal admission in criminal trials: 'Any fact of which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings by or on behalf of the prosecutor or defendant, and the admission by any party of any such fact under this section shall as against that party be conclusive evidence in those proceedings of the fact admitted.'<sup>2</sup> Therefore, no consent or admission by the prisoner or his counsel can dispense with proof.<sup>3</sup> The prosecution must make out its case by evidence, and a gap in the evidence cannot be filled up by any statement made by the accused in his examination under Section 342 of the Criminal Procedure Code, 1898 (now Section 313 of Cr. P. C., 1973).<sup>4</sup> It is not the usual practice to accept even a plea of guilty in a murder case, where the natural consequence would be a sentence of death.<sup>5</sup>

From this age-old criminal jurisprudence a slight departure has been made in the new Code of Criminal Procedure, 1973, by enacting Section 294. That provision requires the parties to be called upon to admit or deny the documents filed by the other side and if the genuineness of the same is admitted by the party or its counsel, it may be read in evidence without formal proof of the signature of the person to whom it purports to be signed, unless of course the Court requires the signature to be proved.

Whether this section applies to criminal cases or not, the Court may, by the express terms of the section, in its discretion, require the facts admitted to be proved otherwise than by such admission. It is not the practice of counsel or vakils to make admissions in criminal cases, and even if they have the power, they will seldom, if ever, assume the responsibility of making such admissions. Were such an admission made, the Court would doubtless, in most criminal cases, require the facts to be proved otherwise than by such admissions under the provisions of the last paragraph of the section.<sup>6</sup> It has been held that admissions of counsel in a criminal trial cannot form the basis of a legal decision.<sup>7</sup> In a case in the Madras High Court, it was held that this section would not enable a Judge to admit the evidence of an absent witness under Section 32, where the reasons specified in that section had not

1. Reg. v. Bertrand, (1867) L.R. 1 P.C. 520; Queen v. Bholanath Pal, 12 W.R. (Cr.) 3; (1876) I.L.R. 2 Cal. 23; K. v. K. Ummar Raji, *In re*, A.I.R. 1923 Mad. 32; I.L.R. 46 Mad. 117; 69 I.C. 636; 23 Cr.L.J. 748; 42 M.L.J. 649; 1922 M.W.N. 644; 16 L.W. 697; Allu v. Emperor, A.I.R. 1924 Lah. 104; I.L.R. 4 Lah. 376; 75 I.C. 980; 25 Cr.L.J. 68; 6 L.L.J. 103.
2. Phipson, *Evid.*, 11th Ed., p. 22.
3. Rangappa Goundan v. Emperor, A.I.R. 1936 Mad. 426; I.L.R. 59 Mad. 349; 161 I.C. 663; 37 Cr.L.J. 471; 70 M.L.J. 447; 1936 M.W.N. 110; 43 L.W. 305.
4. Devi Dial v. King-Emperor, A.I.R. 1923 Lah. 225; I.L.R. 4 Lah. 55; 73 I.C. 805; 24 Cr.L.J. 693.
5. Emperor v. Chrinia Bhika Koli, 3 Bom.L.R. 240; Madhav Ganpat Prasad v. Majidh Khan, A.I.R. 1917 Bom. 737; 42 I.C. 146; 18 Cr.L.J. 914; 18 Bom.L.R. 677. See also Sheo Narain v. Emperor, A.I.R. 1920 All. 99; 58 I.C. 457; 21 Cr.L.J. 777; Hasaruddin Mohammad v. Emperor, A.I.R. 1928 Cal. 775.
6. See Bhulan v. Emperor, A.I.R. 1926 Oudh 245; 91 I.C. 233; 27 Cr.L.J. 57; Emperor v. Narayan Dhaku Bhil, A.I.R. 1928 Bom. 240; I.L.R. 52 Bom. 456; 111 I.C. 664; 29 Cr.L.J. 904; 30 Bom.L.R. 620.
7. R. v. Jaswant Rai, A.I.R. 1925 Lah. 85; I.L.R. 5 Lah. 404; 84 I.C. 464; 26 Cr.L.J. 320.

been proved but the accused had consented to such admission or had failed to object to it.<sup>8</sup> As to a plea of guilty, see Section 43 *ante*.

10. Probate and divorce cases. This section has no application to divorce cases<sup>9</sup> nor to probate cases.<sup>10</sup>

8. Annavi (*In re*), (1916) 39 M. 449; 28 I. C. 518; A. I. R. 1916 M. 851 (2) and see *R. v. Bholanath*, (1876) 2 C. 23.

9. John Over v. Muriel A. I. Over,  
L. E.—190

A. I. R. 1925 Bom. 281; I. L. R. 49 Bom. 368; 91 I. C. 20; 27 B. L. R. 251.

10. See Phipson, *Ev.*, 11th Ed., p. 22.

# CHAPTER IV

## OF ORAL EVIDENCE

### INTRODUCTION

#### SYNOPSIS

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**1. Introductory.** Oral evidence has been defined by the Act to be all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry.<sup>11</sup> This Chapter declares two things :—

I. In the first instance it declares that all facts except the contents of documents may be proved by oral evidence, a proposition of law which, though obvious, was lost sight of in several cases anterior to the passing of the Act. So, it was held that oral evidence, if worthy of credit, is sufficient, without documentary evidence, to prove a fact or title<sup>12</sup> such as boundaries,<sup>13</sup> the existence of an agreement, e.g. a farming lease,<sup>14</sup> the quantity of defendant's land and the amount of its rent,<sup>15</sup> the fact of possession,<sup>16</sup> a prescriptive title,<sup>17</sup> a pedigree,<sup>18</sup> an adjustment of accounts,<sup>19</sup> the discharge of an obligation created by writing<sup>20</sup> in short (as the section now declares), all facts except the contents of documents.

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11. Sec. 3 ante; as to testimony by signs, see notes to S. 59 post.
12. Ram v. Akima, (1867) 8 W. R. 366.
13. Ranee Surat v. Rajender, (1868) 9 W. R. 125.
14. Goluck v. Nund, (1869) 12 W. R. 394.
15. Denoo v. Doonga, (1872) 12 W. R. 348.
16. Sheo v. Goodur, (1867) 8 W. R. 328; Thakoor v. Syud, (1867) 8 W. R. 341; Gobind v. Anund, (1866) 5 W. R. (Cr.) 79.
17. Meherban v. Muhboob, (1867) 7

18. W. R. 462.
18. Mohidin v. Muhammad, (1862) 1 Mad. H. C. R. 92.
19. Kampilikaribasavappa v. Somasamuddiram, (1863) 1 Mad. H. C. R. 183; Purnima v. Nityanund, (1863) B. L. R. Sup. Vol. 3 (F.B.).
20. Ramanadamisaraiyar v. Rama, (1865) 2 Mad. H. C. R. 412; Guman v. Sorabji, (1863) 1 Bom. H. C. R. 11; Dalip v. Durga, (1877) I.A. 442 (even though there be a written receipt not produced); see S. 91, Illus. (e) post.

It is an error to suppose that oral evidence not supported by documentary evidence is of no importance whatever for the determination of the true merits of a case.<sup>21</sup> There is no presumption of perjury against oral testimony, but before acting upon such testimony its credibility should be tested both intrinsically and extrinsically.<sup>22</sup> And in the contradiction of oral testimony, which occurs in almost every Indian case, the Court must look to the documentary evidence, in order to see on which side the truth lies.<sup>23</sup> Much greater credence also is to be given to men's acts than to their alleged words, which are so easily mistaken or misrepresented.<sup>24</sup>

The contents of documents may not (except when secondary evidence is admissible),<sup>25</sup> be proved by oral evidence because it is a cardinal rule, not one of technicality but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence of their own contents.<sup>1</sup> But the rule is confined to documents. Though the non-production of an article may afford ground for observations, more or less weighty, according to the circumstances, it only goes to the weight, not to the admissibility of the evidence. When the question is as to the effect of a written instrument, the instrument itself is primary evidence of its contents, and until it is produced; or the non-production is excused, no secondary evidence can be received. But there is no case whatever deciding that when the issue is as to the state of a chattel, e.g., the soundness of a horse, or the quality of the bulk of goods sold by sample, the production of the chattel is primary evidence, and no other evidence can be given till the chattel is produced in Court for its inspection.<sup>2</sup>

II. Secondly, this chapter declares that oral evidence must in all cases be direct. That is, it must consist of a declaration by the witness that he perceived by his own senses the fact to which he testifies. Thus, if *A* is charged with the murder of *B*, and the facts alleged by witnesses in support of the charge and shown to be relevant under Part I, are as follows: (a) *A* came running from the scene of the murder at 12 o'clock. (b) Someone screamed out at the same time and place; "*A*, you are murdering me". (c) *A* left his house at 11.30 a.m. vowing that he would be revenged on *B* for pressing so hard for his debt. (d) There was blood at the scene of the murder and on *A*'s hands and clothes. (e) There were tracks of footsteps from the scene of the murder to *A*'s house, which corresponded with *A*'s shoes. (f) The wound which *B* received was, in my opinion, of a character to cause death, and could not be inflicted by himself. (g) The deceased said: "The sword-blow inflicted by *A* has killed me". (h) The prisoner said to me: "I killed *B* because I was desperate". (i) The prisoner told me that he was deeply indebted to *B*.

All these various circumstances, statements and opinions could be relevant facts under Part I, and the rule now under consideration provides that,

- 21. Girdharee v. Modho, (1872) 18 W. R. 323.
- 22. In the matter of Goomanee, (1872) 17 W. R. (Cr.) 59, 60.
- 23. Imam v. Hurgovind, (1848) 4 Moo. I. A. 403, 407; Ekowri v. Hiralal, (1868) 2 B.L.R. 4 (P.C.).
- 24. Meer v. Beeby, (1836) 1 Moo. I. A. 19, 42, 43.
- 25. See S. 65 post.

- 1. Dipomoyi v. Roy, (1879) 7 I. A. 8.
- 2. R. v. Francis, 12 Cox C. C. 612, 616, per Lord Coleridge, C. J., and as to notice to produce things other than documents, see Editor's Note to Line v. Taylor, 3 F. & F. 731, at p. 733, as to parol evidence of inscriptions on banners, see King v. Hunt, 3 B. & Ald. 566, 574.

in each instance, they must be proved by direct evidence, that is, the fact that *A* came running from the scene of the murder, as alleged, must be proved by a witness, who tells the Court that he himself saw *A* so running; the fact of the screams heard by the second witness must be proved by the second witness telling the Court that he did hear such screams; the fact of *A*, having vowed, shortly before the murder, to be revenged on *B* must be proved by the third witness, who heard the vow; so, the blood by the person who saw it, the footsteps, by the person who tracked and compared them, the doctor's opinion as to the wound, by the doctor testifying that that is his opinion, the dying man's statements and the prisoner's confession by a person who heard them. They must not be proved by the evidence of persons to whom any of the witnesses above mentioned may have told what they heard or saw, or thought.

On the other hand, the evidence of the following seven witnesses would be indirect : (j) My child came in and said "I have seen *A* running in such a direction". (k) The police told me that screams had been heard at such a time. (l) Father said, "I am sure there will be murder, for *A* has just left the house, vowing to be revenged on *B*". (m) The police said that they had compared the footsteps and found that they exactly fitted. (n) The doctor said that the man could never cut himself like that. (o) Everybody said that there was no more doubt, for the deceased man had identified the prisoner. (p) *B*'s wife told me the day before that *A* was heavily indebted to him.

All the evidence of witnesses, (j) to (p), would be inadmissible, not because the facts to which it refers are irrelevant, but because it is not 'direct,' that is, not given by the persons who with their senses perceived the facts described or in their own minds formed the opinions expressed. The only use that would be made of it would be for the purpose of corroborating some other witness by proving a former consistent statement made by him at the time,<sup>3</sup> or of discrediting him by proving a former inconsistent statement.<sup>4</sup> Except for these purposes it would be inadmissible.<sup>5</sup> The section, however, provides by way of exception that if the fact to be proved is the opinion of an expert who cannot be called (which is the case in the majority of instances in this country) and if such opinion has been expressed in any published treatise, it may be proved by the production of the treatise.<sup>6</sup>

**2. Appreciation of oral evidence. Prevalence of perjury and distrust of oral testimony**—Upon the respective values of oral and documentary testimony, see the Introduction to Chapter V post and notes under Section 3 ante. The prevalence of false testimony in this country has been the subject of frequent judicial comment. In the case of *Atchama v. Ramanadha*,<sup>7</sup> the Judicial Committee observed as follows : "These instruments are

3. See S. 157 post.

4. See S. 155 (3) post.

5. Cunningham, Ev., 38–40.

6. S. 60, proviso (1).

7. (1846) 4 Moo. I. A. 1 at p. 106.

See also *Mudhoo v. Suroop*,<sup>8</sup> (1849)

4 Moo. I. A. 431, 441 cited in *R. v. Tiluk*, (1904) 6 Bom. L. R.

330, in which the High Court commented on the profitless generalizations as to the unreliability of native

testimony; *Bunwaree v. Hetnarain*, (1858) 7 Moo. I. A. 148; 4 W. R. 128 (P.C.); *Ramamani v. Kulanthai*, (1871) 14 Moo. I. A. 354; *R. v. Elahi Bux*, (1866) B. L. R. Sup (F.B.) 482; *Seviaji v. Chinna*, (1864) 10 Moo. I. A. 162; *Edun v. Bechun*, (1869) 11 W. R. 345: "It would, however, be a great mistake to suppose that all natives of India are addicted to these vices in which

produced, and the facts tending to this conclusion are sworn to by a vast number of witnesses. There appears to us to be no objection to this testimony, beyond the observation which may be made on all Hindu testimony that perjury and forgery are so extensively prevalent in India that little reliance can be placed on it."

*Not to be utterly discarded.* "It is quite true that such is the lamentable disregard of truth prevailing amongst the native inhabitants of Hindustan that all oral evidence is necessarily received with great suspicion ; and when opposed by the strong improbability of the transaction to which they depose, or weakened by the mode in which they speak, it may be of little avail. But we must be careful not to carry this caution to an extreme length, nor utterly to discard oral evidence merely because it is oral, nor unless the impeaching or discrediting circumstances are clearly found to exist. It would be very dangerous to exercise the judicial function as if no credit could necessarily be given to witnesses deposing *viva voce*, how necessary so ever it may be always to sift such evidence with great minuteness and care."<sup>8</sup> It would, indeed, be most dangerous to say that, where the probabilities are in favour of the transaction, we should conclude against it solely because of the general fallibility of native evidence.

Such an argument would go to an extent which can never be maintained in this or any other Court, for it would tend to establish a rule that all oral evidence must be discarded ; and it is most manifest that, however fallible such evidence may be, however carefully to be watched, justice never can be administered in the most important causes without recourse to it.<sup>9</sup> "The ordinary legal and reasonable presumptions of fact must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to these Courts may commonly be ; that is, due weight must be given to evidence there as elsewhere; and that evidence in a particular case must not be rejected from a general distrust of native testimony, nor perjury widely imputed without some grave ground to support the imputation. Such a rejection, if sanctioned, would virtually submit the decision of the rights of others to the suspicion,<sup>10</sup> and not to the deliberate judgment of their appointed Judges, nor must an entire history be thrown aside, because the evidence of some of the witnesses is incredible or untrustworthy."<sup>11</sup> Evidence of wit-

some natives indulge and for which some districts are notorious. The upper and more educated classes are as free from them as the same classes in other countries of equal civilization; and they regret their existence among their less enlightened country-men". It must also be remembered that (in the words of Jackson, J.) "We have to do almost universally with the meaner classes, that a respectable native avoids being made a witness, as we should shun the small-pox, and that witnesses, therefore, are scarcely a fair sample of the population." R. v. Elahi Bux, (1866) B. L. R. Sup (F.B.) 482.

8. Mudhoo v. Suroop, (1849) 4 Moo. I. A. 431, and see observations

in Wise v. Sunduloonissa, (1867) 11 Moo. I. A. 177; Nilkristo v. Bir, (1869) 3 B. L. R. 13 (P.C.).

9. Bunwaree v. Hetnarain, (1858) 7 Moo. I. A. 148; 4 W. R. (P.C.) 128.
10. Suspicion is not to be substituted for evidence; see Sreman v. Gopal, (1866) 11 Moo. I. A. 28; Feaz v. Fakiruddin, (1871) 9 B. L. R. 458; Kali v. Shibchandra, (1870) 6 B. L. R. 501; Olpherts v. Mahabir, (1882) 10 I. A. 25.
11. Ramamani v. Kulanthai, (1871) 14 Moo. I. A. 354, 355, cited in Hanumantrao v. Secretary of State for India, I. L. R. 25 B. 287; and see Nilkristo v. Bir, (1869) 3 B. L. R. 13 (P.C.).

nesses though not independent, but not shaken in cross-examination and accepted by the Judge who heard them and saw their demeanour, should not be rejected on mere suspicion, where the story itself as told by them is not improbable.<sup>12</sup>

**3. Test of credibility.** Evidence needs to be not merely enumerated but weighed, and the tests available are well known and settled. Where the parties to a suit are at issue on a vital question, the safe principle is to consider which story fits in with the admitted circumstances and resulting probabilities.<sup>13</sup> Evidence substantially true, not infrequently assumes too perfect a form, and witnesses, such as children, not infrequently get a story by heart which is none the less a true story. The real tests are how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case.<sup>14</sup> If witnesses are *prima facie* interested or disinterested, if they changed or developed their story from time to time, these are also matters that ought to be regarded.<sup>15</sup> Though a "chance witness" is not necessarily a false witness, it is proverbially rash to rely upon his evidence.<sup>16</sup> Tainted evidence or dangerous evidence cannot be relied upon for any purpose, not even for corroboration. If the evidence is rejected, it must be rejected for all purposes.<sup>17</sup>

**4. Where evidence is partly false.** The maxim *falsus in uno, falsus in omnibus* in this country affords a test of little or no value, for it is to be feared that "there is almost always a fringe of embroidery to a story however true in the main".<sup>18</sup>

This maxim has not received general acceptance in different jurisdictions in India; nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to is that, in such cases, the testimony may be disregarded, and not that it *must* be disregarded. Wigmore has stated :

"It may be said, once for all, that the maxim is in itself worthless :— first, in point of validity, because in one form it merely contains in loose fashion a kernel of truth which no one needs to be told, and in the other it is absolutely false as a maxim of life ; and secondly, in point of utility, because it merely tells the jury what they may do in any event, not what

- 12. Maqbulan v. Ahmad, (1903) 8 C. W. N. 241; 26 A. 108, 116 (P.C.). In this case it was also held that the description of a witness in the heading of a deposition taken down in Court is no part of the evidence given by the witness on solemn affirmation.
- 13. G. W. Davis v. Maung Shwe Go, 38 I. A. 155; I. L. R. 38 Cal. 805; 11 I. C. 801; 14 C. L. J. 250; 15 C. W. N. 934 (P.C.).
- 14. Bhojraj v. Sita Ram, A. I. R. 1936 P. C. 60; 160 I.C. 45; 1936 A. L. J. 755; 38 Bom. L. R. 344; 63 Cr. L. J. 42; 40 C. W. N. 257; 70 M. L. J. 225; 1936 M. W. N. 184; 43 L. W. 120; 19 N. L. J. 36; 1936 O. W. N. 38; 38 P. L. R. 69; 1936 P. W. N. 134.
- 15. Jamadar Singh v. Emperor, 1943 Pat. 131, 134; I. L. R. 21 Pat. 854; 205 I. C. 241; 44 Cr. L. J. 356; 9 B. R. 212; 24 P. L. T. 105.
- 16. Ismail Ahmed Peepadi v. Momin Bibi, 1941 P.C. 11, 13; 193 I. C. 209; 1941 A. W. R. (P.C.) 27; 7 B. R. 650; 1941 O. W. N. 565.
- 17. Basangi Kui v. Emperor, A. I. R. 1942 Pat. 321, 322; 199 I.C. 317; 45 Cr. L. J. 549; 8 B. R. 539; 23 P. L. T. 131.
- 18. Hanmantray v. Secretary of State for India, I. L. R. 25 Bom. 287 at 297.

they must do or must not do, and therefore, it is a superfluous form of words. It is also in practice pernicious, first, because there is frequently a misunderstanding of its proper force, and secondly, because it has become in the hands of many counsel a mere instrument for obtaining new trials upon points wholly unimportant in themselves.”<sup>19</sup>

The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called “a mandatory rule of evidence”.<sup>20</sup>

With reference to the testimony of individual witnesses, Mr. Norton observed thus :

“There is a maxim—*Falsus in uno, falsus in omnibus*—false in one particular, false in all. I need hardly say that this is everywhere a somewhat dangerous maxim but specially in India, for, if a whole body of testimony were to be rejected, because the witness was evidently speaking untruth in one or more particulars, it is to be feared that witnesses might be dispensed with ; for, in the great majority of cases, the evidence of a native witness will be found tainted with falsehood. There is almost always a fringe of embroidery to a story, however true in the main. The falsehood should be considered in weighing the evidence ; and it may be so glaring as utterly to destroy confidence in the witness altogether. But when there is reason to believe that the main part of the deposition is true, it should not be arbitrarily rejected because of a want of veracity on perhaps some very minor point.”

If the falsehood is on a major point in the case, or if one of the essential circumstances told is clearly unfounded, this is enough to discredit the witness altogether. This, in the felicitous expression of Hallam, is “to pull a stone out of an arch ; the whole fabric must fall to the ground”.<sup>21</sup>

There was a time when if a witness was not found to have told the truth in one or two particulars, the whole of his statement was ignored. As it was not easy to find angels as witnesses, this angle of vision underwent a radical change. Now the Courts are required to sift the evidence, accept what they find to be true and reject the rest. They have to separate the grain from the chaff. In doing so, they are justified in looking upon a witness with suspicion if he is not found to be true in some material respect. But this does not justify them to throw away the whole of the statement although it is natural that they must examine the rest with greater care.<sup>22</sup> If the false portions of evidence are merely a fringe of embroidery in the witness’s story, or if they can be reasonably attributed to some mistake or carelessness on the part of the witness, it would be possible to rely on other portions of the evidence, even without independent corroboration.<sup>23</sup> There is nothing illegal in a Judge

19. Wigmore, Vol. III, para. 1008.

20. Nisar Ali v. The State of Uttar Pradesh, A. I. R. 1957 S. C. 366 at 368; 1957 A. L. J. 447.

21. See Nandia v. Emperor, A. I. R. 1940 Lah. 457; 190 I. C. 668; 42 Cr. L. J. 53; 42 P. L. R. 570.

22. Emperor v. Muzaffar Hussain, A.

I. R. 1944 Lah. 97, 104; 212 I. C. 440; 45 Cr. L. J. 634; 45 P. L. R. 399; Abdul Gani v. State of Madhya Pradesh, 1954 S.C. 31; 55 Cr. L. J. 323.

23. In re Basireddy Venkata Reddi, A. I. R. 1956 Andhra 53, 55; 1955 Andh. W. R. 814.

of fact accepting one portion of the witness's testimony and rejecting another.<sup>24</sup> In the words of the Calcutta High Court :

"The Court will bear in mind that the use of fabricated written evidence by a party, however clearly established, does not relieve the Court from the duty of examining the whole of the evidence adduced on both sides, and of deciding according to the truth the matters in issue. The person using such evidence may have brought himself within the penalties of the criminal law ; but the Court should not, in a civil suit, inflict a punishment under the name of a presumption. Forgery or fraud in some material part of the evidence, if it is shown to be the contrivance of a party to the proceedings, may afford a fair presumption against the whole of the evidence adduced by that party, or at least against such portion of that evidence as tends to the same conclusion with the fabricated evidence. It may, perhaps, also have the further effect of gaining a more ready admission for the evidence of his opponents. But the presumption should not be pressed too far, especially in this country, where it happens, not uncommonly, that falsehood and fabrication are employed to support a just cause."<sup>25</sup>

If a part of the evidence of a witness is disbelieved, other evidence coming from the same quarter must be viewed warily ; but that does not exonerate the Court from weighing whatever evidence has actually been tendered and the mode in which it has been met.<sup>1</sup> It may be impossible to place any reliance on the statement made by a witness at the trial if it is in hopeless conflict with his previous statement.<sup>2</sup> But a few casual and somewhat ambiguous phrases in a deposition cannot destroy the clear effect of the whole deposition.<sup>3</sup> In *Meer Usudoollah v. Beeby Imaman*,<sup>4</sup> Baron Parke said :

"There are some other facts which are established beyond all possibility of doubt ; and there is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with these facts, according to the ordinary course of human affairs and the usual habits of life."

And in another case, the Privy Council said :

"In examining evidence, with a view to test whether several witnesses who bear testimony to the same facts are worthy of credit, it is important to see whether they give their evidence in the same words, or whether they substantially agree, not indeed concurring in all the minute particulars of what passed, but with that agreement in substance and that variation

- 24. Pardeshi Rambharose v. Devanath Rahipal, A. I. R. 1936 Nag. 273: 165 I. C. 558.
- 25. Goriboola v. Gooroodass, (1865) 2 W.R. 99 (Act X of 1859).
- 1. Rameshwar v. Bharat, (1899) 4 C.W.N. 18 (P.C.); as to disbelief of one statement and setting up alternative case, see Caspersz v. Kedar-
- nath, (1901) 5 C. W. N. 855.
- 2. Ram Karan v. Emperor, A. I. R. 1925 Lah. 483: 92 I.C. 577: 26 P.L.R. 659: 7 L. L. J. 371.
- 3. Mst. Kushibai v. Manrakhan, A. I. R. 1923 Nag. 265: 79 I.C. 422: 7 N. L. J. 217.
- 4. (1836) 1 Moo. I. A. 19, 44.

in unimportant details which are usually found in witnesses intending to speak the truth and not tutored to tell a particular story.”<sup>5</sup>

In the undermentioned case,<sup>6</sup> the Court observed with regard to discrepancies in evidence as follows :

“No doubt it may be contended that if these witnesses were tutored ones, care would have been taken to see that they should tell the same story. But care is not always taken or effectually taken, in such cases, and discrepancies are not less infirm in testimony because a greater sagacity on the part of the witnesses would have avoided them.”

In short, oral evidence must be considered in connection with the documentary proofs on the record, and the probabilities arising from all the surrounding circumstances of the case ; and the only satisfactory mode of dealing with a disputed point of fact is to consider the force and joint result of all the evidence, direct or presumptive, bearing upon the point, a precaution which is nowhere more necessary than in this country where oral evidence *per se* is looked upon with so much distrust.<sup>7</sup> “The consideration of a case”, observed their Lordships of the Privy Council in the case of (*Maharajah Rajundar v. Sheopursun Misser*,<sup>8</sup> “on evidence can seldom be satisfactory, unless all the presumptions for and against a claim arising on all the evidence offered, or on proofs withheld, on the course of pleading, and tardy production of important portions of claim or defence, be viewed in connection with the oral or documentary proof which *per se* might suffice to establish it.” “The observance of this rule is nowhere more necessary than in the Courts of Justice in this country. We cannot shut our eyes to the melancholy fact that the average value of oral evidence in this country is exceedingly low ; and although in dealing with such evidence we are not to start with any presumption of perjury, we cannot possibly take too much care to guard against undue credulity. There is hardly a case involving a disputed question of fact, in which there is not a conflict of testimony; one set of witnesses swearing point-blank to a particular state of facts, the other swearing with equal distinctness to a state of facts diametrically opposed to it.<sup>9</sup> If, therefore, we were to form our conclusions upon the bare depositions of the witnesses, without reference to the conduct of the parties and the presumptions and probabilities legitimately arising from the record, all hope of success in

- 5. *Nana v. Hurree*, (1862) Marshall's Rep., 436 (analysis of conflicting evidence in a suit setting up a will). In *Hurunand v. Ram Gopal*, (1899) 4 C. W. N. 429, the Privy Council speak of “small differences quite consistent with the truthfulness of the witnesses who, it will be remembered, were speaking of conversations some 12 or 14 years after they took place;” and see remarks at p. 431, *ib.*
- 6. *R. v. Kalu*, (1874) 11 Bom. H. C. R. 146.
- 7. (*Rajah Leelanund v. Basheeroo-*  
L. E.—191

- nissa*, (1871) 16 W. R. 102, per Dwarkanath Mitter, J.
- 8. 10 Moo. I. A. 438 at p. 453.
- 9. In some cases effect can be given to testimony without discrediting testimony. See *Mathoor v. Bank of Bengal*, 1 C. L. J. 507, 514 (in which case it was argued that it was impossible to find in favour of plaintiff without impeaching the honesty and veracity of two European gentlemen of position, the Secretary and the Manager of the Bengal Bank, respectively).

discovering the truth must be at an end.<sup>10</sup> In the case last-mentioned the same learned Judge observed as follows<sup>11</sup>:

"It is a truth confirmed by all experience, that in the great majority of cases fraud is not capable of being established by positive express proofs. It is by its very nature secret in its movements, and if those whose duty it is to investigate questions of fraud were to insist upon direct proof in every case, the ends of justice would be constantly, if not invariably, defeated. We do not mean to say that fraud can be established by any less proof or by any different kind of proof from that which is required to establish any other disputed question of fact, or that circumstances of mere suspicion, which lead to no certain result, should be taken as sufficient proof of fraud, or that fraud should be presumed against anybody in any case; but what we mean to say is that in the generality of cases circumstantial evidence is our only resource in dealing with questions of fraud, and if this evidence is sufficient to overcome the natural presumption of honesty and fair dealing and to satisfy a reasonable mind of the existence of fraud by raising a counter-presumption, there is no reason whatever why we should not act upon it. If a Judge in dealing with a question of fact forms his conclusion upon a portion of the evidence before him, excluding the other portion under an erroneous impression that it is not legal evidence but conjecture, there can be no doubt that the investigation is erroneous in law, and that the error thus committed is likely to have produced an error in the decision of the case upon the merits inasmuch as it is impossible to say whether the Judge would have arrived at the same conclusion if he had looked into all the evidence upon the record without excluding any part of it from a mistaken idea that it was not admissible in law. And if the Judge has illegally rejected the evidence on the question of fraud, does it not necessarily follow that he has committed an error in law in the investigation of the case which goes to vitiate his whole decision on the merits?"

*Witness falsely implicating one accused, effect of.* Although it is true that where the falsehood is merely an embroidery to a story, that would not be enough to disbelieve the whole of the witness's evidence, if the falsehood is on a major point in the case, or if one of the essential circumstances of the story told is clearly unfounded, this is enough to discredit the witness altogether.<sup>12</sup> In cases, where there is reason to believe that certain accused, on the ground of enmity or otherwise, may have been falsely charged, then the evidence of those witnesses, who have reasons falsely to implicate the particular accused should not be relied on as against that particular accused; on the other hand, the same witnesses might be relied upon against other accused where there is no reason to suspect enmity on the part of the witnesses. Where, however, perjury has definitely been brought home to a witness, it would be extremely dangerous to rely on his evidence against anyone.<sup>13</sup> Where, therefore, a por-

10. Mathura v. Ram, (1869) 3 B. L. R. A. C. 108, 112, per Mitter, J.
11. ib., p. 110.
12. Nandia v. Emperor, A. I. R. 1940 Lah. 457, 459; 190 I. C. 668: 42 Cr. L. J. 53: 42 P. L. R. 570.
13. Shukul v. Emperor, A. I. R. 1933 All. 314: I. L. R. 55 All. 379.

- 144 I. C. 207: 34 Cr. L. J. 689: 1933 A. L. J. 590; Nem Singh v. Emperor, 1934 All. 908: 152 I. C. 741: 36 Cr. L. J. 152: 4 A.W.R. 5; (In re) Basireddy Venkata Reddi, A. I. R. 1956 Andhra 53: 1955 Andh. W. R. 63.

tion of the evidence is disbelieved on material points, so far as some of the accused are concerned, the remaining portion should not be accepted against other accused.<sup>14</sup> Evidence cannot be said to be unreliable as against certain accused only and reliable as against others, the witnesses being more or less the same.<sup>15</sup>

It is usual for the opposite side to imply that witnesses attending Court without summons and brought by the party cannot be relied upon. This is not universally true.<sup>16</sup> On the other hand, to avoid delays in serving of summons and taking of adjournments, Courts often enjoin upon parties to bring their witnesses on the date of hearing. In fact, in the State of Madras provision is made for parties being handed over the summons and their fetching the witnesses. The only point is that witnesses should not be brought to Court without summons in the sense that the opposite party would not know who the witnesses are that would be examined and which will deprive him of the opportunity of making enquiries about the witnesses beforehand so that they can effectively be cross-examined regarding their trustworthiness. The proper approach to appreciate the evidence of witnesses produced by the party is only whether the opposite party had the requisite beforehand knowledge that these witnesses would be examined so that they could make enquiries and effectively cross-examine these witnesses.

*Defence witnesses from the list of prosecution witnesses.* The fact, that the names of the witnesses for the defence appear in the list of prosecution witnesses, does not render their statements more trustworthy, for their statements have to be judged on their own merits and taken as a whole.<sup>17</sup>

*Co-accused witnesses.* There is no justification for wholly rejecting the evidence of the witnesses of an accused as against the co-accused. Neither the Evidence Act nor the Criminal Procedure Code provides for the cross-examination of co-accused witnesses. The settled law, however, is that the evidence of such a witness would be allowed to be tested by the cross-examination, and then received against the co-accused concerning whom he testifies. Otherwise as pointed out in *Ramchand v. Hanif*<sup>18</sup>:

"We think that there might be many cases of failure of justice if a co-accused were not allowed to cross-examine witnesses called by a person whose case was adverse to him; for the effect might be practically that the Court may act upon evidence which was not subject to cross-examination. The Evidence Act gives a right to cross-examine witnesses called by an adverse party."

*Appreciation of evidence on notes submitted by lawyers.* This is impermissible.<sup>19</sup>

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| 14. Emperor v. Gaya Prasad, 1941 Oudh 487; 194 I. C. 557; 42 Cr. L. J. 595; 1941 A. W. R. (C.C.) 2111; 1941 O. W. N. 852. | M. K. Thiagaraja, A. I. R. 1946 Mad. 271; I. L. R. 1946 M. 389.               |
| 15. (In re) Pichai Rowther, 1940 Mad. 43; 186 I. C. 525; 41 Cr. L. J. 337; 1939 M. W. N. 879; 50 L. W. 557.               | 17. Abaji v. State of Hyderabad, A. I. R. 1952 Hyd. 55, 57; 53 Cr. L. J. 572. |
| 16. See Sidu Gope v. Emperor, 24 Pat. 578; A. I. R. 1946 Pat. 84; (In re)   | 18. 21 Cal. 401.  |
|   | 19. Venka v. Jagannath, A. I. R. 1954 Hyd. 41; I. L. R. 1953 Hyd. 642.        |

*Witnesses unwilling to come forward.* The fact that the alleged eye-witnesses were disposed at the outset not to disclose what they knew is one which should not be regarded as tending to discredit their evidence.<sup>20</sup> Witnesses are almost always unwilling to speak and thereby risk the enmity of the accused and his friends and put themselves to great inconvenience unless they are personally interested. If there is nothing improbable in their evidence and they are absolutely disinterested, there is no reason why their evidence should not be accepted.<sup>21</sup>

*When oral evidence insufficient.* In a suit for compensation for short delivery of a consignment (of coconut oil), if the consignment was booked at owner's risk rate, it was the duty of the plaintiff-consignor to produce the certificate to that effect under Section 74-C(2) of the Railways Act, 1890. Mere oral evidence on such a disputed matter is not sufficient.<sup>22</sup>

*Oral evidence in election case—Caution.* In election cases oral evidence is mostly of partisan nature and consequently has to be accepted with caution, but where it finds corroboration from documentary evidence and appears to be highly probable, the Courts ought not to ignore it.<sup>22-1</sup>

*Hostile witnesses.* Parties may rely on statements of hostile witnesses.<sup>22-2</sup>

**5. Conflict between medical evidence and oral evidence.** Where there is a conflict between the medical evidence and the oral testimony of witnesses, the evidence can be assessed only in two ways. A Court can either believe the prosecution witnesses unreservedly and explain away the conflict by holding that the witnesses have merely exaggerated the incident, or rely upon the medical evidence and approach the oral testimony with caution testing it in the light of the medical evidence. The first method can be applied only in those cases where the oral evidence is above reproach and creates confidence and there is no appreciable reason for the false implication of any accused. Where the evidence is not of that character and the medical evidence is not open to any doubt or suspicion, the only safe and judicial method of assessing evidence is the second method.<sup>23</sup> When medical evidence is in conflict with the oral testimony of eye-witnesses, it gets the better of the evidence of eye-witnesses and discredits them.<sup>24</sup>

**6. Evidence admissible under Secs. 32, 49 and 60.** The value of the evidence admissible under Sections 32, 49 and 60, Evidence Act, as their Lordships of the Privy Council observed in *Garuradhwaja Parshad v. Superundhwaja Parshad*,<sup>25</sup> depends on the character of the witnesses who depose to what they documents.

- 20. Emperor v. Mominuddi, 39 C. W. N. 262; 158 I. C. 67; 86 Cr. L. J. 1254; A. I. R. 1935 Cal. 591 (594).
- 21. In re Boya Chinna, (1941) 2 M. L. J. 1070; 54 M. L. W. 327; 43 Cr. L. J. 346; A. I. R. 1942 Mad. 49 (56).
- 22. Union of India v. Ram Kumar Agarwala, A. I. R. 1967 Pat. 447 (448).
- 22-1. P. C. Purusottam Reddiar v. S. Perumal, A. I. R. 1972 S.C. 608; (1972) 1 S. C. C. 9; (1972) 1 S. C. J. 469; (1972) 1 M. L. J. (S.C.) 83; (1972) 1 Andh. W. R. (S.C.) 83.
- 22-2. Suna v. State, (1974) 40 C. L. T. 159.
- 23. Thakur v. State, A. I. R. 1955 All. 189 at 191; 56 Cr. L. J. 473.
- 24. Raj Kishore v. State, A. I. R. 1969 Cal. 321 (338) following Surjan v. State of Rajasthan, 1956 Cr. L. J. 815; A. I. R. 1956 S. C. 425 (432).
- 25. (1901) 23 All. 37; 27 I. A. 238; 7 Sar. 724 (P.C.).

heard from deceased persons and also on the character of the deceased and whether they were expressing their own opinion or merely repeating hearsay.<sup>1</sup>

Oral evidence is not a safe basis for determination of title to property.<sup>2</sup>

**7. Appellate Court, appreciation of evidence by.** The appellate Court should not ordinarily interfere with the view of the trial Court as to the credibility of a witness on points as to which the only person who can effectively form an opinion and draw conclusions is the trial Judge who has the witness before him. He alone knows the demeanour of the witness; he alone can appreciate the manner in which the questions are answered, whether with honest candour or with doubtful plausibility, and whether after careful thought, or with reckless glibness.<sup>3</sup> A finding that a witness is telling the truth is of the greatest value when it is made by a Judge who saw all the witnesses or at least the important witnesses on each side. But such a finding by a Judge who saw none of the witnesses on the other side is of small value.<sup>4</sup> If the appellate Court differs from the trial Court, who had seen the witnesses, on a pure question of appreciation of evidence, it would be difficult to justify its action, but its action would be justified where the trial Court failed to attach sufficient significance to the execution of a document.<sup>5</sup>

It is open to an appellate Court to differ from the Court which heard the evidence where it is manifest that the evidence accepted by such Court of first instance is contradictory, or is so improbable as to be unbelievable, or is for other sufficient reasons unworthy of acceptance.<sup>6</sup>

If it is not safe from the evidence for the appellate Court to draw a particular inference, it is also not safe for the trial Judge to draw the inference. 'Not safe' must mean that there is no evidence from which the inference can reasonably be drawn. There are cases in which evidence is so well balanced that an inference either way can reasonably be drawn. In such cases, the appellate tribunal may select the inference they choose; but they can have no equal choice between an inference that is safe, and one that is unsafe.<sup>7</sup>

**8. Mechanical devices for reproduction of oral evidence: Judgment of Bhandari, C. J.: Tape-recorder.** "In answer to a suit for recovery of a certain sum of money on the basis of a pronote the defendant put forward

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1. *Mulchand v. Devigir*, A. I. R. 1933 Sind 213 at 216.
2. *Hanumantha v. Gowdaiah*, A. I. R. 1953 Mys. 44; I. L. R. 1952 Mys. 172.
3. *Valarshak Seth v. Standard Coal Co., Ltd.*, A. I. R. 1943 P. C. 152, 161; 209 I. C. 182; 1943 A. L. J. 580; 48 C. W. N. 1: (1943) 2 M. L. J. 405; 56 L. W. 766; 10 B. R. 139.
4. *Pearey Lal v. Nanakchand*, A. I. R. 1948 P. C. 108; 1948 A. L. J. 231; 50 Bom. L. R. 643; 52 C. W. N. 785; 61 L. W. 437.
5. *Tammanna v. Parappa*, A. I. R. 1945 P. C. 111; 221 I. C. 427; 12 B. R. 229; 49 C. W. N. 517.
6. *Bhojraj v. Sita Ram*, A. I. R. 1936 P. C. 60; 160 I. C. 45; 1936 A. L. J. 755; 1936 A. W. R. 37; 38 Bom. L. R. 344; 63 Cr. L. J. 42; 40 C. W. N. 257; 70 M. L. J. 225; 43 L. W. 120; 1936 M. W. N. 184; 1936 O. W. N. 38; 1936 P. W. N. 134.
7. *Sris Chandra Nandy v. Rakhalananda Thakur*, A. I. R. 1941 P.C. 16, 20; 68 I. A. 34: (1941) 1 Cal. 468; 193 I. C. 220; 1941 A. W. R. (P.C.) 34; 43 Bom. L. R. 794; 73 C. L. J. 555; 45 C. W. N. 435; (1941) 1 M. L. J. 746; 1941 M. W. N. 354; 53 L. W. 469; 1941 O. W. N. 572; 22 P. L. T. 286.

the plea that the original pronote containing certain endorsements had been destroyed and replaced by another pronote bearing the same date. He endeavoured to substantiate this plea by the oral testimony of one A. L. Sethi, a broker of Delhi; but the latter declined to support him and the defendant accordingly requested the Court to permit him to confront the witness with a conversation which had taken place between himself and Sethi in regard to the destruction of the earlier pronote and which had been faithfully recorded on a tape-recorder. The plaintiff objected to the admissibility of evidence by tape-recorder but the trial Court overruled the objection and the plaintiff has come to this Court in revision.

"The only two sections which appear to have any bearing on the matter in controversy between the parties are Sections 145 and 155(3) of the Indian Evidence Act. Section 145 provides that a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The record of a conversation appearing on a tape-recorder can by no stretch of meaning be regarded as a statement "in writing or reduced into writing", for Section 3 (58) of the General Clauses Act declares that expressions referring to "writing" shall be construed as including references to printing, lithography, photography and other modes of representing or reproducing words in a visible form and the record which appears on a tape-recorder cannot fall within the ambit of this definition. The expression "writing" appearing in Section 145 refers to the tangible object that appeals to the sense of sight, that which is susceptible of being reproduced by printing, lithography, photography, etc. It is not wide enough to include a statement appearing on a tape which can be reproduced through the mechanism of a tape-recorder.

"The other provision on which reliance has been placed is Section 155(3) of the Evidence Act. This section provides that the credit of a witness may be impeached by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. If the witness in the present case made a statement to the defendant before the commencement of this case which is at variance with the statement made by him on a later date, there can be no doubt that it can be proved by the defendant going into the witness-box and deposing that the statement was in fact made to him. The correctness of this proposition is not in dispute. Difficulty has, however, been presented by the question whether a record of that statement as prepared by a scientific instrument can be produced in evidence in Court.

"The answer is in my opinion clearly in the affirmative. Legal evidence consists of the oral testimony of witnesses and of documents produced in the case, but it is open to a person giving evidence in Court to produce instruments or devices used in the commission of a crime and to exhibit maps, charts, diagrams, models, photographs and X-ray pictures, when properly authenticated, of some fact in issue. A witness testifying to a murder he has seen with his own eyes, may well produce a blood-stained dagger he has snatched from the hand of the assassin and this dagger may speak more eloquently than the witness himself. Proof which is addressed directly to the senses is a most

convincing and satisfactory class of proof. I am aware of no rule of evidence which prevents a defendant who is endeavouring to shake the credit of a witness by proof of former consistent statements from deposing that while he was engaged in conversation with the witness a tape-recorder was in operation, or from producing the said tape-recorder in support of the assertion that a certain statement was made in his presence. This proposition is fully supported by a number of American decisions in which the admissibility of evidence furnished by devices for electrotelephonic communication has been fully considered. Evidence based on conversations on telephone is admissible provided the identity of the person with whom the witness spoke or the person whom he heard speak is satisfactorily established.<sup>8</sup> The phonographic reproduction of sound is generally admissible in evidence upon the trial by showing the manner and the circumstances under which it was secured. A person who objected to a rail-road company laying its track upon a certain street was permitted to operate a phonograph in presence of the jury to produce sounds claimed to have been made by the operation of trains in proximity to his hotel. The Supreme Court of Michigan held that there was no error in the admission of this testimony particularly as it was established that the instrument was a substantially accurate and trustworthy reproducer of sounds actually made. In the course of his order Blair, J., observed as follows :

'Communications conducted through the medium of the telephones are held to be admissible, at least in cases where there is testimony that the voice was recognised.... The ground for receiving the testimony of the phonograph would seem to be stronger, since in its case there is not only proof by the human witness of the making of the sounds to be reproduced but a reproduction by the mechanical witness of the sounds themselves.'<sup>9</sup>

"Similarly, testimony as to a conversation heard by the witness through a 'detectophone' is admissible; and where evidence obtained through a dictograph is received it is open to the State to produce the dictograph in evidence and to have the operator thereof explain the instrument and demonstrate the principles on which it operates.<sup>10</sup> The only English case is that of *Buxton v. Cumming*<sup>11</sup> in which Swift, J. is reported to have raised the question whether a dictaphone record has ever been accepted in evidence by the Courts and upon counsel replying that he did not think so said that he saw no reason why such a record as the one which the witness said he had made should not be put in evidence."<sup>12</sup>

The majority of the Supreme Court has, in *Partap Singh v. State of Punjab*,<sup>13</sup> held, that tape-recordings are not inadmissible merely on ground of possibility of their being tampered with. Raghubar Dayal and Mudholkar, JJ., however, held that the tape-recorded conversation can only be corroborative evidence, but cannot be direct or primary evidence that the third person has

- 8. Andrews v. United States, 105 American Law Reports 322.
- 9. Boyne City G. & A. R. Company v. Anderson, 117 American Law Reports 642.
- 10. Brindley v. State, 193 Ala. 43; annotated cases 1916 E. 177.
- 11. 71 Solicitors Journal 232.
- 12. Rupchand v. Mahabir Prashad, A. I. R. 1956 Punj. 173; I. L. R. 1956 Punj. 1351.
- 13. (1964) 4 S. C. R. 733; (1965) 1 S. C. A. 259; (1966) 1 Lab. L. J. 458; A. I. R. 1964 S. C. 72.

stated what the other speaker had told. They observed, however, that weight to be given to such evidence will depend on the other factors which may be established in a particular case.

The courts must be cautious in accepting a tape-recorded statement in respect of the following matters :

- (1) that the custody from which it comes is above suspicion ;
- (2) that no tampering or ventriloquism has been done ; and
- (3) that it is not the result of trickery.

Corroboration should be looked for from intrinsic and independent evidence and tape-recorded statement if uncorroborated should not be accepted.<sup>18-1</sup>

In regard to the admissibility of tape-recordings in criminal proceedings, a well-informed and balanced comparative note by Mr. R. E. Auld, Bar-at-Law in the Criminal Law Review, September 1961 Part,<sup>14</sup> is found to be of the utmost importance to our country where tape-recorders are coming into common use and it is frequently asked why this useful device for reproduction of oral evidence should not be made use of as an adjunct in the administration of justice in this country. Therefore, gratefully acknowledging this invaluable source of information we summarise below Mr. Auld's comparative note taking care not to omit essential details, as otherwise the value and validity of the conclusions of Mr. Auld would be lost.

There appears to be no decided case in English law in which a tape-recorded confession has been used in evidence in a criminal trial.<sup>15</sup> Its advantages are enormous, particularly in the case of the illiterate prisoners. It will have far greater probative force to a Jury than a statement taken down in long-hand by a policeman. Counsel will no longer be able to suggest that the policeman is making up the accused's statement or that he has missed something out. In a report of a Committee appointed by "Justice" to inquire into Preliminary Investigations of Criminal Offences the use of tape-recordings for such purposes was favourably received, but with some doubts as to the possibility of safeguarding against falsification. However, it was suggested that it would be a useful experiment to instal tape-recorders in police cars so as to record statements made by witnesses "on the spot" in motoring cases.<sup>16</sup> Glanville Williams strongly recommends the use of tape-recorders in the case of first statements made by the accused to the police.<sup>17</sup>

13-1. Sumitra Devi Gour v. Calcutta Dyeing & Bleaching Works, A. I. R. 1976 Cal. 99.

14. 1961 Criminal Law Review 577-652 published by the Sweet & Maxwell Ltd. 11 New Fetter Lane, London (N. M. Tripathi Pvt. Ltd. Bombay, agent in India)—a world renowned publication making available at a moderate price and within easy reach research materials of a high order so indispensable for our researches into and study of these no-

vel problems arising in this country also.

15. Prof. Glanville-Williams in his fascinating article on questioning by the Police in 1960 Cr. L. R., p. 325 refers to one occasion when a conversation in a police station was tape-recorded, the recording was admitted in evidence, (1956) Cr. L. R. 442.

16. Para. 30, 1960 Cr. L. R. 807.  
17. J. S. P. T. L. 1957-58, 217

Recorded confessions have been used quite frequently in the United State of America.<sup>18</sup> The following comment appears in Rule 505 in the Model Code of Evidence drawn up by the American Law Institute in 1942 :

"In some instances confessions taken by the police have been recorded by a sound film.<sup>19</sup> To impose a requirement on the police that they should take no confession unless recorded is believed to be practicable, effective, and desirable..... Certainly, wherever it is practicable to supply and issue the necessary equipment in a reasonably efficient manner it should be done and the courts should encourage such procedure in any legitimate manner."

The use of such recordings has not become so widespread in the United States as the authors of this comment hoped, but certainly their admissibility is no longer doubted where they are properly proved.

*Where the spoken words are themselves part of the offence.* What better evidence could there be where, as in cases of blackmail, bribery, threats, inducement to commit a crime, and sedition, than the speaking of the words recorded itself constitutes the offence? It is similar to photographs of an offender caught red-handed in the act of murder or house-breaking. Recordings of conversations in these circumstances have repeatedly been held by English and American Courts to be admissible. But the admissibility of transcripts of these recordings is more doubtful. In a case where two men were charged with a conspiracy to prevent the course of justice, a recording of a conversation which took place at a police station was held admissible by Hilbery, J., as best evidence. The recording was first played to the jury and they were then given a transcript to "assist" them, and the tape was played over again.<sup>20</sup> In the following year magistrates at Kingston refused to admit a transcript of a tape on the ground that it was hearsay.<sup>21</sup> In *R. v. Bracey*<sup>22</sup> in 1959, Slade, J., admitted a recording of an argument between husband and wife to show who was the aggressor, but at the same time indicated that he would have preferred a transcript; a strange preference in the circumstances. The question of the transcript was discussed more fully in the Scottish case *Hopes & Lavery v. H. M. Advocate*.<sup>23</sup> This concerned an appeal by two persons convicted of extorting money by threats. There was evidence of a meeting where the victim wore a Lapel microphone and transmitter. The conversation was relayed to a police receiving set nearby where it was recorded by a tape-recorder. A stenographer's shorthand note of the recording was held to be probably inadmissible although the recording itself was played as evidence.

Tape-recordings were also used in evidence in a subsequent case in Glasgow Sheriff Court.<sup>24</sup> A man and a woman were charged with attempting to procure an abortion for Miss X. The police arranged that Miss X should

- 18. Wright v. State, 79 Ga. 2d. 66, 79. So. 2d. 26a, Ala. 420.
- 19. Such a sound motion picture was admitted in evidence in People v. Debb, (1948) 32 Cali 2d 491; 197 P. 2d. 1.
- 20. R. v. Burr & Sullivan, 1956 Cr. L.

- R. 442.
- 21. Notes (1957) Cr. L. R. 709.
- 22. The Times, Feb. 25, 1959: 1959 Cr. L. R. 231.
- 23. 1960 Cr. L. R. 566.
- 24. P. F. v. Wyse and another, Decr. 5, 1960.

meet the man in her flat, and their conversation, containing incriminating remarks by the accused, was transmitted via pocket radio to a police car in the street nearby, where it was also recorded. The police also monitored and recorded telephone conversations between the woman and Miss X. These recordings were admitted as evidence, despite objections, and both accused were convicted.

On balance, the present rule of English Law would seem to be that a written transcript of a recording is either hearsay or secondary evidence. But there seems to be no reason why a transcript cannot be introduced along with the recording to help a jury where the whole of the recording is clear.

*Where the way in which the words are spoken is important.* A recording can bring out the mood of the moment, the tone of the words and the reaction of the hearer to them, whereas the printed words are quite lifeless. So, for example, in the case of Bracey<sup>25</sup> where it was important to show who was aggressor in the husband and wife quarrel, the tape-recording of the squabble gave the answer.

*Difficulties in the use of recordings as evidence.* (1) *Authenticity.* Having seen the use to which such recordings can be put, it is interesting to note what problems the courts have had to overcome in accepting them. The first difficulty which springs to mind is the question of authenticity. Recordings, like photographs, must be proved. In this respect American lawyers have been more specific in formulating the requisite tests for authenticity. Wigmore on Evidence<sup>1</sup> has suggested the following five requirements :

- (a) That the party charged spoke the words at a certain time into the microphone ;<sup>2</sup>
- (b) That the sending apparatus was capable of effective transmission to a particular spot ;
- (c) That at that spot was a receiving apparatus capable of effectively reproducing the utterances starting from the sending apparatus ;
- (d) That at the receiver a witness heard, reproduced at the time in question, the words uttered into the microphone ;
- (e) That at the time and place of receiving no other person was speaking into another microphone impersonating the party charged.

Of course, a recorded confession, just as a written one, must be voluntary.<sup>3</sup>

(2) *Tampering.* More difficulty has been found with the problem of intermediate tampering. In an article in this Review in 1954<sup>4</sup> the technical possibilities of tampering were fully canvassed and it was then accepted that no completely foolproof method of preventing subsequent alteration could be found.

25. P. F. v. Wyse and another, Decr.

5, 1960.

1. 2nd Ed., Vol. VIII, 2157.

2. See People v. Fratiano, 282 U. 2d. 1002; 152 C. A. 2d 61c; State v. Lyskoski, P. 2d. 114 (Wash.) 1955.

3. Steve M. Solomon Inc. v. Edgar, 88

S. E. 2d. Ga. App. 1955; Wright

v. State, 79 So. 2d. 66, 79 So. 2d.

262 Ala. 520, Files v. State, 81 So.

2d. 303, 363 Ala. 89.

4. T. B. Radley, "Recording Testimony to Truth", 1954 Cr. L. R. 96.

(3) "Dubbing". Sometimes statements are transferred from one tape to another, or from a wire-recording to a tape-recorder. This is known as "dubbing". Should thus dubbed recording be treated in the same way as the original? It is very similar to the position of a carbon or certified copy and if it is proved in the same way, that is, if oral evidence is given that it is an exact rendering of the original, there seems to be no reason why it should not be admissible. A Washington State Court has compared the re-recording to a photographic print and the original wire or tape-recording to a negative and stated that the same principles apply equally well to both.<sup>5</sup> This seems to be eminently sensible. The best evidence of this would be that of the person who was present at the dubbing.

(4) *Imperfect recording.* Recordings may be so inaudible as to be of little use. This may happen because the machine itself is at fault or because some old recording has not been properly rubbed off the tape. The recording may be so bad that it should not be admitted at all, but if only patches of it are imperfect there is no reason why the remainder should not be admissible. So far, there is no English ruling on this point. American Courts follow the practice of admitting the articulate parts.

(5) *Inadmissible or prejudicial elements.* Another closely connected problem is where part of a prisoner's recorded statement is prejudicial or irrelevant, for example, if the accused refers to previous convictions. Here the solution suggested by an Alabama State Court in *Wright v. State*,<sup>6</sup> is that the inadmissible portions should be erased from the tape and the rest should be allowed, but that if this is not possible then the whole recording should be withdrawn from the jury.

*The desirability of the oral evidence in addition.* It seems that although properly established recordings have overcome the best evidence rule both here and in the United States, wherever oral evidence can be given as to the contents of the spoken words it should be given in addition to the recording. This has been the practice in the few English cases reported, and in almost every American decision, additional oral evidence has been called. In *People v. Sisa*,<sup>7</sup> it was held that the evidence of policemen who overheard the incriminating conversations recorded should also be given, since their evidence was the primary evidence.

*Prospect.* We cannot conclude this summary of Mr. Auld's note better than in the words of Mr. Auld again concerning the prospect of the use of the tape-recorder :

"The solutions suggested by the American Courts to the various problems raised here seem on the whole to have been particularly sensible. The relatively few English decisions on the same points have shown a surprising correspondence with the trans-Atlantic approach. Let us hope that undue technicality in the law will not hamper the further use of recording devices and that technical developments will solve the worry of faked recordings."

5. *People v. King*, 225 P. 2d. 590.

520.

6. 79 So. 2d. 66, 79 So. 2d 262 Ala.

7. 247 P. 2d. 72, 112 C. A. 2d. 574.

One safeguard suggested by Prof. Glanville Williams<sup>8-9</sup> in his fascinating study "Questioning by the Police", of the utmost interest and importance to Indian students of law and practitioners is that the tape be sealed by the accused person and deposited for transcription with an officer of the Court.

This will incidentally help the solution of the vexed question of admission of confessions made to Police officers and concerning which the Indian Law Commission has suggested a partial solution. There can be no doubt that that solution which will probably promote the more efficient prosecution of offenders will be materially facilitated if the higher officers of the police who are intended to be authorised to record the admissible confessional statements record them on tape-recorders and adopt the precautions suggested by Prof. Glanville Williams.<sup>10</sup>

Here is an extract from Prof. Glanville Williams' highlighting the advantages :

"The police are remarkably successful in obtaining incriminating statements by means of interrogation, and this very success naturally awakens dark suspicions. But it is certainly not necessary to suppose that unfair methods have been used. When an offender has been caught in incriminating circumstances, he often judges it better to confess and plead guilty, hoping thereby to get a lighter sentence. Moreover (and this is a fact too little understood by those who express alarm when confessions are made to the police), a guilty person who finds himself detected often wishes to confess in order to obtain relief from the feeling of guilt. The point cannot be better expressed than in the words of Wigmore : 'The nervous pressure of guilt is enormous ; the load of the deed done is heavy ; the fear of detection fills the consciousness ; and when detection comes, the pressure is relieved ; and the deep sense of relief makes confession a satisfaction. At that moment, he will tell, and tell it truly. To forbid soliciting him, to seek to prevent this relief, is to fly in the face of human nature. It is natural, and should be lawful, to take his confession at that moment—the best one. And this expedient, if sanctioned, saves the State a delay and expense in convicting him after he has reacted from his first sensations, has yielded to his friends' solicitations, and comes under the sway of the natural human instinct to struggle to save himself by the aid of all technicalities.'"<sup>11</sup>

On other occasions when the offender wishes to make a statement that he thinks will help his case, he may not realise that some of the facts in the statement tell against him. They may either reveal to the police facts that they did not know before, or else contain palpable untruths which will be used against the accused in cross-examination. In one way or another the statement will help to work his downfall.

Many statements are made by accomplices against each other. When several are arrested, each fears that the other is shielding himself at the expense of his companions. Thus each makes a statement to the police, throw-

8-9. 1936 Cr. L. R., p. 342.  
10. Ibid.

11. Wigmore Evidence, 3rd Ed., S. 851.

ing the blame on the other ; and the conflicting stories disclose facts previously unknown to the police. Eventually the police are able to piece together the truth.

Notwithstanding the danger of a false confession, this can hardly be regarded as a general reason for refusing to receive evidence of confession given to the police. A confession given to the police as a result of ordinary questioning is likely to be true. The veracity of the confession would normally be a matter for consideration by the court of trial ; there would be no sufficient reason to exclude it altogether. We do not normally exclude evidence from the consideration of a court merely because of the bare possibility that it is untrue. Important as it is not to convict the innocent, we cannot draw up the rules of procedure and evidence merely for the purpose of acquitting the innocent. Some slight risk of convicting the innocent in rare and extraordinary cases must be accepted for the purpose of convicting the mass of those who are guilty. Moreover, the risk that false confessions may be obtained by the unfair use of suggestion might perhaps be diminished if a mechanical recording were made of the questions and answers.<sup>12</sup>

**9. Wire-tapping and eavesdropping.**<sup>13</sup> In recent years wire-tapping and many devices in eavesdropping such as microphones, recorders and short-wave transmitters have come to be frequently used. In fact it has been the subject-matter of two detailed studies in the United Kingdom and in the United States of America. The Report of the Committee of Privy Councillors appointed to inquire into the interception of communications, London, H. M. Stationery Office, C.D.M. 283, Oct. 1957 and Eavesdropping and Wire Tapping Report of the New York State Joint Legislative Committee to study illegal interception of communications, State of New York, March 1956, Albany Williams Press, Inc., 1956.

In the United Kingdom the Privy Councillors' Committee has found that the power to intercept letters has been exercised from the earliest times and has been recognised in successive Acts of Parliament and that this power has been extended to telegrams and telephone communications. The procedure is for the Secretary of State, Home Department, to authorise the Police for making these intercepts. The yearly average in 1937-39 was 22 intercepts in regard to telephone taps and in 1953-55 the average was 222.

The Committee found that interception was highly selective and that it was used only where there was good reason to believe that a serious offence or security offence was involved and that interception of communications proved very effective in the detection of major crimes, customs frauds on a large scale and serious dangers to the security of the State.

The tapping of telephone by unauthorised persons did not occupy much attention of the Committee but it found that it would be for technical reasons much more difficult in the United Kingdom than in the United States of Amer-

12. The Criminal Law Review, 1960, p. 32; Sweet & Maxwell Ltd., London, Prof. Glanville Williams. Questioning by the Police.

13. Bibliography.—Journal of International Commission of Jurists, Vol. 1, No. 2, page 319; Underhill, Crimi-

nal Evidence, Vol. I. page 283; Wharton's Criminal Evidence, Vol. II, page 692; Eavesdropping and Wire tapping Report of the New York State Legislative Committee, 1956; Report of the Committee of Privy Councillors, 1957.

tica. However, there was no certainty that unauthorised tapping telephones did not occur and that it was for Parliament to consider whether legislation should be introduced to make unauthorised tapping of a telephone line an offence.

In the United Kingdom evidence obtained by these interception taps has been used before domestic tribunals like the Disciplinary Enquiry Board. In 1953 in a disciplinary enquiry before the Metropolitan Police Disciplinary Board in a charge of corruption against two police officers, the Home Secretary issued a warrant authorising the interception of messages which with his permission were subsequently used, not in Court, but in the disciplinary proceedings. Similarly, in the Marrinan case, telephone intercepts were used as evidence before the Bar Council and in fact, it was this Marrinan enquiry which was the cause for the appointment of the Privy Councillors' Committee. What happened was as follows : In October, 1956, reports appeared in certain newspapers of a case tried at the Old Bailey, where it was alleged that a barrister had obstructed the police when they were acting in the course of duty. The Attorney-General brought to the notice of the Bar Council the alleged professional misconduct of the barrister Mr. Marrinan. Thereupon the Secretary of the Bar Council wrote for information to the Assistant Commissioner of Police, London. On November 26, 1956, the Assistant Commissioner was authorised by the Home Secretary to show to the Chairman of the Bar Council the transcript of conversations between Marrinan and one convicted criminal obtained through tapping of that convict's telephone. Subsequently, the Chairman of the Bar Council obtained the permission of the Home Secretary to show the transcript to the Professional Conduct Committee of the Council. The investigation thus instituted led eventually to the disbarment of Marrinan. This Marrinan case brought to the public notice the practice of wire-tapping by the police and the fact that it was only controlled by the Home Secretary and in no way supervised by the Courts. The Privy Councillors' Committee did not suggest any change in the existing practice but held that the disclosure of intercepts in the Marrinan case to the Bar Council was a mistaken decision.

The Committee did not consider the question of admissibility of evidence lawfully obtained through telephone intercepts because this question would be decided when it arises by a Court before whom the evidence is tendered. The general principle of English law, it may be explained, is to admit all evidence however obtained which is relevant according to English Laws of Evidence subject to the discretion of the Judge and disallow evidence which would unfairly prejudice the accused.<sup>14</sup>

The position in the United States of America is different. In 1927 the United States Supreme Court held in *Olmstead v. U. S.*<sup>15</sup> that evidence obtained by Federal Officers through wire-tapping was competent since the Fourth Amendment had not been violated and wire-tapping was not a search or seizure and that the reception of such evidence did not compel the accused to be a witness against himself in violation of the Fifth Amendment. It was further held that even if the evidence had been obtained illegally under a local statute making it a misdemeanour under the common law the admissi-

14. Kuruma v. Reginam, (1955) 1 All E. R. 236 and Harris v. D. P. P., (1952) 1 All E. R. 1044.

15. 277 U. S. 438; Led. 944; 66 A. L. R. 376.

bility of the evidence was not affected by the fact that it was illegally obtained. But subsequently in 1934 the Congress enacted the Federal Communications Act. The Federal law against wire-tapping is contained in section 605 which prohibits the interception of any wire message without the authorisation of the sender. It has been construed by the United States Supreme Court in the first *Nardone* case<sup>16</sup> that the phrase "no person" applied to Federal officers also and that the ban on divulgence forbids testimony concerning the intercepted messages in a Federal Court. The second *Nardone* case<sup>17</sup> extended the prohibition to evidence indirectly obtained through wire-tapping. It would appear however that it is not wire-tapping itself but wire-tapping and disclosure which is prohibited. There is a difference of judicial views as to whether the consent of one of the parties to telephone conversation is sufficient especially when one of the parties is a police informer.

The Investigation of the New York State Joint Legislative Committee referred to above showed that telephone interception was widely carried on as a major business by private investigators. The enterprise of wire-tappers was however by no means limited to prying into private lives and obtaining evidence in divorce cases for which they had a warrant in the New York case of *People v. Applbaum*,<sup>18</sup> in which it was held that a telephone subscriber may cause his own telephone wire to be tapped. In that case Mr. Applbaum sued for divorce. His evidence was partly based on recorded taps made on his own home telephone. It was found further that private agents were being employed by business executives to worm out the secrets of their rivals. The aforesaid Committee has recommended that it must be made a crime for any private person including the subscriber to the telephone to engage in, authorise or aid in any wire-tapping or to overhear surreptitiously by instrument any conversation to which he is not a party. This will also prohibit eavesdroppers by technical means other than wire-tapping.

Thus the position of the United States of America regarding interception of communications is that in the absence of a statute evidence obtained by the interception of written messages which were to be mailed by eavesdropping by means of concealed microphones or by wire-tapping is admissible.

The International Commission of Jurists,<sup>19</sup> (which is a non-Governmental organisation), which has a consultative status with the United Nations, is publishing a very valuable moderately-priced biennial journal—44 Buctenhof, The Hague, Netherlands—making available the highest quality research materials, on every aspect of the Rule of Law covering every part of the civilised world and truly international in every sense—and in the issue Vol. I, No. 2, Mr. Dobry has made a comparative survey of wire-tapping and eavesdropping all over the civilised world. It is found that on the Continent of Europe Constitutions and statutes of many countries guarantee the right to privacy and secrecy of telephone communications. But judicial and investigating authorities generally have the power to undertake or request wire-tapping for use in criminal proceedings, e.g., Article 15 of the Italian Constitution and Article 10 of the West German Constitution. The laws of the Scandinavian countries give even strict procedural safeguards to protect from breach of the secrecy of telegraphic mails and telephone messages except under order of Court.

16. 302 U. S. 379.

17. 308 U. S. 338.

18. 301 N. Y. 738 (1950).

19. 6 Rue Du Mont-De-Sion, Geneva.

In Switzerland the inviolability of secrecy of letters and telegrams and telephone communications is guaranteed and in case of serious breach of the law, the Court and a competent police authority have the right upon a written request to the postal authorities to obtain information regarding telephonic communications. But by the Federal Law of Criminal Procedure of June 15, 1934, the Judge must not resort to coercion, threats or promises, untruthful insinuations, nor any capricious questions and he is prohibited in particular from using such expedients with a view to bringing about a confession. The application of this principle in relation to wire-tapping and eavesdropping was considered by the High Court of Berne March 1, 1949, which quashed a decision of the District Court on the ground that the Judge left two accused persons together in his room in which he had installed a microphone. The High Court held this evidence inadmissible and added memorable words, which are equally applicable to us, that by the acceptance of such evidence, one would run the risk that methods similar to those practised in totalitarian States would become established. Such methods are unworthy of a State founded on principles of justice; from secret spying . . . . there is but one step to the use of alcohol, suggestion, nocturnal questioning and other methods of psychical coercion. In France, Article 187 of the Penal Code prohibits the disclosure of communications transmitted through radio electrical appliance. Doubt has also been raised as to the propriety of the use of recorded interceptions at a trial on the ground that such evidence was highly unreliable because of the danger of alterations of the text of the record, for example, by reproducing any part of the conversation. In a civil matter the French Court treated the tape-recording as written proof but ordered that it should be played in the presence of the parties who would be able to contradict its contents. Thus, in France, though it does not appear that the propriety of the use of telephone interceptions in either preliminary investigation or at the trial has been finally determined, the doubts expressed above are of considerable significance.

**10. Radar.** One of the more important scientific developments of World War II in presently being used by law enforcement agencies as a means of strengthening observance of the country's traffic and speed laws. Some forty-three States, the Districts of Columbia and Hawaii are employing Radio Detection and Ranging, more popularly known as Radar, for the purposes of measuring the speed of automobiles. In time the usual mode of checking a motorist's speed, where an officer maintains his patrol car at a constant distance from the car being checked, while observing his own speedometer, will likely be replaced by the more accurate radar speedometer.

The radar speedometer consists of a transmitting and receiving unit which sends out the radar beam and receives the impulse, or echo, back from the moving vehicle. Antenna for transmitting and receiving the beam are attached to the unit. The wave from the transmitting antenna is sent out on one frequency and, because of the speed of the approaching vehicle, the deflected wave comes back on a different and higher frequency. It is then translated into miles per hour by the electric speedometer which measures the difference in the frequencies of the transmitted wave and the received wave. Most speedometers have a calibrated dial, similar to that found on an automobile speedometer, and as the vehicle enters the radar beam, the needle, on the meter moves to a point indicating the maximum speed of the car. Other speedometers, in addition to the indicator, have a graph machine which records in writing the speed of the vehicle.

Operations of the speedometer are customarily undertaken by two or more traffic officers. A patrol car parked along the highway contains the radar equipment and when a speed violation is indicated on the meter the attending officer will radio this fact, along with a description of the car, to his fellow officer located down the road. It is this officer who stops the motorist and issues a summons or citations or where necessary makes an arrest.

Notwithstanding the widespread use of the radar speedometer there are relatively few reported cases dealing with the evidentiary problems raised by the speedometer.<sup>20</sup>

**59. Proof of facts by oral evidence.** All facts, except the contents of documents, may be proved by oral evidence.

- s. 3 ("Fact".)
- s. 3 ("Document.")
- s. 3 ("Oral evidence.")

- ss. 61-66 (Proof of contents of document).

### SYNOPSIS

- 1. Principle.
- 2. Proof of facts by oral evidence :  
—Testimony by signs.

**1. Principle.** See Introduction, ante.

**2. Proof of facts by oral evidence.** The distinction between primary and secondary evidence in the Act applies to documents only. All other facts may be proved by oral evidence. See Introduction, ante, where this section is discussed. It is not very happily worded. Contents of documents may be proved by oral evidence under certain circumstances ; that is to say, when such evidence of their contents is admissible as secondary evidence.<sup>21</sup> Where a debtor had deposited a certain number of baskets of jade with his creditor, it was held that oral evidence was admissible to show the nature of the deposit, whether it was for safe custody or by way of pledge.<sup>22</sup> An agreement to create an equitable mortgage and the terms of the mortgage cannot be proved by parole evidence but oral evidence would be admissible to prove the circumstances in which documents of title came to be in the possession of the person who claims to be the mortgagor.<sup>23</sup> Oral evidence of the acts and conduct of parties, such as evidence of the repayment of the money, the return of the deed and the exercise of the acts of possession by the vendor, is admissible to show that a certain conveyance was really a mortgage by way of conditional sale.<sup>24</sup>

Where the main dispute between parties is, if notice under Section 7 of the Administration of Evacuee Property Act, 1950, was served on the persons interested in the property which was later declared as evacuee property, two questions are involved, (1) whether a notice was at all issued and served, and (2) if so, whether it was served on the persons interested in the property.

20. Underhill, Cr. RV., pp. 289, 291.

v. M. A. J. Chen, A. I. R. 1933  
Rang. 299; I. L. R. 11 Rang. 239;  
17 I. C. 1105.

21. Norton, Ev., 239; see S. 63, Cl. (5)  
post.

24. Khanakar Abdur Rahman v. Ali  
Hafez, I. L. R. 28 Cal. 256.

22. Kyan Win Ta v. Daw Khin, 1938  
Rang. 38: 174 I.C. 475.

23. V. E. R. M. A. R. Chettyar Firm  
L. E.—193

When the moot point is about the service, proof of its contents along with the proof of its issue and service has to be established. About the contents of the notice, there cannot be any oral evidence (vide this Section); they can only be proved either by primary or by secondary evidence (vide Section 61).<sup>25</sup>

*Testimony by signs.* Where a fact may be proved by oral evidence it is not necessary that the statement of the witness should be oral. Any method of communicating thought which the circumstances of the case or the physical condition of the witness demand may, in the discretion of the Court, be employed. Thus, a deaf mute may testify by signs, by writing, or through an interpreter. So where a dying woman, conscious, but without power of articulation, was asked whether the defendant was her assailant, and if so, to squeeze the hand of the questioner, the question and the fact of her affirmative pressure were held admissible in evidence.<sup>1</sup>

60. *Oral evidence must be direct.* Oral evidence must, in all cases, whatever, be direct; that is to say—

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds :

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable :

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

- s. 3 ("Oral evidence.")
- s. 3 ("Fact.")
- s. 3 ("Evidence.")
- s. 3 ("Court.")
- s. 3 ("Document.")

- ss. 45-51 (Opinion when relevant).
- s. 51 (Grounds of opinion.)
- s. 45 (Opinions of experts.)
- s. 165 (Judge's power to put question or order production.)

25. Arun Kumar v. The Union of India, A. I. R. 1951 Pat. 326.

I. See R. v. Abdullah, (1885) 7 A. 362 (W. B.).

Steph. Introd., 161–163, 170, and *passim*; Steph. Dig., Art. 14, pp. 173–176; Taylor, Ev., ss. 567–606; Best, Ev., s. 492 et seq and pp. 444–458; Powell, Ev., 9th Ed., 305; Wills, Ev., Index, sub voc. ‘Hearsay’; Norton, Ev., 28, 174, 237, 238; Markby, Ev., 52, 53, 19; Wigmore, Ev., ss. 1361–1363; Index, sub voc. “Hearsay”.

### SYNOPSIS

1. Principle.
2. Rule against hearsay :
  - Test to distinguish between direct and hearsay evidence.
3. Background of hearsay :
  - Logical relevancy and legal relevancy.
  - Hearsay and Best Evidence Rule.
4. Hearsay and media of proof.
5. Consent cannot render hearsay admissible.
6. Grounds for exclusion of hearsay evidence.
7. Scope and object of section.
8. Opinion evidence.
9. Circumstantial evidence :
  - Distinction between direct and circumstantial evidence.
    - (a) Falsehood by accused or suspected persons.
    - (b) Demeanour subsequent to crime.
10. Real evidence.
11. Admissions.
12. Affidavits.
13. Reputation.
14. Court’s power to admit inadmissible evidence.
15. Hearsay in cross-examination.
16. Corroboration.
17. First proviso :
  - “Treatise” meaning of.
18. Second proviso.

**1. Principle.** Direct evidence is the best evidence. Derivative or second-hand evidence is excluded owing to its infirmity as compared with its original source.<sup>2</sup>

**2. Rule against hearsay.** This section enacts the general rule against the admission of hearsay. Hearsay evidence has been defined to be, and in its sense denotes, “all the evidence which does not derive its value solely from the credit given to the witness himself, but which rests also in part on the veracity and competence of some other person”.<sup>3</sup> Another definition is: ‘the evidence not of what the witness knows himself but of what he has heard from others.’ It has also been defined as ‘A statement made by a witness of what has been said and declared out of Court by a person not a party to the suit’. Bentham’s definition is: ‘The supposed oral testimony transmitted through orally delivered evidence of a supposed extra-judicially narrating witness judicially delivered *viva voce* by the judicially depositing witness’. It must be borne in mind that the term ‘hearsay’ is not only used with reference to what is done or written, but also to what is spoken. The general rule, with regard to hearsay evidence, is that it is not admissible, and within the scope of this rule are included all statements, oral or written, the probative force of which depends either wholly or in part on the credit of an unexamined person, notwithstanding that such statements may possess an independent evidentiary value derived from the circumstances under which they were made, and also

2. Best, Ev., s. 402, et. seq; Taylor, Ev., s. 567, et. seq; Powell, Ev., 9th Ed., 305, and see notes, post.  
 3. Taylor, Ev., s. 570. As to the history

of the Rule, see Wigmore, Ev., s. 1364. Down to the middle of the 17th century hearsay statements were constantly received.

where no better evidence of the facts stated is to be obtained. The fact, therefore, that a statement is contained in any book, document, or record whatever, proof of which is not admissible on other grounds, are respectively deemed to be irrelevant to the truth of the matter stated.<sup>4</sup> This is the general rule, but there are several exceptions to it as will be seen from a consideration of Sections 32, 33, ante. The late Mr. Justice Stephen asserted that the phrase 'hearsay is no evidence' had many meanings; its common and most important meaning, he said, might be expressed by saying that the connection between events and reports that they have happened is generally so remote that it is expedient to regard the existence of the reports as irrelevant to the concurrence of the events except in certain cases. Another meaning is, that it expresses the same thing from a different point of view, and is subject to no exceptions whatever. It asserts that, whatever may be the relation of a fact to be proved to the fact in issue, it must, if proved by oral evidence, be proved by direct evidence, e.g., if it were to be proved that A, who died 50 years ago, said that he had heard from his father, B, who died 100 years ago, that A's grandfather C, had told B that D, C's elder brother, died without issue. A's statement must be proved by someone, who, with his own ears, heard him make it.

Where the testimony of a witness is entirely hearsay and on some matters hearsay of hearsay, it is not admissible in evidence.<sup>5</sup>

*Test to distinguish between direct and hearsay evidence.* The test to distinguish between direct and hearsay evidence is this: It is direct if, to act upon it, the Court has to rely upon only the witness, whereas it is hearsay if it has to rely upon not only the witness but some other person also.<sup>6</sup> In a case of criminal trespass a police officer gave evidence that he took the police dogs to a place where the culprit was suspected to have climbed over a wall and, allowing them to smell the place, took them to a group of people including the accused, and that one of the dogs pointed to the accused. It was held, that the behaviour of the dog could not be evidence in Court, and that the evidence of the witness was inadmissible as the fact that the smell of a certain person was the same as that which the dog pointed was a fact which might be in the knowledge of the dog and not in that of the witness.<sup>7</sup> But evidence of witnesses who say that they recognised a person as the son of a particular individual is not excluded. That evidence really relates to their own perception when they saw that particular person after his appearance and the recollection of their past perception of the said person before his disappearance.<sup>8</sup> When a girl states that a particular person used to conduct himself as her father, she says so from her personal knowledge, it is not hearsay.<sup>8-1</sup>

If (as in the case of slander) the speaking of the words was the very point in issue, they must be proved in exactly the same way, i. e. the fact of their utterance by the defendant must be deposed to by some person hearing them

4. Law Times, p. 4, May 2, 1896.

5. Chakrapani Jagannath Prasad v. Chandoo Sahadeo, A.I.R. 1959 M.P. 84 : 1958 M.P.L.J. 833.

6. Jagroop v. Rex., A. I. R. 1952 All. 276, 277: 53 Cr. L. J. 588.

7. Said Ali Dost Mohd. v. Emperor, A. I. R. 1940 Pesh. 47: 192 I.C.

246: 1940 Pesh. L. J. 47.

8. Bibhabati Devi v. Ramendra Narayan, A. I. R. 1942 Cal. 498, 503: 202 I. C. 551: 47 C. W. N. 9 (S.B.).

8-1. Hazara Singh v. Attar Singh, A. I. R. 1976 Punj. 24.

used. A testifies that he heard B say that C had taken a bribe. A's testimony is adduced to prove that B did make the statement and not to prove the truth of the allegation, which would be that last thing that C would want. Sometimes the statements of third persons are adduced for the purpose of showing the maker's knowledge or his intent or motive or his good or bad faith. It is then original evidence and not hearsay. It does not follow, therefore, that because the writings or the words in question are those of a third person, they are hearsay. Whether or not they will be excluded as hearsay depends upon the use that is made of them.<sup>9</sup> Evidence given as to character or general opinion is not an exception to this rule, for, when a man swears that another has good character, he means that he has heard many people speak well of him, though he does not particularly recollect what people, or recollect all that they said.

**3. Background of hearsay. Logical relevancy and legal relevancy.** All facts that are logically probative are not admissible in evidence. Sometimes the law rejects facts which have considerable probable value, as, for example, in *Stobart v. Dryden*<sup>10</sup> and *Wright v. Tatham*.<sup>11</sup> Relevancy, as understood in ordinary experience, and as a matter of logic, is only a primary test of admissibility; exclusionary rules, superimposed for reasons of policy or practical necessity or convenience, in many cases, close the door after logical relevancy has opened it. That this is partly due to the way in which the jury system of trial developed in England is generally accepted. As observed by Bosanquet, J., in *Wright v. Tatham*<sup>12</sup>:

"By rules of evidence established in the courts of law, circumstances of great moral weight are often excluded from which much assistance might in particular cases be afforded in coming to a just conclusion, but which are nevertheless withheld from the consideration of the jury upon general principles, lest they should produce an undue influence upon the minds of persons unaccustomed to consider the limitations and restrictions which legal views upon the subject would impose."

The law first considers whether the submitted testimony is logically relevant, as tested by the same tests as are applied in everyday life, namely, the ordinary laws of reasoning, and then if it is logically relevant, classifies it as legally relevant provided no rule of policy, practical convenience, or necessity

9. See Halsbury's Laws of England, 3rd Ed., Vol. 15, p. 295.

10. (1836) 5 L. J. Ex. 218; 1 M. & W. 615; 2 Cale 146; 1 Tyr. & Gr. 899; 46 R. R. 424. In this case the plaintiff sued the defendant on a mortgage deed. The defendant pleaded that the deed had been fraudulently altered by one of the attesting witnesses, who had since died. In support of this plea, the defendant called a witness to prove statements and letters made and written by the deceased attesting witness, tending to show that he had fraudulently altered the deed. It was held that the evidence was inadmissible being hearsay.

11. (1838) 4 Bing N. C. 489; 6 Scott 58; 5 C. & F. 670; 7 A. & E. 313. In this case the point at issue between the heir-at-law and the devisee of a deceased testator (Mr. Marsden) was whether Mr. Marsden's will was invalid, because of his incapacity at the time he executed it. Three letters written to the deceased by third persons about that time, letters which would only have been written to a person believed to be of sound mind, were tendered in evidence by the defendant, the devisee, to show the testator's competency. The letters were held to be inadmissible.

12. (1838) 7 A. & E. 313, 375.

excludes it. It cannot accept all relevant facts, because the dangers inherent in the admission of certain kinds of relevant facts would more than outweigh the advantages of their reception. Accordingly, it is often necessary to take a mean of convenience in judicial proceedings even though it leads to a fixed arbitrary rule, excluding one type of testimony or another. Hearsay is the subject of one of these exclusionary rules. The law has to take account of such things as the powers of observation of witnesses, the quality of their memories, the competency of their knowledge. These factors demand that testimony which is to be received must be given by a witness in open Court, upon oath and subject to cross-examination. Hearsay does not satisfy these conditions and so it is excluded.

*Hearsay and Best Evidence Rule.* Stephen, Powell, Best and Taylor all connected the Hearsay Rule with the Best Evidence Rule. Thus in Note III to his Digest of the Law of Evidence, Stephen declares that the hearsay rule is an example of the principle governing the law of evidence generally that only the best evidence is admissible. But Thayer showed the historical fallacy of connecting the two rules. The two rules have not a common origin nor are they the development of a common principle. The Hearsay Rule is the result of a marking off of the functions of witnesses from those of jurors, a development that took place long before the crystallisation of the Best Evidence Rule<sup>13</sup> Phipson,<sup>14</sup> after tracing the history of the Rule, says that in the present day, "it is not true that the best evidence must, or even may, always be given, though its non-production may be a matter for comment or affect the weight of that which is produced. All admissible evidence is in general equally accepted."

At the present time, it is recognised that the only rule that can be said to be an application of the best evidence formula is the one that excludes secondary evidence of documents, if the originals are available. That it has no connection with the exclusion of hearsay is well demonstrated, apart from the historical factor, by the fact that hearsay evidence not coming within any of the exceptions is not receivable,<sup>15</sup> even though it is shown that no better evidence is available, and, on the other hand, by the fact, when the proposed testimony does fall within one of the exceptions, it is admissible even though direct testimony to the same effect is available.

4. *Hearsay and media of proof.* Instead of regarding hearsay from the point of relevancy and admissibility and reaching the conclusion that it is not legal evidence, Thayer (and Greenleaf) wrote of hearsay under the heading of Media of Proof, an arrangement that has been followed by Wills.

Stephen maintained that it was possible to adopt either method of treatment, that is, you could discuss hearsay either as a question of relevancy or as a question of medium of proof. For convenience's sake, he treated hearsay under the former.<sup>16-17</sup> It is perhaps on this ground that in the Indian Evidence Act the Hearsay Rule is dealt with in Part II, "On Proof", while the exceptions to the rule are dealt with in Part I, "On Relevancy of Facts". This may be a convenient method of treatment, but what is the principle involved?

13. Thayer, p. 497, etc.

(1966) 2 S. C. J. 241: A. I. R.

14. 11th Edn., pp. 61, 62.

1966 S. C. 580.

15. Laliteshwar Prasad v. Bateshwar Prasad, (1966) 1 S. C. A. 532:

16-17. Stephen's Digest, 12th Ed., p. 193.

Is hearsay excluded because it is not legal evidence, or is it excluded because the wrong mode of proof is being used? Phipson, Roscoe, Taylor and Wigmore all adopt the former view, and it is submitted that their view is the correct one. Hearsay is excluded, because it is considered not sufficiently trustworthy. It is rejected because it lacks the sanction of the tests applied to admissible evidence, namely, the oath and cross-examination. The exceptions to the Hearsay Rule bear out the present contention. Where any hearsay testimony falls within one of the recognised exceptions, that is, where there are special circumstances which give a guarantee of trustworthiness to the testimony, it is admitted, even though it comes from a second-hand source.

**5. Consent cannot render hearsay admissible.** Even if admission of hearsay evidence is not objected to, the fault of the counsel cannot so alter the character of testimony as to convert into corroborative evidence that which the law regards as merely fit for rejection as hearsay.<sup>18</sup> The evil consequence of the admission of such evidence is not merely that it prolongs litigation, and increases its costs, but that it may unconsciously be regarded by judicial minds as corroboration of some piece of evidence legally admissible, and thereby obtain for the latter quite undue weight and significance.<sup>19</sup>

**6. Grounds for exclusion of hearsay evidence.** On principle hearsay evidence is rejected as it is untrustworthy for judicial purposes for various reasons.<sup>19-1</sup> The grounds for the exclusion of hearsay evidence are these: (a) the irresponsibility of the original declarants, for the evidence is not given on oath or under personal responsibility; (b) it cannot be tested by cross-examination; (c) it supposes some better testimony and its reception encourages the substitution of weaker for stronger proofs; (d) its tendency to protract legal investigation to an embarrassing and dangerous length; (e) its intrinsic weakness; (f) its incompetency to satisfy the mind as to the existence of the fact, for truth depreciates in the process of repetition. It is a matter of common experience that statements in common conversation are made so lightly and are so liable to be misunderstood or misrepresented that they cannot be depended upon for any important purpose unless they are made under special circumstances;<sup>20</sup> and (g) the opportunities for fraud its admission would open.<sup>21</sup> Wigmore is of the view that it is the fact that the adverse party has had no opportunity to cross-examine the maker of an extra-judicial statement that is the real basis of the exclusion of hearsay. But as Phipson points out: "No single principle can be assigned as having operated to exclude hearsay generally, or from any ascertainable date."<sup>22</sup> The law of evidence has, perhaps no other section of English common law, developed in a haphazard and

18. Lim Yam Hong & Co. v. Lam Choon & Co., A. I. R. 1928 P. C. 127, 128; 107 I. C. 457; 30 Bom. L. R. 757; 47 C. L. J. 288; 56 M. L. J. 88; Sachhu v. Mela Ram, A. I. R. 1929 Lah. 588; 119 I. C. 734; Munishwar v. Indra Kumari, I. L. R. (1963) 2 Punj. 263; 65 Punj. L. R. 1029; A. I. R. 1963 Punj. 449 (452).

19. (Mst.) Atkia Begum v. Muhammad Ibrahim Rashid Nawah, A. I. R. 1916 P.C. 250, 252; 36 I. C. 20; 21 C. W. N. 345; 6 L. W. 26; 1917

M. W. N. 261.  
Herbetus Oram v. State, (1971) 37 Cut. L. T. 477; (1971) 1 Cut. W. R. 960.

20. Steph. Introd., 161.  
21. Law Times, p. 4, May 2, 1896; see Steph. Dig., pp. 173-176; Powell, Ev., 9th Ed., 305; Phipson, Ev., 9th Ed., pp. 228-229; Best, Ev., s. 494, p. 444, et. seq., where the principle of the hearsay rule is discussed. Gresley, Ev., 304; Phips, Ev., 142.

22. Phipson, Ev., 11th Ed., p. 277.

piecemeal fashion. The exceptions to the hearsay rule were not the results of a deductive process of reasoning from a general principle but arose as necessity demanded. The hearsay rule, itself originally the result of a rule that witnesses should appear publicly in open Court to testify, was justified at its full development by an aggregate of reasons, namely, to protect the jury from testimony which it could not properly evaluate, to prevent undue prejudice and surprise to the parties, to insist on witnesses giving their evidence in open Court, on oath and subject to cross-examination. A statement which "if made by a witness" would be perfectly relevant is, when so made, excluded because it is wanting in the sanction and the tests which apply to sworn testimony and admitted only when in respect of the persons making it, or of the circumstances under which it was made, there is some security for its accuracy, which countervails the absence of those safeguards.<sup>23</sup>

Hearsay evidence is, however, admissible for certain purposes. In order to explain the conduct of a witness before the court hearsay evidence can be looked into not as proof of truth of his evidence but to establish the connection between it and such conduct.<sup>24</sup> The exceptional cases in which such statements are admitted are dealt with in Sections 17–39 ante.<sup>25</sup> Oral or written statements made by persons not called as witnesses, are generally speaking, and subject to the exceptions mentioned, not receivable to prove the truth of the matters stated, that is, such statements are inadmissible as hearsay, when they are offered as proof of their own truth.<sup>1</sup> The fact that a person identified the accused at an identification parade cannot be taken into consideration, if the person is not called as a witness.<sup>2</sup> But statements by non-witnesses may be original evidence, and as such admissible, that is, where the making of the statement and not its accuracy is the material point.<sup>3</sup>

- 23. Phipson, Ev., 11th Ed., 278; Wharton, Ev., 170–176; Best, Ev., ss. 492–495; Step. Dig., Art. 14 and Note viii; Taylor, Ev., ss. 567–606; Powell, Ev., 9th Ed., 305; Phips, Ev., 143; Wright v. Doed Tatham, 1837 7 A. & E. 313, 408.
- 24. State of M. P. v. Gangabai, 1971 M. P. W. R. 443; I. L. R. (1969) M. P. 1014.
- 25. See notes to following sections : Secs. 17–31 (admissions and confessions), Secs. 32–33 (statements by persons who cannot be called as witnesses), Secs. 34–38 (statements made under special circumstances). To these may be added statements made in the presence of a party. See S. 8.
- 1. See Chandu Lal Agarwala v. Bibi Khatemonnessa, A. I. R. 1943 Cal. 76, 86; I. L. R. (1942) 2 Cal. 299: 205 I.C. 344; 75 C. L. J. 301; 46 C. W. N. 729; In the matter of B, an advocate, A. I. R. 1935 All. 1023: 159 I.C. 561: 37 Cr. L. J. 117: 1935 A. W. R. 1229 (S.B.).
- 2. Mohammad Ishaq Madari v. Emperor, A. I. R. 1942 Lah. 59: 198 I. C. 796; 43 Cr. L. J. 428; 43 P. L. R. 712; Nagina v. Emperor, A. I. R. 1921 All. 215; 95 I. C. 477: 27

- Cr. L. J. 813: 19 A. L. J. 947.
- 3. e.g., statements which are part of the *res gestae*, whether as actually constituting a fact in issue (e.g., a libel) or accompanying one (Ss. 5, 8) statement amounting to acts of ownership, as leases, licences and grants (S. 13), statements which corroborate or contradict the testimony of witnesses (Ss. 155, 157, 158). Enquiries made of, and answers received from, parties (themselves not called) tendered to the Judge to show reasonable search for a lost document or an absent person are admissible. R. v. Brain-tree, (1858) 1 E. & E. 51; Wyatt v. Bateman, (1836) 7 C. & P. 586; Venkataramanujacharyulu v. Appalacharyulu, 1926 Mad. 1003: 97 I.C. 785: 24 L. W. 227. See notes to S. 33. In some cases what is called a verbal fact ("There is a category of cases in which a man's words are his acts, sometimes indeed the most important acts of his life", per Erle, J., Shilling v. Accidental Death Co. post, (1868) 1 F. & F. 116: 4 Jur. (N.S.) 244) may be admissible as original evidence although the particulars of it may be excluded as

The test whether a statement belongs to one class or the other is the purpose for which it is tendered.

**7. Scope and object of section.** The intention of this section is to take care that whatever is offered as evidence shall itself sustain the character of evidence. It must be immediate. It may not be mediate or delivered through a medium, second-hand, or, to use the technical expression, hearsay.<sup>4</sup> Evidence of statements made even by a child who is not a competent witness is not admissible.<sup>5</sup> Even statements of counsel concerning relevant facts of the case cannot be accepted as evidence unless made in the witness-box.<sup>6</sup> Even a dying declaration based entirely on rumour is not admissible unless it satisfies the conditions of Section 32.<sup>7</sup> Likewise, a history-sheet maintained in the Police Station is not admissible in evidence as proof of a man's character, because it might have been based on information that the police received from time to time. It would be nothing more than hearsay.<sup>8</sup> Statements given to the police in connection with the commission of a cognizable offence fall under two heads, those given before the commencement of investigation and those given during investigation. Under the general rules of evidence no such statement can be used at a trial as substantive evidence, that is to say, no statement is evidence of the truth of its contents; all such statements can be used at the trial either to corroborate or contradict the evidence of the witnesses at the trial who had previously made them, but by a special rule such statements, if made during the course of investigation, cannot be used for any

hearsay, e.g., the fact that a person made a communication to another, in consequence of which an act was done [R. v. Wilkins, (1849) 4 Cox. 92; R. v. Wainright, 13 Cox. 171], or consulted him on a given subject [Shilling v. Accidental Death Co., 4 Jur. (Ns) 244: (1858) 1 F. & F. 116, see S. 8, and Cunningham, Ev., 94], or complained of an injury [see S. 8, illusts. (j), (k)]; in this case, however, according to Indian law, the particulars are receivable; or had a dispute, prior to the publication of a libel [S. 9 illust. (b)]. Hearsay, in its legal sense is confined to that kind of evidence (whether spoken or written), which does not derive its credibility solely from the credit due to the witness himself, but rests also in part on the veracity and competency of some other persons from whom the witness may have received his information. Phillips, Ev., 143.

4. In his notes on this Act, Markby, J., says: that the first four paragraphs of this section have been supposed to have been intended to exclude that kind of evidence which is called hearsay, but that for the reason he states it is difficult to believe this, and moreover hearsay would not be

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excluded by the language here used. For statements are facts and are so treated in Ss. 17, 29, *passim*. If, therefore, A, a witness, had been told something by B and A were asked what B had told him, the evidence of A would refer to a fact which would be heard, and A is a witness who says he heard it; this section would therefore not exclude it. He states that the following universally recognised rule has been in fact omitted from the Act, viz.: "No statement as to the existence or non-existence of a fact which is being enquired into, made otherwise than by a witness whilst under examination in Court, can be used as evidence." Markby, Ev., 52, 53, 19.

5. Kashi Nath Pandey v. Emperor, A. I. R. 1942 Cal. 214; I. L. R. (1941) 2 Cal. 180: 199 I.C. 311: 43 Cr. L. J. 548.
6. Local Government v. Mst. Gui, A. I. R. 1935 Nag. 69: 17 N. L. J. 189. See also Emperor v. Lalit Mohan, A. I. R. 1921 Cal. 111: 62 I. C. 578: 22 Cr. L. J. 562: 25 C. W. N. 788.
7. Ram Krishna Roy v. State, A. I. R. 1952 Cal. 231: 53 Cr. L. J. 623.
8. Kamal Kanto v. State, A. I. R. 1959 Cal. 342: 1959 Cr. L. J. 694.

purpose. The question whether a statement made to the police is or is not a first information report, or has or has not been recorded in the manner laid down by Section 154, Cr. P. C., is not of primary importance. What is of importance is whether such statements were made prior to the commencement of investigation. If so, they can be proved for purposes of contradiction or corroboration but not for any other purpose.<sup>9</sup> It may also be noted that a first information report may be merely hearsay and need not necessarily be given by a person who has first-hand knowledge of the facts.<sup>10</sup> Evidence that after the occurrence of dacoity the police Patil went round the village and ascertained whether the accused was in his house can at best be regarded as hearsay and has little evidentiary value.<sup>11</sup> The principle underlying the reception of this kind of evidence rests on the primary distinction between factum and the truth of a statement. Evidence of a statement made to a witness by a person who is not himself called as a witness, will be hearsay and inadmissible, when the object of the evidence is to establish what is contained in the statement. It is not hearsay, and is admissible, when it is proposed to establish by the evidence, not the truth of the statement but the fact that it had been made. Hence, where an informant of the first information report had died before he could be examined as a witness, the evidence of the witness who recorded the report is inadmissible to prove that a certain person was in fact present at the time of the occurrence; but the statement is admissible to prove that the informant had mentioned his name to him.<sup>12</sup> Press reports are not substantive evidence of the statements made and, as such, are inadmissible.<sup>12-1</sup>

Oral evidence of the contents of a document must be given by some person who has seen those contents, that is to say, who has read the document. Evidence that the witness saw the document and heard it read out by someone else is only hearsay so far as the contents are concerned.<sup>13</sup> A witness may be allowed to depose to the receipt of a letter and even to say that in consequence of receiving it he took, or did not take, certain action but his evidence is no proof of the truth of the contents of the letter or of the statements contained in it.<sup>14</sup> Even if a newspaper is admissible in evidence without formal proof, the paper itself is not proof of its contents. It will merely amount to an anonymous statement which is inadmissible as hearsay.<sup>15</sup> The presumption of

9. Mir Rahman v. Emperor, 1935 Pesh. 165; 159 I.C. 890.
10. Shwe Pru v. The King, A. I. R. 1941 Rang. 209, 211; 197 I.C. 350; 43 Cr. L. J. 157; 1941 P. L. R. 346.
11. Mohammad Jamsher Tadvi v. State, A. I. R. 1956 Bom. 186, 188.
12. Umrao Singh v. State of M. P., A. I. R. 1961 Madh. Pra. 45; (1961) 1 Cr. L. J. 270; Ram Bala v. Ram Krishna, (1969) 73 C. W. N. 751 (755); Sachindra Chatterjee v. Nilima, 74 C. W. N. 168; A. I. R. 1970 Cal. 38 (58); Subramiam v. Public Prosecutor, (1956) 1 W. L. R. 965. (970).
- 12-1. Village Panchayat v. Lt. Governor of Goa, Daman & Diu, A. I. R. 1972 Goa 1.
13. Ma Mi v. Kallander Ammal, A. I. R. 1927 P. C. 15; 54 I. A. 61; I. L. R. 5 Rang. 18; 100 I. C. 1; 25 A. L. J. 65; 29 Bom. L. R. 800; 45 C. L. J. 269; 31 C. W. N. 621; 52 M. L. J. 376; 1927 M. W. N. 80; 25 M. L. W. 342; 28 P. L. R. 109; 8 P. L. T. 280, affirming Kalanther Ammal v. Ma Mi, A. I. R. 1924 Rang. 363; I. L. R. 2 Rang. 400; 84 I. C. 175; M. Yusuf v. D., I. L. R. 1966 Bom. 420; 68 Bom. L. R. 228; 1967 Mah. L. J. 65; A. I. R. 1968 Bom. 112.
14. Firm Ghunni Lal Mansa Ram v. Firm Sheo Prasad Banarsi Dass, A. I. R. 1943 All. 370; I. L. R. 1943 All. 752; 210 I.C. 55; 1943 A. L. J. 411; 1943 A. W. R. (H.C.) 224.
15. Bawa Sarup Singh v. The Crown, A. I. R. 1925 Lah. 299; 88 I. C. 22; 26 Cr. L. J. 1078; 26 P. L. R. 566; 7 I. L. J. 264; Hazarilal Bhanna Mal v. State of Himachal Pradesh, A. I. R. 1953 H. P. 41.

genuineness attached to a newspaper under section 81 *post* cannot be treated as proof of the facts stated therein as a statement of fact contained in a newspaper is only hearsay and therefore inadmissible in evidence, in the absence of the maker of the statement appearing in Court and deposing to have perceived the fact reported.<sup>16</sup> A news item, without any further proof of what had actually happened through witnesses, is of no value; it is at best a second-hand secondary evidence.<sup>17</sup> Where in a case a *Sarpanch* is said to have spoken to witness J about his having learnt from the accused that the accused had a scuffle with the deceased K, and the *Sarpanch* was not asked any question about his having spoken with J, the evidence of J in respect of the scuffle would be inadmissible as neither falling under the present section nor under section 157 *post*.<sup>18</sup> In order to establish the policy decision of a company which involved retrenchment, it is not necessary to produce the Resolution of the Board of Directors of that company; it can be proved through the manager.<sup>19</sup> If a person, alleged to be adopted soon after his birth, speaks to that adoption, his evidence is at best hearsay.<sup>20</sup> When an Inspector inspects the condition of a property to be mortgaged with the Life Insurance Corporation and gives oral evidence of what he saw, the evidence is primary evidence under the section. But when he says that the object of the loan was to meet the expenses of repairs and additional constructions, his evidence is plainly hearsay.<sup>21</sup> If a person, who was not present when a distress warrant was executed, gives evidence that the property of the accused was found locked, his evidence is at best hearsay evidence and inadmissible.<sup>22</sup> The statement of a person in the course of an inquest recorded by a Head Constable in the presence of the Sub-Inspector can be spoken to by the Sub-Inspector.<sup>23</sup> The evidence of identification of a dead body by a doctor who conducted the post-mortem on that body is hearsay because the doctor himself had no personal acquaintance with the body.<sup>24</sup> The statement of a co-accused before a witness when the co-accused herself was not a witness and the other accused had no opportunity to cross-examine her, is hearsay and not admissible against the other accused.<sup>25</sup> A *panchnama* can never be treated as substantive evidence of the fact recorded therein. These facts have to be proved independently of the *panchnama* by the testimony on oath of the *panch* who had seen these facts and who was a party to the *panchnama*.<sup>1</sup> A map by itself is nothing but statements made by the maker by means of lines and pictorial representation instead of by word of mouth as to the state or configuration of a particular site and the objects standing thereon. To admit in evidence a map without calling the maker thereof is the same as admitting in evidence statements made

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- 16. Harbhajan Singh v. State of Punjab, 63 Punj. L. R. 794: (1961) 1 Cr. L. J. 710: A. I. R. 1961 Punj. 215 (221).
- 17. Samant N. Balakrishna v. George Fernandez, (1969) 3 S. C. R. 603: (1970) 1 S. C. A. 376: (1969) 2 S. C. J. 598: 72 Bom. L. R. 117: A. I. R. 1969 S.C. 1201 (1220).
- 18. Kanbi Vaghji Surji v. State of Gujarat, 1968 Cr. L. J. 54: A. I. R. 1968 Guj. 11 (13).
- 19. Parry & Co., Ltd. v. P. C. Pal, (1969) 2 S. C. R. 976: (1970) 2 S. C. J. 433: 38 F. J. R. 164: 21 Fac. L. R. 266: 1970 Lab. I. C. 1071: (1970) 2 Lab. L. J. 429: A. I. R. 1970 S. C. 1334 (1341).
- 20. L. Debi Prasad v. Tribeni Devi, (1970) 1 S. C. 677: A. I. R. 1970 S. C. 1286 (1289).
- 21. Dalim Kumar v. Nandarani Dassi, 73 C. W. N. 877: A. I. R. 1970 Cal. 292. (311).
- 22. Abdul Subhan v. Corporation of Madras, 1969 M. L. W. (Cr.) 241.
- 23. Ramaswami Goundar v. Ponnammal, 1969 M. L. W. (Cr.) 168 (169).
- 24. Herbetus Gram v. State, (1971) 37 Cut. L. T. 477 (478).
- 25. Arundhati Kentuni v. The State, 34 Cut. L. T. 60 (68).
- 1. Kadiya Kanbi Bhavan Manji v. Ismail Mamad, 1955 Sau. 32: 56 Cr. L. J. 274.

by a third party who is not called as a witness. In other words, it amounts to admitting hearsay.<sup>2</sup> So maps and plans made for the purpose of the suit are *post item motam* and lack trustworthiness.<sup>3</sup> But statements embodied in a catalogue of prices issued by a business firm in the course of its business are not hearsay as they are direct invitations issued by the sellers for offers of purchase and embody statements of the prices at which the goods can be obtained.<sup>4</sup>

The evidence of two witnesses that not only they but also sixty-four others who were election-petitioners with them, were misled by a mistake in the spelling of the name of a candidate, is merely hearsay and is therefore irrelevant and inadmissible. The provisions of the Act are applicable to an Election Tribunal which is a court within the meaning of section 3 *ante*.<sup>5</sup> Statement of a truck driver that the persons travelling in his truck told him that they were going to cast their votes was hearsay and not admissible unless such persons were called and it was used to confront them as their previous statement.<sup>5-1</sup>

Exclusion of hearsay evidence is a basic rule which is applicable even before domestic tribunals though they are not bound by technical rules of procedure of the Evidence Act.<sup>5-2</sup> An expert's evidence is no exception to the rule in this section that oral evidence must be direct unless any statute provides otherwise. Where there is no such statute, an expert's opinion must be given orally and a mere certificate by him cannot be evidence. If a party does not object to the admission of such a document, he can be said to have waived the proof of it but not its relevance.<sup>6</sup> A statement by a witness regarding relationship which does not indicate who told the witness about the relationship and as to when it was said to him, constitutes hearsay and is inadmissible in evidence.<sup>7</sup>

Appearance or rather description as regards the age of a person and estimate of age, or reliance on memory regarding past events as to the time they took place, is hardly a reliable basis to come to a definite finding about the age of any person.<sup>8</sup> The testimony of a teacher who admitted two boys to his school, gave them lesson and marked their attendance cannot establish any opinion on his part on the paternity of the boys the source of his knowledge thereto not having been disclosed. Such testimony is not direct evidence of the paternity in dispute.<sup>9</sup>

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- 2. Dwijesh Chandra Roy v. Narash Chandra Gupta, A. I. R. 1949 Cal. 492, 494: 49 C. W. N. 791.
- 3. Damodaran v. K. Plantations Co., Ltd., A. I. R. 1959 Ker. 358; 1959 Ker. L. J. 372.
- 4. Hassan Ali v. Dara Shah, 1949 Nag. 282; I. L. R. 1948 Nag. 922; 1949 N. L. J. 279.
- 5. Prem Chand v. O. P. Trivedi, 1967 A. L. J. 5 (7).
- 5-1. Nihal Singh v. Rao Birendra Singh 1970 U. J. (S.C.) 753; 45 F. L. R. 207; (1970) 3 S.C.C. 239.
- 5-2. Delhi Municipality v. P.O., Labour Court, 1973 Lab. I. C. 771; I.L.R. (1972) 2 Delhi 653; 42 F. J. R. 401; (1972) 1 Lab. L. N. 559;
- (1972) 1 Lab. L. J. 378; Tarlochan Singh v. State of Punjab, 1975 Lab. I. C. 986.
- 6. B. Poornalaih v. Union of India, (1967) 2 Andh. L. T. 141; A. I. R. 1967 A. P. 338 (348); Perumal Mudaliar v. S. I. Ry. Co., Ltd., A. I. R. 1937 Mad. 407; R. M. Y. R.M. Palaniappa Chettiar v. Bombay Life Assurance Co., A. I. R. 1948 Mad. 298, (299).
- 7. Kamalambal v. Srinivasa Odayar, (1968) 2 M. L. J. 487 (489).
- 8. Paryanibai v. Bajirao, I. L. R. 1961 B. 963; A. I. R. 1963 B. 25.
- 9. Shankar Lal v. Vijay Shanker, A. I. R. 1968 All. 58 (63).

**8. Opinion evidence.** Under this section A who saw, heard, etc., must be produced. The fact cannot be proved through the medium of B who did not himself see, hear, etc., but is prepared to swear that A told him he had seen, heard, etc. So with respect to the fourth case, opinion evidence, when such is admissible, this section necessitates the production of the witness who holds the opinion ; it excludes the evidence of any witness who can merely say that he had heard another express such an opinion. It is admissible evidence for a living witness to state his opinion on the existence of a family custom, and to state, as the grounds of that opinion, information derived from deceased persons ; and the weight of the evidence would depend on the position and character of the witness and of the person on whose statement he has formed his opinion. But it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay.<sup>10</sup> In a prosecution under Section 143, Penal Code, only what the witnesses actually saw and heard as to what a mob was doing and saying is admissible to prove the nature of the assembly, their opinions and impressions that the assembly appeared to be unlawful are not admissible.<sup>11</sup> Where the opinion as to the non-existence of a custom expressed by the Law Committee of a Municipality in a resolution was relied upon without calling the members of the committee as witnesses it was held that the opinion was inadmissible for the purpose of proving the non-existence of the custom.<sup>12</sup> Similarly, a medical certificate tendered without calling the doctor who gave it is inadmissible as it is the worst form of hearsay evidence.<sup>13</sup> The Court ought not to rely upon the report of the doctor which is not before it. He ought to be summoned. If that is not done, the Court cannot reach the conclusion without any direct evidence in support of it.<sup>14</sup> Even if the doctor's report has been exhibited with the consent of the opposite party, that would mean that the party waived his right to have the document proved. The party cannot be said to have agreed to accept the statements of the doctor as evidence of the correctness of the matters contained in the report.<sup>15</sup> Even the doctor's evidence is worthless and inadmissible if it is based entirely on hearsay.<sup>16</sup> Even a report sub-

10. Garuradhwaja v. Saparandhwaja, 23 A. 37, 51, 52; 27 I.A. 238 (P.C.); Mulchand Bassammal v. Devigir Motigir, A. I. R. 1933 Sind 213; Pratap Chandra Deo v. Jagdish Chandra Deo, A. I. R. 1925 Cal. 16; 82 I.C. 886; 40 C. L. J. 331; (Mst.) Amina Khatun v. Khalilur-rahman, A. I. R. 1933 Oudh 246; I. L. R. 8 Luck. 445; 10 O. W. N. 268.
11. Jogi Raut v. Emperor, A. I. R. 1928 Pat. 98; 105 I. C. 234; 28 Cr. L. J. 906; 9 P. L. T. 260.
12. Municipal Board, Benares v. Kandhaiya Lal, A. I. R. 1931 All. 499; 134 I. C. 21; 1931 A. L. J. 757 (S.B.)
13. Srischandra Nandy v. Smt. Annapurna Ray, A. I. R. 1950 Cal. 173. See also Imperator v. Ahila Manaji, 1923 Bom. 183; I. L. R. 47 Bom. 74; 84 I. C. 643; 26 Cr. L. J. 339; 24 Bom. L. R. 803 (certificate of Professor in Medical College); Peary Lal v. Kidar Nath, A. I. R. 1923 All. 601; 75 I. C. 148; 24 Cr. L. J.

- 900; 21 A. L. J. 399 (opinion of handwriting expert); Pitain v. Baboo Singh, A. I. R. 1924 Nag. 183; 79 I. C. 641 (report of finger-print expert); Raghunath v. The Kunseong Municipality, A. I. R. 1923 Cal. 561; 76 I. C. 394; 25 Cr. L. J. 170 (report of Public Analyst); Shaukat v. Sheodayal, A. I. R. 1957 M. P. L. J. 633 (report of Health Officer); Govindrajulu v. Lakshmi Ammal, A. I. R. 1961 M. 158.
14. Mohammad Ikram Hussain v. State of U. P., A. I. R. 1964 S. C. 1625; 1964 S. C. D. 328; (1964) 1 S. C. W. R. 328; 1963 All. W. R. (H.C.) 377; (1964) 2 Cr. L. J. 590.
15. R. M. Y. R. M. Palaniappa Chettiar v. Bombay Life Assurance Co., Ltd., A. I. R. 1948 Mad. 298; (1947) 2 M. L. J. 535; 1947 M. W. N. 753; 60 L. W. 803.
16. Judah v. Isolyne Shrojbashini Bose, 1945 P.C. 174; 221 I.C. 587; 712 B. R. 221; 1945 M. W. N. 634; 1945 O. W. N. 287.

mitted by a Commissioner deputed to make a local investigation is not *per se* evidence in the case. It is only when it is verified by him by a statement on oath that it becomes evidence.<sup>17</sup> Similarly as regards facts stated in balance-sheets.<sup>18</sup>

Where the offered item of evidence under Section 50 of this Act is conduct, then such conduct or outward behaviour must be proved in the manner laid down in this section; if the conduct relates to something which can be seen, it must be proved by the person who saw it; if it is something which can be heard, then it must be proved by the person who heard it; and so on. The portion of this section which provides that the person who holds an opinion must be called to prove his opinion does not necessarily delimit the scope of Section 50 of the Act in the sense that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct may be proved either by the testimony of the person himself whose opinion is evidence under Section 50 or by some other person acquainted with the facts which express such opinion<sup>19</sup> and is in each case direct within the meaning of the present section.

**9. Circumstantial evidence.** The same rule of excluding hearsay—second hand or mediate—evidence prevails with regard to circumstantial evidence, as to direct evidence. Circumstantial evidence must be established by 'direct' evidence within the meaning of this section, namely, by witnesses who themselves saw etc. the facts to which they depose, and which are material for inference respecting the existence of the fact in issue.<sup>20</sup> "This section provides that when it (i. e. the oral evidence) refers to a fact which could be seen, it (i. e. the oral evidence) must be the evidence of a witness who says he saw it. This last 'it' is somewhat indefinite; but I think that this 'it' has reference to the fact previously spoken of; and I think the fact previously spoken of is the fact deposited to, and therefore not always the fact which it is ultimately intended to prove. In other words, I do not think it was intended by this section to exclude circumstantial evidence of things which could be seen, heard, and felt, though the wording of the section is undoubtedly ambiguous, and at first sight might appear to have that meaning."<sup>21</sup>

17. *Shib Singh v. Sridhar*, A. I. R. 1953 All. 371; 54 Cr. L. J. 794; 1952 A. L. J. 19.

18. *Petlad Turkey Reddy Works v. Dyes and Chemical Workers' Union*, A. I. R. 1960 S. C. 1006; 1960 S. C. J. 696; (1960) 2 S. C. R. 906; (1960) 1 Lab. L. J. 548.

19. *Fulkalia v. Nathu Ram*, A.I.R. 1960 Pat. 480; *Shanker Lal v. Vijay Shanker*, A.I.R. 1968 All. 58 (63); *Bishwanath Gosain v. Dulhin Lalmuni*, I.L.R. 47 Pat. 636; A.I.R. 1968 Pat. 481 (484); *In re Bhogal Paswan*, A.I.R. 1963 Pat. 450. All the foregoing decisions have followed the leading case, *Dolgobinda Paricha v. Nimaicharan Misra*, A. I. R. 1959 S.C. 914; see section 50 ante, Note 5, p. 1094 *et seq.*

20. *Norton, Ev.*, 240. The proof of the circumstances themselves must be direct, i.e. the circumstances cannot be proved by hearsay. Thus, if the circumstance offered in evidence is the correspondence of the prisoner's shoes with certain marks in mud or snow, the party who has made comparison and measurement must himself be called not a third party, who heard from the measurer of the correspondence, *ib.*, 82. See (*Dr.*) *Jainand v. R.*, A. I. R. 1949 All. 291; 50 Cr. L. J. 498; 1949 A. L. J. 60.

21. *Neel Kanto v. Juggobondho*, (1874) 12 B. L. R. App. 18, 19, per Markby, J., followed in *Karali Prasad Dutta v. E. I. Ry. Co.*, 1928 Cal. 498; 111 I.C. 792: 48 Cr. L. J. 32.

Circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. But in applying the principle, it is necessary to distinguish between facts which may be called primary or basic on the one hand and inference of facts to be drawn from them on the other. In order to make the proof of basic or primary facts, the Court has to judge the evidence in the ordinary way, and in the appreciation of evidence in respect of the proof of the basic or primary facts, there is no scope for the application of the doctrine of benefit of doubt. The Court considers the evidence and decides whether it proves a particular fact or not. When it is held that a certain fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not, and in dealing with this aspect of the problem, the doctrine of benefit of doubt applies, and the inference of guilt can be drawn only, if the proved fact is wholly inconsistent with the innocence of the accused and is consistent only with his guilt.<sup>22</sup>

However, circumstantial evidence has its own limitations. Before acting on that evidence, the Court must first see whether the circumstances put forward are satisfactorily proved and whether the proved circumstances are sufficient to bring home satisfactorily the guilt to the accused. The established circumstances must not only be consistent with the guilt of the accused, but at the same time they must be inconsistent with his innocence. While appreciating circumstantial evidence, the Court should not view in isolation the various circumstances. It must take an overall view of the matter, but without substituting conjectures for legal inference.<sup>23</sup> The circumstantial evidence, however, should be scrutinised properly and must be sufficient to prove the prosecution case beyond reasonable doubt and the facts so proved must be incompatible with the innocence of the accused.<sup>24</sup>

Abandonment of possession is a question of fact and in a large number of cases it can be only inferred or proved from circumstances or circumstantial evidence.<sup>25</sup>

*Distinction between direct and circumstantial evidence.* Evidence is evidence. What is meant by direct evidence and by circumstantial evidence is that as proof one goes directly to establish the culpability of the accused person in the commission of the offence, the other brings the guilt home to him by placing certain circumstances from which the inference is absolutely irresistible that the accused has committed the offence. It is as proof that circumstantial and direct evidence is to be dealt with. Circumstances before or after the occurrence or circumstances going to corroborate the evidence of witnesses do not come within, what is known as circumstantial evidence. Whether the guilt of the accused persons is established or not, in a case where there are eye-witnesses, the question of guilt has to be determined upon the credibility of the evidence of such witnesses and in connection with the belief or disbelief

22. M. G. Agrawal v. State of Maharashtra, (1963) 2 S.C.R. 405: A. I. R. 1963 S.C. 200: 64 Bom. L. R. 773: (1963) 1 Cr. L. J. 235: 1963 S.C.D. 441.

23. Jai Singh v. The State, A. I. R.

1967 Delhi 14: 1967 Cr. L. J. 628.  
24. Razak Khizar v. State, A. I. R. 1967 J. & K. 22: 1967 Kash. L. J. 162: 1967 Cr. L. J. 484.  
25. Man Singh v. Telu, A. I. R. 1967 Punj. 252 (254).

of the evidence of such witnesses other circumstances come in and have got to be considered by the jury, but that is not a question of circumstantial evidence.<sup>1</sup> In the undermentioned case,<sup>2</sup> the Privy Council held that the evidence of certain witnesses was hearsay and, to use the language of the Evidence Act, not relevant, and should be disregarded. Where evidence, such as hearsay, is improperly admitted, the question for the Judicial Committee is whether, rejecting that evidence, enough remains to support the findings.<sup>3</sup>

Every fact need not necessarily be proved by direct evidence. It is sufficient that the evidence adduced is of a clear and convincing nature. Thus, the question whether a particular woman is a prostitute and runs a brothel, need not necessarily be proved by direct evidence, that is, by the testimony of persons who had direct dealings with the woman, it being sufficient that the evidence adduced is clear and convincing.<sup>4</sup>

Apart from relevant facts, showing cause or motive for a crime,<sup>5</sup> which may throw a flood of light and be a very useful adjunct in cases resting upon circumstantial evidence, one species of circumstantial evidence, namely, any statement or conduct of a person indicating a consciousness of guilt made at a time when he is charged with or accused of a crime or thereafter, deserves attention.<sup>6</sup> These circumstances are grouped in standard American treatises on Criminal Evidence like Wigmore, Wharton and Underhill and are equally applicable to our Courts subject of course to the limitations placed by the other provisions of the Indian Evidence Act, Section 25 or Criminal Procedure Code, Section 162.

(a) *Falsehood by accused or suspected persons.* But testimony that the accused has been guilty of falsehood is somewhat unreliable. Its force depends largely upon the temperament, education, experience and habits of life of the accused or suspect.

(b) *Demeanour subsequent to crime.* The movements, appearance and bearing of the accused and his behaviour when charged with the crime or confronted with the consequences of the scene or surroundings of the crime with which he is charged, are always relevant. The familiar examples are that the

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1. Makbul Ahmad Mallik v. Abdul Rahman Ahmad, A. I. R. 1952 Cal. 494; I. L. R. (1953) 1 Cal. 348; 53 Cr. L. J. 944.
2. Narain Das v. Ramanuj Dayal, 25 I. A. 46; I. L. R. (1897) 20 All. 209; 2 C. W. N. 193 (194).
3. Mohur v. Ghuriba, (1870) 6 B. L. R. 495; 15 W. R. (P.C.) 8. As to hearsay, see Kakar Singh v. R., A. I. R. 1924 Lah. 733; 81 I. C. 717; 25 Cr. L. J. 1005.
4. Seetharamamma v. Sambasiva Rao, A. I. R. 1964 A. P. 400; (1968) 2 Andh. W. R. 336.
5. Hanumant v. State of M. P., A. I. R. 1952 S.C. 343; 1953 Cr. L. J. 129; Shreekantiah v. State of Bombay, A. I. R. 1955 S.C. 287; 1955 S. C. A. 283; 1955 S.C.J. 233; Atley v. State of U. P., A. I. R. 1955 S. C. 807; 1955 Cr. L. J. 1653; Gurcharan Singh v. State of Punjab, A. I. R. 1956 S.C. 460; 1956 Cr. L. J. 827; Mangal Singh v. State of M. B., A. I. R. 1957 S.C. 199; 1957 Cr. L. J. 325; Anant Chintaman Lagu v. State of Bombay, A. I. R. 1960 S. C. 500; 1960 Cr. L. J. 682; Rabari v. State of Bombay, A. I. R. 1960 S. C. 748; 1960 Cr. L. J. 1156.
6. Zwinglee Ariel v. State of M. P., A. I. R. 1954 S.C. 15; 1954 Cr. L. J. 230; Pritam Singh v. State of Punjab, A. I. R. 1956 S.C. 415; 1956 Cr. L. J. 805; Sardul Singh Cavasheer v. State of Bombay, A. I. R. 1957 S.C. 747; 1957 Cr. L. J. 1325; Khushal Rao v. State of Bombay, A. I. R. 1958 S.C. 22; 1958 Cr. L. J. 106; Anant Chintaman Lagu v. State of Bombay, A. I. R. 1960 S. C. 500; 1960 Cr. L. J. 682.

accused was very nervous, manifested fear and turned pale on being brought before the prosecutrix or while in custody or attempted or threatened to commit suicide or that he avoided a friend whom he had injured or that he showed callousness towards the victim of homicide when from his near relationship he should be expected to show sorrow.

(c) *Flight and escape.* See illustration (h) to section 8, Indian Evidence Act. But at the same time it cannot be said that flight or attempted flight raises a reasonable presumption of guilt so that an inference of guilt may be drawn therefrom. The departure of the accused may have been prompted by motives consistent with innocence. It is well known that different persons are differently constituted and that some accused persons though innocent deliberately abscond rather than face the ordeal of a criminal trial. He might have absconded as usually happens in this country on the advice of the lawyers not to fall into the hands of the police for fear that confessional statements might be wrong from him or alleged information leading to so-called discoveries might be extorted or fabricated. In the State of Madras, accused persons as soon as they are likely to be arrested are advised by their lawyers to lie low till they gather funds, etc., and then make arrangements for surrendering them before Court and obtaining, if possible, bail. Therefore, though it might be conceded generally that the fact of accused's flight is admissible as evidence of consciousness of guilt, before an adverse inference is drawn the accused's explanation should be obtained and secondly, evidence of flight would amount to nothing more than one of the incriminating circumstances which can be taken into consideration along with other pieces of affirmative evidence.<sup>7</sup>

(d) *Resisting arrest.* Resisting arrest, or assaulting an officer, is evidence of consciousness of guilt. However, it has been held that such evidence is admissible only, if it is affirmatively shown that the accused was aware at the time that he was being lawfully taken into custody. An unlawful arrest can certainly be resisted.

(e) *Fabricating or suppressing evidence.* In *Queen-Empress v. Sam*,<sup>8</sup> it was stated :

"Where an accused person attempted to make evidence for himself by antedating of bond to prove *alibi*, projected a flight by sea, took precautions to conceal his identity, the conduct of the accused was strong evidence indicating from his consciousness of some impending grave danger and shows that he was actuated by a strong desire to escape; and so far as antedating a bond was concerned, it having been done at a time when he was neither pursued nor even suspected, his conduct was all the more significant and important."

Illustration (e) to section 8 is in point.

But at the same time as pointed out in *Tarapada v. Emperor*,<sup>9</sup> a person cannot be convicted merely because he fabricated evidence. When rumours

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| 7. Parmesher Din v. Emperor, A. I. R.<br>1941 Oudh 517; 42 Cr. L. J. 758;                                   | R. 1940 Mad. I: 41 Cr. L. J. 369.                              |
| Chandikaprasad v. Emperor, A. I.<br>R. 1930 Oudh 924; 31 Cr. L. J.<br>1081; In re Kanakasabai Pillai, A. I. | 8. 13 Mad. 426.  |
|   | 9. A. I. R. 1933 Cal. 603; 34 Cr. L.<br>J. 1073; 145 I.C. 814. |

are afloat, connecting a man with a grave and brutal murder, a quite innocent man may behave very foolishly quite like a guilty one and attempt to fabricate evidence in order to see that he is not made to undergo the torture and suspense of a trial for murder.<sup>10</sup>

In any event, the fabrication or suppression of evidence would only be an element of circumstantial evidence to be taken into consideration in assessing the evidence against the accused and would not relieve the prosecution of the burden of establishing their case against the accused.

(f) *Offers of compromise.* In the United States of America, an offer or suggestion to compromise by the accused is admissible in evidence against him in some jurisdictions and excluded in other jurisdictions. But, in India, it is legitimate for an accused to compromise all compoundable offences and in fact it is enjoined upon Courts to promote such friendly adjustments which are best calculated to serve public interest, and even in non-compoundable cases such an offer of compromise may be capable of equivocal interpretation, because even the innocent or semi-innocent may try to purchase off litigation lest worse things might befall them in the gamble of litigation.

(g) *Stifling prosecution or thwarting investigation.* See illustration (e) to section 8. Thus, an adverse inference is often drawn against a suspected person, if he or she refuses to submit to any examination, medical or otherwise.

(h) *Silence of accused under accusation of guilt.*<sup>11</sup> The silence of accused with respect to statements made in his presence which implicate him directly or indirectly may be proved and from his silence an adverse inference may be drawn. In fact silence may sometimes be regarded as a quasi-confession. An innocent person will naturally deny an accusation of crime as a matter of self-preservation and self-defence and as a precaution against prejudicing himself.<sup>12</sup> But, at the same time, there may be many attendant circumstances explaining motives and reasons of silence. The silence of the accused may spring from a variety of motives some of which may be consistent with innocence that silence alone is only right evidence of guilt. The accused might be able to prove that his silence was caused by hyper-sensitivity, tongue-tiedness, threat, fear, duress or other restraining reason or that he kept quiet for reasons of delicacy and that any explanation given by him would only have aggravated the situation and provoked further trouble. Explanations might degenerate into brawls. Silence might be natural, proper, or expedient. Illustration (g) to section 8 is in point though it relates to conduct with reference to civil liability. The question is whether A owes B Rs. 10,000' and that A went away without making any answer are relevant facts in A's presence and hearing 'I advise you not to trust A for he owes me Rs. 10,000' and that A went away without making any answer are relevant facts under Explanation II read with illustration (g); positive silence when the accusation demands an answer is deemed to be relevant conduct and may be construed to amount to an admission. But as pointed out in *Emperor v. Bal Gangadhar*,<sup>13</sup> "It would be a mistake to infer always that a man who does not

10. In re Marudai, A. I. R. 1960 Mad. 370, 373: 1960 Cr. L. J. 1102.

11. See Zwinglee Ariel v. State of M.P., A. I. R. 1954 S.C. 15: 1954 Cr. L. J. 230.

12. "Innocence claims the right of speaking, as guilt invokes privileges of silence"—Bentham.

13. 28 Bom. 479.

repudiate an allegation admits the truth of it. An impertinent statement especially when it is not specifically addressed to an individual but is merely made in his presence and within his hearing, is best answered with a contemptuous silence."<sup>14</sup>

Statements made and things done by the defendant, according to Underhill,<sup>15</sup> which indicates a consciousness of innocence, are generally not admissible except to explain specific testimony introduced by the prosecution to show a consciousness of guilt. Professor Wigmore<sup>16</sup> believes that statements and facts showing a consciousness of innocence should be as readily received as statements and facts showing a consciousness of guilt. But statements indicating consciousness of innocence are excluded on the ground that such evidence would be often false and misleading and developed as they would be after reason to fabricate them had arisen and that suspects and criminals cannot be permitted to manufacture evidence in this way. "Let the accused's whole conduct come in ; and whether it tells for consciousness of guilt or consciousness of innocence let us take it for what it is worth remembering in either case it is open to varying explanations. And it is not to be emphasised. Let us not deprive an innocent person falsely accused, of the inference which common-sense draws from a consciousness of innocence and its natural consequences."<sup>17</sup> So far as the Evidence Act is concerned, an admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission —Section 21 (3), Illustrations (d) and (e) are in point. They are instances of exculpatory subsequent conduct of an accused person influenced by facts in issue. *A* accused of receiving stolen goods, knowing them to be stolen, may prove that he refused to sell them below their value. *A* may prove the self-serving statements because they are not bare statements but are explanatory of conduct. Explanatory statements under section 9 often merged into statements accompanying and explaining acts. Facts necessary to explain a fact in issue or relevant facts....or which rebut an inference suggested by a fact in issue or relevant facts....are relevant in so far as they are necessary for that purpose. See Section 9, Illustration (c). The fact that *A* accused of a crime absconds soon after the commission of a crime is relevant under section 8 ; therefore the explanatory fact that at the time when he left home he had sudden and urgent business at the place to which he went is relevant. Thus, though it is true that there is no illustration attached to section 8 making exculpatory conduct on the part of an accused person relevant, it does not mean that the words in the body of section 8 "that the conduct of any party to any proceeding" are not wide enough to include the conduct of an accused person provable in his favour. Statements under section 8 of the Act are of course subject to sections 24, 25 and 26 of the Evidence Act and to section 162, Cr. P. C. Such an attitude in the words of Wigmore is wholly consistent with itself and is in harmony with the spirit of our law.

The warning given in *R. v. Hodge*,<sup>18</sup> should be always borne in mind. The mind is apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, for the purpose of forcing them to form parts of a connected whole.

14. Emperor v. Damapala, A. I. R. 1937 Rang. 83; 38 Cr. L. J. 524 (F.B.); Hadu v. The State, A. I. R. 1951 Orissa 53: I. L. R. 1950 Cut. 509.

15. Cr. Ev., Ch. 28, p. 957.  
16. Evidence, Vol. I, Sec. 293, p. 384.  
17. Wigmore, *ibid.*  
18. (1838) 2 Lew C.C. 227.

In case, in which evidence is of a circumstantial nature, care should be taken to see that each link in the chain of evidence against the accused is affirmatively forged by the prosecution, secondly, that the chain of circumstances is complete, and thirdly, that the total effect of these circumstances points irresistibly and unmistakably to the guilt of the accused, and is, finally, of such a nature as to exclude every hypothesis except that of his guilt.

Their Lordships of the Supreme Court have laid down these principles in (1) *Hanumant v. State of M. P.*,<sup>19</sup> (2) *Palwinder Kaur v. State of Punjab*,<sup>20</sup> (3) *Kedarnath v. State of West Bengal*,<sup>21</sup> (4) *Ram Bharose v. State of U. P.*,<sup>22</sup> (5) *Deonandan Mishra v. State of Bihar*,<sup>23</sup> (6) *Eradu v. State of Hyderabad*,<sup>24</sup> (7) *Govinda Reddy v. State of Mysore*,<sup>25</sup> and (8) *Anant Chintaman Lagu v. State of Bombay*.<sup>1</sup>

*Circumstantial evidence.* With respect to the comparative weight due to direct and presumptive evidence, it has been said that 'circumstances are in many cases of greater force and more to be depended on than the testimony of living witnesses' inasmuch as 'witnesses may either be mistaken themselves, or wickedly intend to deceive others'....but circumstances and presumptions naturally and necessarily arising out of a given fact cannot lie.<sup>2</sup> Taylor, Section 66, vigorously criticises Mounteney, B.'s dictum. 'In no sense is it possible to say that a conclusion drawn from circumstantial evidence can amount to absolute certainty, or, in other words, that circumstances cannot lie.' It has been observed that 'it is the property of a mass of circumstantial evidence, in proportion to the extent of it, to bring a more and more extensive assemblage of facts under the cognizance of the judge', i. e. a greater surface is exposed for testing.<sup>3</sup> 'On the other hand, it may be observed, circumstantial evidence ought to be acted on with great caution, especially where an anxiety is naturally felt for the detection of great crimes. This anxiety often leads witnesses to mistake or exaggerate facts and juries to draw rash inferences. Not infrequently a presumption is formed from circumstances which would not have been noticed as a ground of crimination but for the accusation itself—such as the conduct, demeanour and expressions of a suspected person, when scrutinised by those who suspect him. And, again, any circumstantial evidence which comes through the medium of witnesses, may, no less than direct evi-documents.

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| <p>19. A. I. R. 1952 S.C. 343: 1953 Cr. L. J. 129; 1952 S.C.J. 509: (1952) 2 Mad. L. J. 631: 1952 S. C. A. 623: 1952 All W. R. (Sup.) 109: 1953 Mad. W. N. 347: 1952 Bh. L. R. (S.C.) 366.</p> <p>20. A. I. R. 1952 S.C. 354: 1953 Cr. L. J. 154: 1952 S. C. J. 545: 1953 All L. J. 18: 1953 S. C. R. 99: 1953 All W. R. (Sup.) 19: 1953 S. C. A. 226: 1953 Mad. W. N. 418; I. L. R. 1953 Punj. 107: 8 D. L. R. (S.C.) 6: 1 B. L. J. 30.</p> <p>21. A. I. R. 1954 S.C. 660: 1954 Cr. L. J. 1679.</p> <p>22. A. I. R. 1954 S.C. 704: 1954 Cr. L. J. 1755.</p> <p>23. A. I. R. 1955 S. C. 801: 1955 Cr. L. J. 1647: 58 Punj. L. R. 171: (1955) 1 Mad. L. J. (S.C.) 31: 1955 B.</p> | <p>L. J. R. 77: (1955) 2 S.C.R. 570: 1956 All L. J. 97: 1956 All W. R. (Sup.) 17: 1956 S. C. J. 41: 1956 S. C. A. 336: 1956 Mad. W. N. 385.</p> <p>24. A. I. R. 1956 S.C. 316: 1956 Cr. L. J. 559.</p> <p>25. A. I. R. 1960 S.C. 29: 1960 Cr. L. J. 137.</p> <p>1. A. I. R. 1960 S.C. 500: 1960 Cr. L. J. 682: (1960) 2 S. C. R. 460: (1960) 2 S.C.A. 62: 1960 S. C. J. 779: 1960 Mad. L. J. (Cr.) 493: 62 Bom. L. R. 371: 1960 Cr. L. J. 682.</p> <p>2. Per Mounteney, B., in <i>Annesley v. Lord Anglesea</i>, (1743) 17 St. Tr. 1139.</p> <p>3. Bentham's <i>Rationale of Judicial Evidence</i>, (1827) Vol. 3, page 251.</p> |
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dence, be discoloured, exaggerated, perverted.<sup>4</sup> The charge of Martin, B. in White (1865) is a strong caution about circumstantial evidence.<sup>5</sup>

**10. Real evidence.** Real evidence sometimes referred to as "physical facts" has been defined as meaning a fact, the existence of which is perceptible to the senses.<sup>6</sup> When it is desired to show the condition or quality of a thing or substance, or its effect in operation the thing itself is the most effective evidence that is available. It may be introduced in evidence as supplementing the testimony of witnesses, or as direct evidence, when properly identified, notwithstanding the fact that it cannot be incorporated in the record.<sup>7</sup> This type of evidence, called real or demonstrative evidence, is the direct presentation to the jury for their inspection of the thing itself, rather than the presentation of words of witnesses describing it.<sup>8</sup> Real evidence may be either the actual or original objects involved in the crime, such as the body of the victim, clothing, the instruments of the crime or it may be objects which have been created, such as photographs, plaster casts. Such evidence is admissible so show the commission of crime charged, to connect the accused with the commission of crime, to show finger-prints, or foot-prints in order to establish the identity of the wrong-doer to illustrate, explain or throw light on the criminal transaction. Demonstrative or real evidence or evidence by inspection is, therefore, such evidence as is addressed directly to the senses of the Court or jury without intervention of testimony of witnesses,<sup>9</sup> as where various things are exhibited in open court. Demonstrative evidence should be admitted only when it is of real assistance and it will not likely to be given undue weight to the jury. It should not be admitted merely to arouse feeling<sup>10</sup> as by unduly exciting antipathy,<sup>11</sup> or sympathy. Inspection may be refused where in the opinion of the Court, the evidence would be likely to mislead the jury or bewilder them with a number of preliminary or collateral issues, where the fact sought to be proved is insufficiently or only remotely connected with the issue. The admission or rejection of demonstrative or real evidence rests largely in the discretion of the trial Court.<sup>12</sup>

**11. Admissions.** The admissions of a person, whose position in relation to property in suit it is necessary for one party to prove against another, are in the nature of original evidence and not hearsay, though such person is alive and has not been cited as a witness.<sup>13</sup> For, the general rule excluding hearsay evidence, does not apply to those declarations to which the party is privy, or to admissions which he himself has made. But, entries in solicitor's books of account regarding the object of a purchase made by them for their client was held to be not hearsay.<sup>14</sup>

4. 1 Phillips, Ev., 10th Ed. 468, See further Starkie, Ev., 4th Ed., p. 838; Best, Ev., 10th Ed., p. 256, Bk. 3, Pt. 2, Ch. 3.
5. Roscoe's Criminal Evidence, p. 21.
6. Vt. Biggie v. Grand Trunk R. Co., 107 A. 126; 93 Vt. 282.
7. People v. Searcey, 121 Cal. 1; 53 P. 359; 41 L. R. A. 157.
8. People v. Gonzalez, 35 N.Y. 49.
9. Garbarsky v. Simkin, 73 N.Y.S. 199; 26 Misc. 195.
10. Patterson v. Howe, 202 P. 225.
11. Selleck v. Janesville, 80 N. W. 944;

- 104 Wis. 570; 76 Am. S. R. 892; 47 L. R. A. 691.
12. Louisville and N. R. Co. v. Pearson, 12 So. 176; 97 Ala. 211; 22 C. J. P. 767.
13. 32 C. J. S., para. 602, p. 454.
14. Ali v. Elayachanidathil, (1882) 5 M. 239.
15. Hari Ram v. Madan Gopal, A.I.R. 1929 P.C. 77; 114 I. C. 565; 1929 A.L.J. 406; 31 Bom.L.R. 710; 49 C. L.J. 335; 33 C.W.N. 493; 57 M.L.J. 581; 1929 M. W. N. 422; 30 L.W. 835.

**12. Affidavits.** A copy of an affidavit is not admissible in evidence when the original is not put in and no case is made out for admission of secondary evidence.<sup>16</sup>

**13. Reputation.** Hearsay evidence amounting to evidence of general repute is admissible for the purpose of proceeding under Chapter VIII of the Criminal Procedure Code.<sup>17</sup> Reputation is the sum-total of the rumours and talks about a man accepted and believed by those who know him well. The evidence of reputation is made up partly of the belief of the deponent and partly of what he heard from others of their beliefs. The distinction between reputation and rumours is well marked, though it may be difficult to say generally where a rumour ends and reputation begins, and the distinction between admissible evidence of reputation and inadmissible hearsay evidence can be stated thus: If the evidence is of those persons who are living in the locality, where the reputation is prevailing and where people talk of their beliefs about him and who themselves believe it, it is admissible. But, if the evidence is of a man who does not know about the reputation himself but has heard it from others, it will be hearsay. In other words, the evidence of those who know the man and his reputation is admissible. Evidence of those who do not know the man, but have heard of the reputation, is not admissible.<sup>18</sup> Although evidence cannot be given that an accused person has been suspected by persons, other than the witness, of having committed a certain offence, that does not mean that a witness cannot be permitted to say that he himself suspected an accused person of having committed a certain offence. Such evidence would, in no sense of the word, be hearsay evidence and would clearly be admissible as forming one of the grounds for his belief that the accused is a habitual offender.<sup>19</sup> The evidence of a Police Inspector that the accused has no ostensible means of livelihood is wholly inadmissible, if it is based, not on his personal knowledge but is the result of inquiries made by him in the course of his official duties.<sup>20</sup> The evidence of repute, which is allowed by this Act, must satisfy the requirements of Section 32 (5) and (6) and Section 50 of the Act. Such evidence must be expressed by the conduct of the person expressing the opinion as to the relationship, who has special knowledge of the existence of the relationship. Mere evidence that an adoptee was known in the village as the son of his alleged adoptive parents is not admissible as being hearsay.<sup>21</sup> Inasmuch as an accused cannot give evidence whilst on his trial, secondary evidence of an identification of a co-accused by him is not admissible.<sup>22</sup> On the same principle, the report of a Probation Officer regarding the previous convictions of the accused, cannot be used against the accused, when the officer himself has not been examined and the report also had not been formally proved.<sup>23</sup>

16. *Hans Raj v. State*, 1966 Cr. L. J. 1132; A. I. R. 1966 H.P. 52.

17. *R. v. Raoji*, (1909) 6 Bom. L. R. 34.

18. *Firangi Rai v. Emperor*, A. I. R. 1933 Pat. 189 at 191, 192; 143 I. C. 687; 34 Cr. L. J. 645; 14 P. L. T. 482 followed in *Baso Rai v. Emperor*, A. I. R. 1948 Pat. 84; 229 I. C. 474; 48 Cr. L. J. 409; 13 B. R. 381.

19. *Emperor v. Kumera*, A. I. R. 1929

All. 650; I. L. R. 51 All. 275.  
20. *Lakman Kurmi v. Emperor*, A. I. R. 1941 Pat. 478; 194 I.C. 295; 42 Cr. L. J. 554; 7 B. R. 747.

21. *U Maung Gyi v. Maung Shwe Thee*, A. I. R. 1941 Rang. 185; 196 I.C. 144.

22. *Khetal v. R.*, 45 A. 300; 24 Cr. L. J. 526; A.I.R. 1923 All. 352; 73 I.C. 62; 21 A. L. J. 143.

23. *Pedru v. State of Kerala*, 1957 Ker. L. T. 633.

**14.** Court's power to admit inadmissible evidence. Under the provisions of Section 165 *post*, the Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness or of parties about any facts, relevant or irrelevant. But it is not open to any Judge to exercise a dispensing power and to admit evidence not admissible by the statute, because to him it appears that the irregular evidence would throw light upon the issue.<sup>24</sup>

**15.** Hearsay in cross-examination. The evidence offered in a Court of Justice is of two kinds : (a) substantive evidence, or evidence of facts necessary and relevant to the determination of the issue ; and (b) evidence of facts affecting the trustworthiness of the media by which the former evidence is presented to the Court, namely, evidence touching the credibility of the witnesses examined. This credibility is the subject of cross-examination. Hearsay is always inadmissible as substantive evidence whether that evidence be elicited in examination or cross-examination. But hearsay may be admissible in cross-examination in so far as it touches the question of the credibility of the witness examined.<sup>25</sup> "The rule against hearsay applies in strictness to the proof of the relevant facts in the course of cross-examination just as much as to their proof by examination-in-chief, that is to say, a party is not entitled to prove his case merely by eliciting from his opponent's witness in cross-examination not his own knowledge on the subject, but what he has heard others say about it, but not verified for himself. The application of the rule is, however, obscured by the fact that the opponent is entitled to test the witness's own conduct and consistency and for that purpose to interrogate him as to statements made to him by other person, so that the party by whom the witness was called is not entitled to exclude the question but only to comment to the jury on the effect and value of the witness's answer. Similar considerations apply with even greater force to the witness's admissions in cross-examination of his own previous statements about the relevant facts."<sup>1</sup>

**16.** Corroboration. Corroboration of a witness, who deposes as to material facts alleged by the prosecution in a murder trial, is desirable and in some cases necessary.<sup>2</sup>

**17.** First proviso. The first proviso, which makes an exception to the general rule analogous to the exceptions made in Section 32, should be read with Section 45 *ante*, and is an alteration of the rule of English law, which does not admit this evidence.<sup>3</sup>

24. Smt. Mohani Dasi v. Paresh Nath Thakur, 1954 Orissa 198: I. L. R. 1954 Cut. 265; 20 C. L. T. 545; Srischandra Nandy v. Rakhalananda Thakur, A. I. R. 1941 P.C. 16 at 20; 68 I. A. 34: I. L. R. 1941 Cal. 468; 193 I. C. 220: 1941 A. W. R. (P.C.) 34: 43 B. L. R. 794: 73 C. L. J. 555: 45 C. W. N. 435: (1941) 1 M. L. J. 746: 53 L. W. 469: 1941 M. W. N. 354: 1941 O. W. N. 572: 22 P. L. T. 286, reversing 41 C. W. N. 1103: 60 C. L. J. 520.  
25. See Ganouri v. R., (1889) 16 C.

210, 211, 215. "This case is, however, no authority for the contention that such evidence (hearsay) is admissible in cross-examination, except under the provisions of Sec. 146 *post*.

1. Wills, Ev., 3rd Ed., 149-150; see Notes to S. 137 *post*.
2. Rajanikant v. State, A. I. R. 1967 Goa 21: 1967 Cr. L. J. 357 (F.B.).
3. Norton, Ev., 200; according to English law, scientific treatises are no evidence, whether the author be producible or not; Collier v. Simpson, 5 C. & P. 74.

*"Treatise"*, meaning of. By a "treatise" is meant, a work dealing specifically with the subject-matter to which the particular question belongs, and it may be read as included in the term appropriate books or documents of reference used in Section 57.<sup>4</sup> The treatise, in order to be admissible, must be one commonly offered for sale; and the author of it must be not producible within the meaning of the section. Strictly the burden of proving these facts will lie upon the person who desires to give such treatise in evidence.<sup>5</sup> Section 45 ante, refers to the evidence of living witnesses given in Court. This section makes scientific treatises and the like, commonly offered for sale, evidence, if the author be dead, or under any of the circumstances specified in Section 32, which render his production impossible or impracticable.<sup>5-1</sup> The Court has thus referred to Taylor's Medical Jurisprudence.<sup>6</sup> In a case in the Madras High Court, it was held, that under this section the Court could consider and act upon the opinions of experts (as contained in the treatises), when dealing with the question whether a child could have been begotten at a certain date.<sup>7</sup> The use of scientific treatises may lead to error, if either those who so use them are themselves not experts in the matter dealt with, or are not assisted by experts to whom passages relied upon may be put. It would not be safe to rely on the books alone without the aid of an expert to whom their alleged effect may be put. Passages in scientific treatises cannot be used by the defence in refutation of the expert's opinion, unless those passages have been put to the prosecution expert and unless notice has been given to him by cross-examination of the deduction which the defence seeks to draw from them, so that he may give an answer, if he can.<sup>8</sup>

In regard to foreign law, Section 38 ante, makes certain books admissible which would not be probably regarded as treatises under this section. And it would be difficult to say that under the words of Section 57 any books on science or art could not be consulted by the Judge without any restriction as to whether any person could be called or not.<sup>9</sup>

**18. Second proviso.** In respect of the second proviso it has already been observed that the production of a chattel is not primary evidence of it. A witness may, therefore, without infringing the rule relating to direct evidence, give evidence with reference to the existence or condition of any material thing, other than a document, without that material thing being produced in Court. This proviso, however, permits the Court, if it thinks fit, to require the production of such material things for its inspection. Under Section 165 also the Judge may, in order to discover or obtain proper proof of relevant facts, direct the production of any document or thing.

4. Cun., Ev., 11th Ed., p. 147.

5. S. 104 post.

5-1. Kandon Soren v. Jitan Hembram, A.

I. R. 1973 Pat. 206

6. Hatim v. R., (1882) 12 C. L. R. 86, 87, 88 followed in Hurry v. R., (1883) 10 C. 140, 142.

7. Howe v. Howe, A. I. R. 1916 Mad. 338; I. L. R. 38 M. 466; 21 I.C. 645; 25 M. L. J. 594; 1913 M. W.

N. 983; 14 M. L. T. 447 (F.B.).

8. Grande Venkata Ratnam v. Corporation of Calcutta, A. I. R. 1919 Cal. 862; 46 I.C. 593; 19 Cr. L. J. 753; 28 C. L. J. 32; 22 C. W. N. 745. See also Rawat Sheo Bahadur Singh v. Beni Bahadur Singh, A. I. R. 1919 Oudh 136; 51 I. C. 419. 9. Markby, Ev., 53.

## CHAPTER V.

### Of Documentary Evidence

#### INTRODUCTION

#### SYNOPSIS

1. Introductory :
  - Superiority of documentary evidence.
  - Best evidence rule.
  - Primary evidence.
  - Secondary evidence.
  - Value of documentary evidence.
  - Kinds of documents.
  - Questions dealt with in the Act.
  - (a) How contents are to be proved?
  - (b) How genuineness is to be proved?
  - (c) Exclusion of oral by documentary evidence.

**1. Introductory.** Documentary evidence means all documents produced for the inspection of the Court,<sup>10</sup> and the definition given of a 'document' is very wide, covering many things which would not be considered documents in the popular acceptation of the word.<sup>11</sup> Aside from real evidence, of which the Court or jury are the original percipient witnesses<sup>12</sup> and evidence of matters of which judicial cognizance is taken,<sup>13</sup> all evidence comes to the tribunal either (a) as the statement of a witness, or (b) as the statement of a document.<sup>14</sup> As the last chapter dealt with the mode of proof in the case of the statements of witnesses, so the present chapter deals with the mode of proof of the statements which are contained in documents. But documents, being inanimate things, necessarily come to the cognizance of tribunals through the medium of human testimony; for which reason some old authors have denominated them dead proofs (*probatio mortua*) in contradistinction to witnesses who are said to be living proofs (*probatio viva*).<sup>15</sup>

**Superiority of Documentary evidence.** The superiority in permanence, and in many respects in trustworthiness, of written over verbal proofs, must have been noticed from the earliest times—*Vox audita perit; litera scripta manet*. The false relations of what never took place; and, even in the case of real transactions, the decayed memories, the imperfect recollections, and wilful misrepresentations of witnesses; added to the certainty of the extinction, sooner or later, of the primary source of evidence by their death,—all show the wisdom of providing some better or at least more lasting mode of proof for matters which are susceptible of it, and are in themselves of sufficient conse-

10. S. 3 ante, Best, Ev., p. 213.

11. v. ib., and Best, Ev., p. 213 where it is suggested that the definition of 'document' might with advantage be narrowed in certain instances to the single case of writing as a means of conveying thought. See also ib., s. 215 et seq., as to the difference bet-

ween actual and symbolical representations, e.g., between writings and models or drawings.

12. v. ante, S. 3

13. v. ante S. 57.

14. Best, Ev., p. 109.

15. ib., s. 216.

quence to overbalance the trouble and expense of its attainment.<sup>16</sup> There is, moreover, often a great difficulty in getting at the truth by means of parol testimony.<sup>17</sup> But, in the case of documents their genuineness may be shown by many facts and circumstances very different from mere oral evidence, and moreover, the witnesses who are to prove a written document cannot resort to that latitude of statement which affords such opportunity of fabrication to purely oral evidence. There are more means of trying the genuineness of a written instrument than there can be of disproving purely oral evidence. For the truth of the transaction may be investigated by reference to the handwriting, to the seal, to the stamps,<sup>18</sup> the description of the paper, the alleged habits of him who is said to have written it,<sup>19</sup> and by a comparison of the circumstance indicated by the document with those which are proved to have actually existed at the date of its execution.

*Best evidence rule.* Documentary evidence is especially valuable, where there is a conflict of oral testimony, as a guide to show on which side the truth lies.<sup>20</sup> Obviously, the value of such evidence might be destroyed, if the rule which required that the best evidence shall be given did not necessitate the production of the document itself, or an accounting for its absence to the satisfaction of the Judge.<sup>21</sup> "One single principle runs through all the propositions

16. Best, Ev., s. 60: "The force of written proofs consists in this, that men have agreed together to preserve by writing the recollection of things past, and of which they were desirous to establish the remembrance, either as rules for their guidance or to have therein a lasting proof of the truth of what they write." Domat cited, ib., s. 217; and see observations of Best, C. J., in Strother v. Barr, (1828) 5 Bing. 136.

17. Per Best, C. J., in Strother v. Barr, (1828) 5 Bing. 136 specially this may be said to be the case in this country; see as to this the remarks of the Judicial Committee in the cases cited in Introduction to Chapter IV ante.

18. Bunwaree v. Hetnarain, (1858) 7 Moo. I. A. 148, 156. There are many instances of discovering a forgery by examining the stamp. Thus, a conveyance purporting to have been executed in 1855 was engrossed on a stamp-paper bearing the Royal Arms of England with V. R. and a Crown above. This paper was manufactured only in 1850 when Queen Victoria assumed the government of India. Previously, the paper in use bore the arms of the East India Company with the letters E.I.C. The forger had erased the letters V. R. and the Crown but he wholly failed to notice the minute device on the arms and the difference of the motto. Again, forgeries may

be detected by the presence or the absence of the distinguishing mark impressed on the stamps from time to time. In many forgeries it is necessary to antedate and it is desirable to make it more difficult for a forger to obtain a stamp with the required date by making the rules relating to vending of stamps more stringent so that stamp vendors are obliged to account strictly for their sales. Though, in theory there is the check of purchaser's name being endorsed on the stamp, in practice it is not effective as fictitious names are used. Too great reliance should not be placed upon apparently ancient documents by reason of the genuineness of the stamp, for it is well known that blank stamped papers may be obtained which extend for very many years past.

19. Bunwaree v. Hetnarain, (1858) 7 Moo. I. A. 148, 156, 157.

20. v. ante, Introd. to Chap. IV ante.

21. See S. 64 post. This rule as applied to documents is as old as any part of the Common Law of England; Taylor, Ev., S. 396 and cases there cited; Best, Ev., p. 15. "The best evidence of which the subject is capable ought to be produced, its absence reasonably accounted for or explained, before secondary or inferior evidence is received"; Ramalakshmi v. Sivanantha, (1872) 14 Moo. I. A. 570, 588; "If the best evidence be kept back, it raises a

relating to documentary evidence. It is that the very object for which writing is used is to perpetuate the memory of what is written down and so to furnish permanent proof of it. In order that full effect may be given to this, two things are necessary, namely, that the document itself should, whenever it is possible, be put before the Judge for his inspection,<sup>22</sup> and that if it purports to be a final statement of a previous negotiation, as in the case of a written contract, it shall be treated as final, and shall not be varied by word of mouth.<sup>23</sup> If the first of these rules were not observed, the benefit of writing would be lost. There is no use in writing a thing down unless the writing is read. So, even if original books of account were in a rotten and tottering condition, secondary evidence is not permissible.<sup>24</sup> If the second rule were not observed people would never know when a question was settled, as they would be able to play fast and loose with their writings."<sup>25</sup>

*Primary evidence.* The Act, therefore, requires that documents must be proved by primary evidence (that is, the document itself produced for the inspection of the Court)<sup>1</sup> except in certain cases specifically mentioned by the Act.<sup>2</sup> It is primarily for the trial Court to decide whether a case has been made out for the reception of secondary evidence. The appellate Court, however, is justified in holding that secondary evidence of a deed is admissible when the lower Court has rejected it.<sup>3</sup> Further, the general rule is that even oral admissions as to the contents of a document are not relevant unless secondary evidence is admissible.<sup>4</sup>

*Secondary evidence.* In dealing, therefore, with documentary evidence, the substantial principles, on which the authenticity and value of evidence rest, should be observed.<sup>5</sup> Thus secondary evidence should not be accepted without a sufficient reason being for the non-production of the original<sup>6</sup> nor should documents be considered as proved because they have not been denied by the opposite side,<sup>7</sup> and the use to which it can legitimately be put should

suspicion that, if produced, it would falsify the secondary evidence on which the party has rested his case"; Strother v. Barr, (1828) 5 Bing. 136.

22. See S. 64 post.

23. See Ss. 91, 92 post.

24. Amrita v. Sripat, A. I. R. 1962 All. 111.

25. Steph. Introd., 171, 172.

1. S. 62 post.

2. Ss. 64-66 post.

3. Rameshwar v. Girwar Prasad, A. I. R. 1917 Pat. 117: 45 I. C. 888; 5 P. L. W. 316, as where all reasonable steps have been taken to produce the document; Atal v. Lal, 49 I.C. 507: A. I. R. 1919 C. 75; and search is fruitless; Jiban v. Manimala, 49 I.C. 1006 : A.I.R. 1919 C. 159.

4. See notes to S. 63 post; but this rule will not apply to admissions made under S. 58 ante; see Shekh Ibrahim v. Parvata, 8 Bom. H.C.A.C. 163 (A party's admission as to the contents of a document not made in the pleadings, but in a deposition, is

secondary evidence and cannot supply the place of the document itself).

5. Ramalakshmi v. Sivanantha, (1872) 14 Moo. I. A. 570, 588; see the judicial criticisms on the laxity of documentary evidence prior to the passing of this Act, in Bunwaree v. Hetnarain, (1858) 7 Moo. I. A. 148, 168; Unide v. Pemmasamy, (1858) 7 Moo. I. A. 128, 137; The provisions of the Act must now, however, be strictly observed; Ram v. Raghunandan, (1885) 7 A. 738. Ramalakshmi v. Sivanantha, (1872) 14 Moo. I. A. 570, 588; Ram v. Gordon, (1872) 14 Moo. I. A. 461; S. 64 post; Syud Abbas v. Yadeem, (1843) 3 Moo. I. A. 156.

6. Kirteeash v. Ramadhan, 1867 B. L. R. 658 (F.B.); Reazonisa v. Bookoo, (1869) 12 W. R. 267, 268. Every document must first be started by some proof or other before the person who disputes that document can be considered in any way bound by it.

be kept in view. Thus a document may be relevant to affect a person with knowledge of its contents, whether true or false, without being relevant to prove the truth of its contents.

*Value of documentary evidence.* And notwithstanding the general value of documentary evidence, regard must be had to the habits and customs of the people of this country, and their well-known propensity to forge any instrument which they might deem necessary for their interest and the extreme facility with which false evidence can be procured from witnesses. Under such circumstances the probability or improbability<sup>8</sup> of the transaction forms a most important consideration in ascertaining the truth of any transaction relied upon.<sup>9</sup> The use of fabricated written evidence by a party, however clearly established, does not relieve the Court from the duty of examining the whole of the evidence adduced on both sides, and of deciding according to the truth of the matters in issue.<sup>10</sup> The presumption against the party using such evidence must not be pressed too far, especially in this country where it happens not uncommonly, that falsehood and fabrication are employed to support a just cause.<sup>11</sup> In addition to guarding against fraud, care must be taken that the documentary evidence is in itself admissible, lest documents which are not strictly evidence at all should be used to prop up oral evidence too weak to be relied on.<sup>12</sup>

*Kinds of documents.* Documents are of two kinds: public and private. Under the former come Acts of the Legislature, judgments and acts of Courts, Proclamations, public books, and the like. They are also divided into 'judicial' and 'non-judicial'; and also into "writings of records" and "writings not of records".<sup>13</sup> Public documents other than those mentioned in the section are private.<sup>14</sup> The Civil and Criminal Procedure Codes regulate the production of documents,<sup>15</sup> and the discovery, admission and inspection of documents in civil cases,<sup>16</sup> and admission of documents in criminal cases.<sup>17</sup>

*Questions dealt with in the Act.* There are three distinct questions which are dealt with in the Act in regard to documentary evidence: (a) first, there is the question how the contents of a document are to be proved; (b) secondary, there is the question how the document is to be proved to be genuine; (c)

8. v. ante; see S. 3; R. v. Hedger, 131; Raghunatha v. Brozo, (1875) 3 I. A. 175, 176; Bunwaree v. Hetnarain, (1858) 7 Moo. I. A. 148, 155, 166, 167, 168; Mudhoo v. Surroop, (1849) 4 Moo. I. A. 441; Chotey v. Ratan, (1894) 22 I. A. 23, 24; Hurrichurn v. Monindra, (1891) 19 I. A. 4; Wise v. Sundloonissa, (1867) 11 Moo. I. A. 187, 188; Edum v. Bechun, (1869) 11 W. R. 345.

9. Bunwaree v. Hetnarain, (1858) 7 Moo. I. A. 148, 155.

10. Goriboola v. Gooroodas, (1865) 2 W. R. 99; Sevvaji v. Chinna, (1864) 10 Moo. I. A. 151.

11. See cases cited in Sevvaji v. Chinna, (1864) 10 Moo. I. A. 151.

12. Eckowrie v. Heeralal, (1868) 11 W.

R. (P.C.) 2.  
13. Best, Ev., S. 218; see S. 74 post.  
14. 3. 75 post.  
15. Civ. P. C., Order VIII, rules 14–18; Order XI, rules 14–23; Order XIII. The Court may send for papers from its own records or from other Courts, ib. Order XIII, rule 10, the provisions as to documents are applicable to all other material objects, ib., Order XIII, rule 11. As to the production of documents and other movable property in criminal cases, see Cr. P. C., Chap. VII. As to applications in respect of endorsements made on exhibits, see Rattan v. Chotey, (1894) 21 C. 476.  
16. Civ. P. C., Orders XI, XII, XIII.  
17. Cr. P. C., 1973, Sec. 294.

thirdly, there is the question how far and in what cases oral evidence is excluded by documentary evidence.

(a) *How contents are to be proved?* The first question is dealt with in Sections 61–66 and is also affected by Sections 59 and 22. Taking Section 59 with Sections 61 and 64, the result may be stated as follows: The contents of a document must, in general, be proved by a special kind of evidence called primary evidence; but there are exceptional cases in which such contents may be proved otherwise. Evidence used to prove the contents of a document which is not primary is called secondary. Primary evidence is said (Section 62) to be the document itself produced for the inspection of the Court. Later on, in the section, this is called the original document. The contents of public documents being provable in a particular manner, this matter is dealt with separately in Sections 74–78. The question, how far witnesses may be cross-examined, as to written statements made by them, without producing the writings is dealt with by Section 145 post.

(b) *How genuineness is to be proved?* Besides the question, which arises as to the contents of a document, there is always the question, when it is used as evidence, is it what it purports to be; in other words, is it genuine? The signature or writing, sealing or mark and attestation where the latter is a necessary formality of execution, must be proved. This matter is dealt with in Sections 67–73. Lastly, the chapter deals (Sections 79–90) with the presumptions which the Courts are enabled or directed to make in respect of certain documents, specified classes of documents tendered in evidence before them.

(c) *Exclusion of oral by documentary evidence.* The exclusion of oral by documentary evidence is the subject-matter of the next chapter to the Introduction to which the reader is referred.<sup>18</sup>

61. *Proof of contents of documents.* The contents of documents may be proved either by primary or by secondary evidence.

#### SYNOPSIS

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| 1. Documents.<br>2. Meaning of "primary" and "secondary" evidence. | 3. Objection to mode of proof—When to be taken. |
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1. *Documents.* Reference should be made to the definition given in the third section. Exchequer tallies and wooden scores used by milkmen and bakers have been included in the term.<sup>19</sup> So also an inscription on a ring,<sup>20</sup> or coffin plate<sup>21</sup> and perhaps a direction on a parcel.<sup>22</sup> On the other hand, it has been held in England that inscriptions on flags and placards exhibited to public view and of which the effect depends upon such exhibition, bear the character rather of speeches than of writings and are not subject to the rules relating to documents.<sup>23</sup>

18. Markby, Ev., 56, 57, 60.

19. Best, Ev., s. 215.

20. R. v. Farr, 4 F. & F. 366.

21. R. v. Edge, Wills Cir. Ev., 7th Ed. 319, 353, per Maule, J. (the plate being removable).

22. R. v. Fenton cited in 3 B. & C.

760; per Parke, B. R. R. Co. v. Maples, 63 Ala. 601 (Amer.); contra: Burrell v. North, 2 C. & K. 680; Com. v. Morrel, 99 Mass. 542 (Amer.).

23. R. v. Hunt, (1820) 3 B. & Ald. 566; Phipson, Ev., 11th Ed., 738.

But, in the undermentioned case, it has been held that a sealed packet is a document and therefore liable to production upon a *subpoena duces tecum*, even when it has been confined to a banker upon the terms that he should not part with it without the depositor's consent.<sup>24</sup> In one sense, the Court is bound to consider any document which is tendered before it for the purpose of being *admitted in evidence*, but that is a different thing from *considering it as evidence*. If that distinction is kept in mind, it will be clear that documents should not be tendered with the written statement, but should be tendered separately for admission in evidence and it will then be open to the Court to decide whether such documents require proof before they can be admitted in evidence, but the Court should not accept other documents as part of the written statement.<sup>25</sup>

**2. Meaning of "primary" and "secondary" evidence.** The contents of documents may, unless admitted,<sup>1</sup> be proved either by primary or secondary evidence. "Primary" and "secondary" evidence means this: Primary evidence is evidence which the law requires to be given first; secondary evidence is evidence which may be given in the absence of better evidence which the law requires to be given first, when a proper explanation is given of the absence of that better evidence.<sup>2</sup> Primary evidence of a document is defined by the Act to mean the document itself, produced for the inspection of the Court.<sup>3</sup> Thus, where the report of a doctor is relied upon, it is primary evidence and ought to be produced.<sup>4</sup> Secondary evidence is defined by Section 63. This section lays down that "the contents of documents may be proved either by primary or secondary evidence" within the meaning given to those terms in the Act; and this rule means that there is no other method allowed by law for proving the contents of documents. Whatever the law may have been upon the subject before the passing of this Act the rules contained in this enactment must now be strictly observed.<sup>5</sup>

The words "contents of documents" have to be carefully construed. Thus, in a mortgage, both the *factum* of its execution and the passing of consideration may not be designated as "contents of documents". Hence proving the *factum* of a mortgage is not the same as proving the terms of the mortgage; nor is proving the consideration for a mortgage the same as proving the terms of a mortgage.<sup>6</sup>

The evidence of the contents contained in a document is hearsay evidence unless the writer thereof is examined before the Court. Any attempt to prove the contents of a document by proving the signature or the handwriting of the author thereof will set at naught the well-recognised rule against admission of hearsay evidence.<sup>7</sup>

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| <p>24. R. v. Daye (Div. Court), (1908) 2 K. B. 333.</p> <p>25. Emperor v. Tuti Babu, A. I. R. 1946 Pat. 373; I. L. R. 25 Pat. 33; 226 I.C. 404; 47 Cr. L. J. 37; 12 B. R. 751.</p> <p>1. See Jai Gopal Singh v. Divisional Forest Officer, A. I. R. 1953 Pat. 310; 54 Cr. L. J. 1660; 1 B. L. J. 199.</p> <p>2. Per Lord Esher, M. R. in Lucas v. Williams &amp; Sons, (1892) L. R. 2 Q. B. 113, 116; and see Taylor, Ev., S. 394.</p> | <p>3. S. 62, post.</p> <p>4. Mohammad Ikram Hussain v. State of U. P., A. I. R. 1964 S. C. 1625; 1964 I.S.C.D. 328; I. L. R. (1964) 2 All. 423; (1964) 5 S. C. R. 86.</p> <p>5. Ram v. Raghunandan, I.L.R. (1885) 7 A. 738, 743.</p> <p>6. Panchia v. Harnath, I. L. R. 8 Raj. 459.</p> <p>7. M. Yusuf v. D., I. L. R. 1966 Bom. 420; 68 Bom. L. R. 228; 1967 Mah. L. J. 65; A. I. R. 1968 Bom. 112 (118).</p> |
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Recitals as to legal necessity in a document cannot be relied upon for the purpose of proving the assertions of fact that they contain. If the deeds were challenged at the time or near the date of their execution so that independent evidence would be available, the recitals would deserve but slight consideration and certainly should not be accepted as proof of the facts.<sup>8</sup>

An inspection report pertaining to a motor vehicle after an accident is not admissible in evidence unless proved in the manner required.<sup>9</sup>

**3. Objection to mode of proof—When to be taken?** Objection as to the mode of proof of the contents of a document should be raised before the court admits it on record by marking it as an exhibit.<sup>10</sup>

**62. Primary evidence.** Primary evidence means the document itself produced for the inspection of the Court.

*Explanation 1.* Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

*Explanation 2.* Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

#### *Illustration*

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

#### SYNOPSIS

1. Primary evidence:  
—Explanation 1.

—Explanation 2.

**1. Primary evidence.** "Primary evidence" means the document itself produced for the inspection of the Court. A written statement, filed in Court on behalf of an accused is not a document produced for the inspection of that Court.<sup>10</sup> Where a judgment originally written in English was translated into Urdu and the Judge signed the translation, it was held that the

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| 8. Banga Chandra Dhur Biswas v. Jagat Kishore Achariya Chowdhuri, A. I. R. 1916 P. C. 110 (III); Jayarun Bibi v. Kashim Khan, (1966) 8 O. J. D. 94 (100).  | M. P. W. R. 57.   |
| 9. Ram Dulare Shukla v. Nawab Ahmed Yar Khan, 1970 Jab. L. J. 626 (629); 1969 M. P. L. J. 922; 1970 9-1. S. C. Gupta v. Madan Lal, 1973 A. W. R. (H.C.) 472; 1973 A. L. J. 635; 1974 R. C. R. 104. |   |
|  | 10. Emperor v. Tuti Babu, A. I. R. 1946 Pat. 373; I. L. R. 25 Pat. 33; 226 I. C. 404; 47 Cr. L. J. 937; 12 B. R. 751. |

translated judgment was primary evidence of its contents.<sup>11</sup> An anonymous letter is no evidence, primary or secondary, of its contents.<sup>12</sup> As the law requires that the particulars of a claim should be embodied in the decree, recitals of the contents of a plaint made in a decree are not secondary evidence of the contents of the plaint but are admissible as primary evidence of the statement of facts made to the Judge as the basis of the plaintiff's claim.<sup>13</sup> Written receipts for payments are important, but by no means necessary as proof; nor are they of the nature of primary evidence, the loss of which must be shown in order to let in secondary evidence.<sup>14</sup>

If accounts be merely memoranda and rough books from which regular accounts are prepared, the former, it has been said, can hardly be treated as the original account.<sup>15</sup> Though different classes of books of account may, and in fact in the larger number of instances must, deal with the same matter, it does not follow that one only of such classes constitutes the original document. So, where entries in a ledger were tendered and it was objected that the ledger was secondary evidence, being merely a copy of the cash-book, the Court admitted the ledger entries.<sup>16</sup>

The document produced in evidence must be one which can be designated as primary evidence. Besides, it must not have any serious defects which may cause prejudice to the other side. In *Raj Kishan v. State*,<sup>17</sup> there was a serious defect in the report of the Government Analyst and it was that full protocols of the test were not supplied. The report was in the prescribed form but all the headings were not fully answered. The report contained only the result of the test or analysis. It could not be said to be a report "in the prescribed form". There were substantial omissions which went to the root of the existence of the report "with prescribed form" and could not be treated as evidence of the facts stated therein. It was held that under these circumstances the Government Analyst must himself have been examined to prove his opinion. Otherwise the case could not be proved against the accused.

The admission of the existence of a document (as registered deed of trust dated January 18, 1879) gives to the secondary evidence furnished by the certified copy the character of primary evidence.<sup>18</sup> Similarly where original sale deed is lost, admission of execution of sale deed by the vender in mutation proceeding becomes primary evidence.<sup>18-1</sup>

Where a witness stated that he was on patrol duty at a particular time and produced a command certificate in support of his statement, his oral evidence was primary evidence and the certificate only a corroborative one.<sup>18-2</sup>

- 11. *Jai Gopal v. Sheo Sagar*, 4 I. C. 579.
- 12. *Ayyamperumal Pillai v. Emperor*, A.I.R. 1925 Mad. 879; 91 I.C. 50; 27 Cr. L. J. 18; 1925 M. W. N. 319; 22 L. W. 405.
- 13. *Mahomed v. Bhuggobutti*, Appeal from original decrees, Cal. H. C. No. 303 of 1897 (25th June, 1900) as to the statement of a witness deposing, that another person gave evidence being primary evidence. See *Haranund v. Ram*, cited in notes to S. 65 post.
- 14. *Rameshwari v. Bharat*, (1899) 4 C. W. N. 18.
- 15. *Raja Peary v. Narendra*, (1905) 9 C. W. N. 421; see S. 34 ante.
- 16. *Megraj v. Sewnarain*, (1901) 5 C. W. N. cclxxviii.
- 17. A. I. R. 1960 A. 460; 1960 A. L. J. 43.
- 18. *Lakshmi Kanto Roy v. Nishi Kanto Roy*, 71 C. W. N. 362 (372).
- 18-1. *Bagga Singh v. Darbara Singh*, (1971) Rev. L. R. 357 (Punj.).
- 18-2. *Sri Buti Kunwra v. State of Orissa*, (1975) 41 C. L. T. 167.

*Explanation 1.* The first portion of the first Explanation of Section 62 refers to what are known as duplicate, triplicate or the like, originals. The expressions "executed in parts" and "in counterparts" refer to the mode in which documents are sometimes executed. It is convenient sometimes that each party to a transaction should have a complete document in his own possession. To effect this, the document is written out as many times as there are parties and each document is executed—that is, signed or sealed as the case may be—by all the parties. No one of these is more the original than the other, and any one of them may be produced as primary evidence of the contents of the document. When an instrument is executed by all the parties in duplicate or triplicate, and each party keeps one, each instrument is treated as an original, and each is primary evidence of all the others.<sup>18-3</sup> When each of the instruments is signed by one party only, and each delivers to the other, the documents are termed 'counterparts' and each is primary evidence against the party executing it, and those in privity with the executing party, and secondary evidence<sup>19</sup> as against the other parties,<sup>20</sup> "even though the original alone is impressed with a stamp of higher denomination".<sup>21</sup> Execution in counterpart is a method of execution adopted when there are two parties to the transaction. Thus if the transaction is a contract between A and B, the document is copied out twice, and A alone signs one document, whilst B alone signs the other. A then hands to B the document signed by himself and B hands to A the document signed by himself. Then as against A the document signed by B is primary evidence; whilst as against B the document signed by B is primary evidence.<sup>22</sup> It is, however, essential that each of the instruments should have been duly signed by the party bound by it.<sup>23</sup>

*Explanation 2.* "A printed paper does not differ from a written one, in respect of both being copies; they can alike, therefore, only be received as secondary evidence of the original under such circumstances as render secondary evidence admissible; for instance, if the original is shown to be lost or destroyed, or to be in the possession of the opposite party, notice having been given to produce it. There is no more guarantee for a printed copy being a true copy than a written one; indeed being a copy at all. But there is a far better guarantee for a number of printed papers struck off from the same machine at the same time being correct facsimiles of each other, than a number of written papers; for here the draftsman or draftsmen may introduce differences impossible with the machine. In this case, each machine-made copy is accepted as primary evidence of all the others, *inter se*, and not of the original from which they were copied; for instance, if it is desired to prove the publication of a libel in a newspaper, any copy of the issue in which the libel appeared would be primary evidence of publication in all the other copies of that issue. But if it were necessary to prove the original libel from which the article was set up, the printed paper would not be primary, but only secondary, evidence of the manuscript and admissible only under the conditions which render the reception of secondary evidence admissible."<sup>24</sup>

18-3. See Jayaram Iyer v. S. Ramanatha Iyer, (1976) 1 M. L. J. 185: 89 L. W. 30 (dissolution of partnership copies signed by all parties).

19. S. 63, clause (4).

20. Taylor, Ev., s. 426; Norton, Ev., 241, 252, S. 62.

21. Kruttivasa v. Malati, A. I. R. 1959 L. E.—197

Orissa 113.

22. Markby, Ev., 57; Phipson, Ev., 9th Ed., 559.

23. Kathihar Jute Mills v. Calcutta Match Works, A. I. R. 1958 Pat. 133.

24. Norton, Ev., 242, and see R. v. Watson, 32 How. St. Tr. 82.

Where a number of documents are all made by one uniform process as in the case of printing, etc., each is primary evidence of the contents of the rest, but where they are all copies of a common original, they are not primary evidence of the contents of the original. From this it follows that one specimen of a newspaper is not a copy of another specimen of the same newspaper of the same date. There is no relation between them of copy and original. They are all counterpart originals, each being primary evidence of the contents of the rest.<sup>25</sup> In order to bring a document within the meaning of this explanation the whole document with the signature must have been made by one uniform process.<sup>1</sup> Each of a number of printed leaflets (notices) printed at one time from one original is primary evidence of the contents of other leaflet.<sup>2</sup>

63. *Secondary evidence.* Secondary evidence means and includes—

- (1) Certified copies given under the provisions herein-after contained;<sup>3</sup>
- (2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
- (3) Copies made from or compared with the original;
- (4) Counterparts of documents as against the parties who did not execute them;
- (5) Oral accounts of the contents of a document given by some person who has himself seen it.

#### *Illustrations*

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

25. Ram Chandra v. Emperor, A. I. R. 1930 Lah. 371; 120 I. C. 798; 31 Cr. L. J. 168.

1. Sivasankaram Pillai v. Agali Narayana Rao, A. I. R. 1937 Mad. 807; (1937) 2 M. L. J. 581; 1937 M.

W. N. 746; 46 L. W. 437.

2. Chhaganram v. Nagin Lal, I.L.R. 1966 Guj. 900: (1966) 7 Guj. L. R. 993 (1000).

3. See Sec. 76 post.

|                                 |                  |
|---------------------------------|------------------|
| s. 3 ("Document.")              | s. 3 ("Proved.") |
| s. 3 ("Evidence.")              | s. 3 ("Court.")  |
| ss. 76–78 ("Certified copies.") |                  |

Steph. Dig., Arts. 63–64; Taylor, Ev., ss. 15–45, 394, 426; 550–553 cited and ib. Index sub voc. ('Primary Evidence' and 'Secondary Evidence'), Norton, Ev., 241.

### SYNOPSIS

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|--|--|
| 1. Secondary evidence.                                   | original (Third clause).                       |
| 2. Certified copies (First clause).                      | 5. Counterparts (Fourth clause).               |
| 3. Copies made by mechanical process<br>(Second clause). | 6. Oral account of contents (Fifth<br>clause). |
| 4. Copies made from or compared with                     | 7. No degree in secondary evidence.            |

**1. Secondary evidence.** The section is exhaustive of the kinds of secondary evidence admissible under the Act. Where, therefore, the terms of a document were sought to be proved by a judgment containing a translation thereof in a suit which was not between the same parties or their representatives-in-interest, it was held that neither the translation of the document nor the statement in the judgment was secondary evidence of the contents of the document.<sup>4</sup>

Drafts of award of an arbitrator do not come within any of the clauses of the section for the drafts are not copies from the original. Nevertheless, the drafts can be called secondary evidence only when they are shown to be accurate copies of the original. A piece of paper cannot be admitted as secondary evidence of the contents of a document by simply calling it a draft.<sup>5</sup> The copy of the original letter addressed by the Government to the Deputy Commissioner, prepared privately from the original at the time of inspection of the relevant file, is not admissible as secondary evidence of the original letter. If, for some reason, the original letter could not be produced, the only way of proving it would be production of a certified copy thereof.<sup>6</sup>

Secondary evidence, as a general rule, is admissible in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party who files it to prove it to be valid, the same party, is not entitled to introduce secondary evidence of its contents. An admission cannot be made use of as secondary evidence of a document inadmissible in evidence for want of stamp or registration. The Court cannot allow admissions to be used as secondary evidence of the contents of a document when the document put forward as an original is found to be forgery. Even written admissions must be classed as secondary, not primary evidence of the contents of a document so that proof of the original having been duly executed is indispensable. The provision for receiving written admissions as proof of the

4. Jagannatha v. Secretary of State, A. I. R. 1922 Mad. 334; 70 I.C. 107; 43 M. L. J. 37; 1922 M. W. N. 432; 16 L. W. 11; Hafiz Muhammad Suleman v. Hari Ram, A. I. R. 1937 Lah. 370; 39 P. L. R. 602; but see P. K. Kalliani v. M. T. Narayanan, A. I. R. 1915 Mad. 962; 28 I. C. 69; 28 M. L. J. 266; 1915 M. W. N. 105; Ratipal Singh v. Udai Bhan Pratap Singh, A. I. R. 1919 Oudh 343; 53 I. C. 667;

see also Bahadur Singh v. Madho Singh, A. I. R. 1916 Oudh 161; 36 I.C. 696, where admissions were held to be secondary evidence of document.

5. Girdhar Prasad v. Ambika Prasad Thakur, 1969 B. L. J. R. 1096; 1969 P. L. J. R. 82; A. I. R. 1969 Pat. 218 (224).

6. Nurmahamed v. Md. Abdul Karim, A. I. R. 1970 Manipur 7 (8).

contents of a document, is confined to cases where the original is in existence and might be, but is not, produced.<sup>7</sup>

A statement of a witness abstracted in a judgment given in a previous suit cannot be made use of in lieu of the original statement itself. If a party wants to prove what a witness has said in the previous suits, he can do so only by the production of the original deposition or a certified copy of it.<sup>8</sup> Where a sale-deed is not available, copies of mutation order and entries in Jamabandi based on that sale-deed are not admissible as secondary evidence of the sale-deed.<sup>8-1</sup>

Section 65 permits secondary evidence only where the original document has been destroyed or lost. There must, therefore, be sufficient proof of the search for the original to render secondary evidence admissible. The trial Court must not accept the loss of the document as a fact without taking into consideration the prerequisite conditions that are required by this Act, namely, that the Court must be satisfied that the document existed, that the loss or destruction has in fact taken place and that reasonable explanation of this has been given.<sup>9</sup>

**2. Certified copies.** (First clause). A certified copy is a copy signed and certified as true by the officer to whose custody the original is entrusted; and it is admitted, in the same way, upon the credit of such officer without examination with the original.<sup>10</sup> Section 76 enables certified copies of public documents to be given; and such documents may be proved by the production of a certified copy.<sup>11</sup> Certain other official documents especially designated may be also proved by certified copies.<sup>12</sup> The certified copy of a document (in the instant case, a secret G.O.) can be used without formal proof.<sup>13</sup> Section 79 deals with the presumption as to the genuineness of certain certified copies, and Section 86 as to certified copies of foreign judicial records. And the Civil Procedure Code,<sup>14</sup> now gives the Court power to order production of verified copies of entries in business books instead of the originals, when inspection of the latter has been demanded. A copy of the office copy of a sale-deed issued by an Official Receiver, is only a copy of a copy and cannot be taken to be a certified copy.<sup>15</sup>

**3. Copies made by mechanical process (Second clause).** The copies must be made from the original by such mechanical processes as in themselves insure the accuracy of the copy, such, for example, as the processes mentioned in the Second Explanation, Section 62.<sup>16</sup> Where the original of a report,

7. Per Spencer, J., in P. K. Kalliani v. M. T. Narayanan, A. I. R. 1915 Mad. 962; 28 I. C. 69; 28 M. L. J. 266; 1915 M. W. N. 105.
8. Suradamba v. Pattabhiramayya, A. I. R. 1931 Mad. 207; I. L. R. 53 Mad. 952; 129 I. C. 463; 60 M. L. J. 13; 1930 M. W. N. 601; 33 L. W. 20. See also Ramsunder Gope v. Haribala, A. I. R. 1917 Cal. 700; 37 I. C. 911; Surya Narayan v. Ratanlal, A. I. R. 1952 Hyd. 34.
- 8-1. Bagga Singh v. Darbara Singh, (1971) Rev. L. R. 357 (Punj.).
9. Parekh Brothers v. Kartick Chan- dra Saha, A. I. R. 1968 Cal. 532 (536).
10. Phipson, Ev., 11th Ed., p. 747.
11. S. 77 post.
12. S. 78 post.
13. Chaji Lal v. Town Area Committee, 1970 A. W. R. (H.C.) 69.
14. Order XI, rule 19, C. P. C.
15. Ramagopal Naicker v. Muthukrishna Ayyar, 1957 Mad. 1.
16. Cf. S. 35, Act. II of 1855. "An impression of a document made by a copying machine shall be taken without further proof to be a correct copy".

which is typed to dictation, is lost, and a copy of it, which is neither a carbon copy nor a copy compared with the original, is tendered in evidence, the copy is not secondary evidence of the original.<sup>17</sup> Illustration (a) must be read with the first portion of this clause. It means that, provided it can be shown that the original which is sought to be proved was really photographed, such photograph will be receivable as secondary evidence. The negatives and the photographic prints are secondary and not primary evidence of the original.<sup>18</sup> Illustration (b) must be read with the second portion of this clause and means that a copy (compared) is receivable as secondary evidence of the original and cannot be rejected as being a copy of a copy.<sup>19</sup> A copy of a copy is admissible in evidence if it has been compared with the original, or a copy of the original is taken out by means of mechanical process.<sup>20</sup> The reason of this rule is, that the accuracy of the first copy being insured by the mechanical process, it is not necessary to compare it with the original which it will be taken to correctly reproduce; but there is ordinarily no such guarantee, or at least not an effective one, in the case of copies taken from such first copy and they must therefore be proved to have been compared with it before they will be receivable as secondary evidence of the original. An oral account of a photograph or a machine copy of the original is not secondary evidence of the original.<sup>21</sup> So also, a carbon copy of a search list, with certain ink writings on it, is not admissible, if the whole of it could not have been made by one uniform process.<sup>22</sup> In regard to reliability of carbon copies for comparison of signature, see *Nityananda v. Rashbehari*.<sup>23</sup>

The accuracy of photographic copies, particularly of external objects as shown in the photograph, is to be established on oath to the satisfaction of the Court, either by the photographer or someone who can speak to their accuracy.<sup>24</sup> Only when the photographer deposes to his having photographed the document and developed it into the negative, the negative can be said to have been proved. Such evidence is all the more necessary where a photo enlargement is relied upon.<sup>24-1</sup>

In a case where photostat copy of a document was filed and the opposite party endorsed upon it "This may be received in evidence", the Kerala High Court held that foundation was not laid in the evidence to show that the requirement of the proof of accuracy of the photographic copy or its having been compared with or being true reproduction of the original. It is submitted that this view requires reconsideration. All that this clause requires is that the mechanical process should be such as to by itself ensure the accuracy of the copy. Photography is such a process. Only photographer may have been required to be produced to prove that he took the photograph but that necessity seems to have been dispensed with when the opposite party endorsed consent to the photostat copy being admitted in evidence. It is

- 17. R. M. Pandye v. Automobile Products of India, A. I. R. 1956 Bom. 115.
- 18. See Brahma Shumshere Jang Bahadur v. Chartered Bank of India, A. I. R. 1956 Cal. 399.
- 19. Norton, Ev., 243.
- 20. Rahimuddin v. Nayan Chand, A. I. R. 1950 Assam 18.
- 21. Illust. (d).
- 22. Makhan Lal v. State, A. I. R. 1958 Cal. 517.
- 23. A. I. R. 1953 Cal. 465; 89 C. L. J. 204; 54 Cr. L. J. 1108.
- 24. Latino Andrew Henriques v. Union Government, New Delhi, A. I. R. 1968 Goa 132 (197).
- 24-1. Laxman Ganpati v. Ansuya Bai, A. I. R. 1976 Bom. 264.

another matter that the secondary evidence might be rejected on the ground that the reasons for non-production of the primary evidence were not established, but in the circumstances of the case non-acceptance of the photostat as a piece of secondary evidence does not appear to be justified.<sup>24-2</sup>

**4. Copies made from or compared with original. (Third clause).** See illustration (c). In the first case here put, the party who made the copy can swear to its being a true copy. If he is not produced, then a witness must be called who can swear to his own comparison; or, as sometimes, two witnesses, one of whom read the original, while the other read the copy or the reverse. But it will save time and trouble to have the comparison made by one and the same person.<sup>25</sup> Where the person who is alleged to have made the copy, and the person who is alleged to have compared it with the original, are both dead, and their signatures only are proved by one acquainted with their handwriting, the copy is not proved to have been made from, or compared with, the original, and is inadmissible in evidence.<sup>1</sup> Reading together the second and third clauses and illustrations (b) and (c), it will appear that a copy of a copy is admissible in evidence if it has been compared with the original or a copy of the original taken out by means of mechanical process.<sup>2</sup> Copy of a copy, i.e., a copy transcribed and compared with a copy is inadmissible<sup>3</sup> unless the copy with which it was compared was a copy made by some mechanical process which, in itself, insures the accuracy of such copy.<sup>4</sup> A copy of a copy is inadmissible if the man who made the copy is not produced.<sup>5</sup> But copies of copies kept in a registration office, when signed and sealed by the registering officer, are admissible for the purpose of proving the contents of the originals.<sup>6</sup> The correctness of certified copies will be presumed,<sup>7</sup> but that of other copies will have to be proved. This proof may be afforded by calling a witness who can swear that he has made the copy, or a

24-2. I. L. R. (1974) 2 Ker. 150.

25. Nityananda v. Rashbehari, A. I. R. 1953 Cal. 465; 54 Cr. L. J. 1108; see also Ralli v. Gau, (1883) 9 C. 943, 944.

1. Narendra Chandra De v. Rajindra Chandra Chanda, A. I. R. 1941 Cal. 506; 197 I. C. 45; 73 C. L. J. 159; 45 C. W. N. 654; Suganchand v. Balchand, A. I. R. 1957 Raj. 89.

2. Hanuman Bux Agarwala v. Bibhuti Prasad Singh, A. I. R. 1950 Assam 17; Smt. Krishna Subala Bose v. Dhanapati Dutta, A. I. R. 1957 Cal. 59; Rajendra Narayana Singh Deo v. Behari Lal Chakrawarti, A. I. R. 1932 Pat. 157; I. L. R. 11 Pat. 569; 138 I. C. 419; Smt. Krishna v. Dhanapati, A. I. R. 1957 Cal. 591; Commissioner of Wakfs v. Kawan, 58 C. W. N. 533; Hind Iran Bank v. M/s. Malak Singh, (1958) 28 Com. Cases 182; Sri Aswini Kumar v. Union Territory of Tripura, A. I. R. 1969 Tripura 26 (30).

3. Ram v. Raghunandan, (1885) 7 A. 738, 743; Secretary of State v. Man-

jeshwar, 28 M. 257; Abdul Ghani v. Mohammad Raza, A. I. R. 1920 Pat. 610; 54 I. C. 941; 1 P. L. T. 47; see Taylor, Ev., s. 553; the following cases are no longer law so far as they relate to copies: Unide v. Pemmasamy, (1858) 7 Moo. I. A. 128; dictum followed in Ajodhya v. Umrao, (1870) 6 B. L. R. 509; Makbul v. Masand, (1869) 3 B. L. R. 54; Ram v. Gordon, (1872) 14 Moo. I. A. 453; Norton, Ev., 243. Even before the Act a copy of a copy was rejected; Nemeland v. Nusseed, (1866) 6 W. R. 80; Sri Aswini Kumar v. Union Territory of Tripura, A. I. R. 1969 Tripura 26 (30).

4. But a copy transcribed from a copy and afterwards compared with the original is secondary evidence, illus. (c).

5. Suganchand v. Balchand, A. I. R. 1957 Raj. 89.

6. Act XVI of 1908, S. 57. See Bava v. Bhaorao, A. I. R. 1924 Nag. 274; 78 I.C. 865.

7. S. 79 post.

witness who can swear that he has compared the copy tendered in evidence with the original or with what some other person read as the contents of the original, and that such copy is correct. It is not necessary for the persons examining to exchange papers and read them alternately both ways. It is not necessary that the scribe of the copy should be produced. What is required to be proved is that the document produced is a true copy of the original. Anyone who has heard the original and the copy read out to him may swear that the contents of the two were identical. This would be a statement which would be admissible in evidence and would prove that the document produced was a true copy of the original.<sup>8</sup> If the documents be in an ancient or foreign character, the witness who has compared the copy with it must have been able to read and understand the original.<sup>9</sup> But an admission dispenses with proof, and omission to object implies that the document is a true copy. Where a document has been admitted in evidence in the trial Court without objection, its admissibility cannot be challenged in the Appellate Court. Omission to object to its admission implies that it is a true copy and therefore it is not open to the Appellate Court to consider whether the copy was properly compared with the original or not.<sup>10</sup> Even if a document is admitted to the record by consent, that alone will not enable either party to prove by that document anything which under the Evidence Act cannot be proved. But, if the parties consent that, for the purposes of the case, it shall be treated as showing the contents of some other documents, then, although the contents of that other document could be proved under the Act by the document produced, that is of no consequence. The parties may, if they wish, admit the contents of a document not produced and may admit that those contents are correctly shown by any paper produced even if what is written on it purports to be fifty times a copy.<sup>11</sup> In the undermentioned case,<sup>12</sup> a copy of a deed which was filed in another suit and was still on the record of the Court was let in as secondary evidence. That deed was endorsed "copy in accordance with the original," and was signed by the Judge presiding in the Court. The Privy Council accepted and concurred in the opinion of the Judicial Commissioner upon the value of that copy. His words were: "There can be no doubt that the Judge, in the course of the suit, in 1864, did accept and file, with the proceedings of a copy of a deed of gift by KB, and the only question is whether that copy had been compared with the original, when the copy is en faced, in accordance with practice, 'copy according to the original', and the Judge's order to file is also found on it. I can not doubt that the copy was duly compared. Except the Judge there was no person who was authorised to compare and accept a copy, and his signature to the order must, it seems to me guarantee the genuineness of the copy."<sup>13</sup>

8. Sri Babu Lal v. Ganga Saran, A. I. R. 1952 All. 48; 1951 A. L. J. 746.
9. Taylor, Ev., ss. 15—45.
10. Ram Lochan v. Harinath, A. I. R. 1922 Pat. 565; I. L. R. 1 Pat. 606: 67 I. C. 628; 3 P. L. T. 397 approving Chimmaji v. Dinkar, 11 B. 320; Lakshman v. Amrit, 24 B. 591; Kishori v. Rakhal, 31 C. 155. See also Chhatra Kumari Debi v. Mst. Parbati Kuer, A. I. R. 1936 Pat. 600: 166 I. C. 262; 17 P. L. T. 709; Latchayya Subudhi v. Seetharamayya, A. I. R. 1925 Mad. 257:

- 84 I. C. 921; 1924 M. W. N. 923: 20 L. W. 719; Kedarnath v. G. R. Pradhan, A. I. R. 1937 Nag. 13: I. L. R. 1937 Nag. 68: 167 I. C. 190.

11. Marri Narasayya v. Peruri Krishna-murthi, A. I. R. 1928 Mad. 1255.
12. Luchman v. Puna, 16 C. 753. See also Chudasama Khoduba Sartansang v. Chudasama Takhatsang Narasingji, 1922 Bom. 177 (2): I. L. R. 46 Bom. 32: 76 I.C. 155.
13. ib., at p. 756.

A copy of a document made in handwriting is not admissible when it is not proved as to who made it, from what document it was made or whether it was compared with the original or not, because in the circumstances it cannot be said to have been proved as a copy at all.<sup>13-1</sup>

A copy of a deposition in the printed record of the High Court is but a copy of a copy and unless there is evidence of some comparison with the original, the printed record is, in the absence of consent, not secondary evidence of the original.<sup>14</sup> An abstract translation which does not purport to be copy or even a full or complete translation of a document produced in a previous suit but is merely a summary of its terms prepared for reference at the hearing of an appeal in that suit is not a copy 'made from or compared with the original' and does not fall within this clause.<sup>15</sup> The deposition of a witness abstracted in a judgment is not admissible as secondary evidence of a deposition under this section.<sup>16</sup> So also the translation of a document contained in a judgment.<sup>17</sup> Where in guardianship proceeding, the formal order of the Judge, which was in vernacular and signed by him, set forth the vernacular application made to his Court in full, it was held that a copy of the order was a copy made from the original and was admissible as secondary evidence of the original application.<sup>18</sup> Orders issued by public officers in the discharge of official duties kept together in a register in the usual course of business should be presumed to be accurate copies of the original public documents and are admissible in evidence as "secondary evidence" of such public documents.<sup>19</sup>

A register containing copies of prescriptions made directly from the originals by a dispensing firm of Chemists and Druggists is legally admissible in proof of them.<sup>20</sup> And where loose sheets are made from and compared with the original, e. g., the cash book, they are secondary evidence within the meaning of this clause.<sup>21</sup>

It is scarcely necessary to observe that proof of a copy being a correct copy is no proof of the execution and genuineness, etc. of the original.<sup>22</sup> And

- 13-1. Laxman Ganpat v. Ansuya Bai, A. I. R. 1976 Bom. 264.
14. Alapati Narasimham v. Ailoori Babu Rao, A. I. R. 1939 Mad. 40; I. L. R. 1939 Mad. 333; 183 I. C. 751; (1938) 2 M. L. J. 883; 1938 M. W. N. 1102; 48 M. L. W. 650 explaining Ganapathy Aiyar v. Sakarayappa Mudaliar, A. I. R. 1929 Mad. 187; 115 I. C. 147.
15. Hafiz Muhammad Suleman v. Hari Ram, A. I. R. 1937 Lah. 370; 39 P. L. R. 602.
16. Saradamba v. Pattabhiramayya, A. I. R. 1931 Mad. 207; I. L. R. 53 Mad. 952; 129 I. C. 463; 60 M. L. J. 13; 1930 M. W. N. 601; 33 M. L. W. 20.
17. Jagannatha Naidu v. Secretary of State, A. I. R. 1922 Mad. 334; 70 I. C. 107; 43 M. L. J. 37; 1922 M. W. N. 432; 16 L. W. 11.
18. Mst. Kundan Bibi v. Maganlal, A. I. R. 1932 All. 710; 139 I. C. 718.
19. Krishna Rao Bahadur, Rajah v. Mukhanji Buchi Ramanayya, 28 I. C. 808; A. I. R. 1916 M. 85.
20. Mst. Chandrani Kuwar v. Lala Sheo Nath, 1931 Oudh 146; 132 I. C. 837; 8 O. W. N. 194.
21. State v. Harish Chandra, I. L. R. 1965 Cut. 426; A. I. R. 1966 Orissa 189; 1966 Cr. L. J. 1042.
22. See Ramjadoo v. Luckhee, (1967) 5 R. C. and Cr. Reporter, Act X, rule 23; Shookram v. Ramlal, (1868) 9 W. R. 248, 250; Ameeroonissa v. Abedoonnissa, (1875) 23 W. R. 208; Appathura v. Gopala, 25 M. 674, 675; Sheik Karimullah v. Gudur Koeri, 1925 All. 56; 82 I. C. 306; Brajraj Singh v. Yogendrapal Singh, 1952 M. B. 146; Chuhamal v. Haji Rahim Baksh, 1924 Lah. 303; 71 I. C. 568; 18 P. W. R. 1923; Deputy Commissioner of Partabgarh v. The Universal Film Co. (India), Ltd., 1950 All. 696.

secondary evidence cannot be given by means of a copy until it be shown that such copy is accurate.<sup>23</sup> The correctness of certified copies is directed to be presumed by this Act.<sup>24</sup> And other Acts, such as the Registration Act,<sup>25</sup> declare that copies given thereunder shall be admissible for the purpose of proving the contents of the original documents and that they shall be taken to be true copies without other proof than the Registrar's Certificate of their correctness.<sup>1</sup>

**5. Counterparts (Fourth clause).** A counterpart is primary evidence only as against the parties executing it.<sup>2</sup> The usual case of counterpart is that of *pattah* and *kabuliati*.<sup>3</sup>

**6. Oral account of contents (Fifth clause).** The person must have seen the original.<sup>4</sup> The statements of the witnesses who have not themselves read the documents are not secondary evidence of the contents of the documents within the meaning of Section 63.<sup>5</sup> An illiterate witness cannot be said to have seen a document.<sup>6</sup> A person unable to read a document cannot give secondary evidence of its contents, even though the document may have been read over to him.<sup>7</sup> It was held in some earlier cases, if a witness is unable to read a document and it is read over to him, he may be said to have seen the document, and he can give secondary evidence of its contents. But these decisions must be taken to have been overruled by the decision of the Privy Council in *Ma Mi v. Kallander* cited above. Moreover, it must have been the original. It will not be sufficient for the person to have seen a copy. Thus, a written statement of the contents of a copy of a document, the original of which the person making the statement has not seen, cannot be accepted as an equivalent of that which this clause renders admissible, namely, an oral account of the contents of a document given by some person who has himself seen it.<sup>8</sup> It is, moreover, plain that even if parol evidence be admissible as secondary evidence of a document, it may, owing to its character or the circumstances of the case, be such that the Court cannot rely upon it for

23. Taylor, Ev., s. 553; *Shookram v. Ramlal*, (1868) 9 W. R. 248, 250; *Krishna v. Kishori*, (1887) 14 C. 487, 488.

24. S. 79 post.

25. Act XVI of 1908, S. 57.

1. *Hurish v. Prosunno*, (1874) 22 W. R. 303.

2. S. 62, Explanation (1) ante. See *Baidya Nath Dutt v. Kamni Kant Gupta*, 6 C. L. J. 572.

3. *Ma Mi v. Kallander*, A. I. R. 1927 P. C. 15; 54 I. A. 61; I. L. R. 5 R. 18; (1927) 29 Bom. L. R. 800; 45 C. L. J. 263; 31 C. W. N. 621; 52 M. L. J. 376; 1927 M. W. N. 80; 25 L. W. 342; 28 P. L. R. 109.

4. ib.; *Dalu v. Juharmal*, A. I. R. 1952 Raj. 91; I. L. R. 1951 Raj. 166; 2 Raj. L. W. 180; *Mangi Lal v. Ram Dayal*, A. I. R. 1951 Ajmer 21; *Maung Chit U v. Maung Tha Ku*, A. I. R. 1923 Rang. 113; 77

I.C. 258; *Ram Pearcey v. Ram Rabhubir Lal*, 112 I. C. 310; *Trimbak Narayan Moghe v. Yado Rao Shankarrao*, A. I. R. 1940 Nag. 116; 186 I. C. 851; 1940 N. L. J. 85; *Katihar Jute Mills v. Calcutta Match Works*, A. I. R. 1958 Pat. 133.

5. *Janki v. Ram Kishore*, A. I. R. 1922 All. 232; 66 I. C. 557. See also *Ghure v. Chatrapal*, 23 I. C. 11; 12 A. L. J. 239; A. I. R. 1914 A. 69.

6. *Ma Mi v. Kallander*, 54 I. A. 61; 31 C. W. N. 621; I. L. R. 5 Rang. 18; 52 M. L. J. 376; A. I. R. 1927 P.C. 15; *Bagga Singh v. Darbara Singh*, (1971) Rev. L. R. 357 (Punj.).

7. *Ramkrishna v. Arjuno*, A. I. R. 1963 Orissa 29.

8. *Kanayalal v. Pyarabai*, (1882) 7 B. 139; see illust. (d); 7 Ind. Jur. 429.

the purpose of proving those contents.<sup>9</sup> Secondary evidence in actions for libel should give the actual words used and complained of.<sup>10</sup> In *Khilumal v. Arjun Das*,<sup>11</sup> it was said that a report of speech made in a newspaper is not admissible in evidence to prove the speech. The person who made the speech, or a person in whose presence the speech was made, or a reporter of the newspaper in whose presence the speech was made and who had sent the report to be published in the paper should be produced. In the absence of such evidence, no reliance can be placed on the version of speeches given in the newspaper.

A newspaper report cannot be treated as substantive evidence. The correspondent who made that report should be examined. The mere fact that a report appears in a newspaper cannot amount to evidence.<sup>12</sup> Secondary evidence of the endorsement on a railway receipt, can be furnished by the person who had made it or seen it having been made.<sup>13</sup>

**7. No degree in secondary evidence.** The general rule is that there are no degrees in secondary evidence and that a party is at liberty to adduce any description of secondary evidence he may choose.<sup>14-16</sup> So, a party may give oral evidence of the contents of a document, even though it be in his power to produce a written copy. For, if one species of secondary evidence were to exclude another, a party tendering oral evidence of a document would have to account for all the secondary evidence that has existed. He may know of nothing but the original, and the other side at the trial might defeat him by showing a copy, the existence of which he had no means of ascertaining. Fifty copies might be in existence unknown to him, and he would be bound to account for them all. Further, there is the inconvenience of requiring evidence to be strictly marshalled according to its weight. But, if more satisfactory proof is withheld, that will go to the weight of the evidence. If, for instance, the party giving such oral evidence appears to have better secondary evidence in his power, which he does not produce, that is a fact from which the Court may presume that the evidence kept back would be adverse to the party withholding it.<sup>17</sup> There are, however, exceptions to the general rule. For the Act declares that when the existence, condition, or contents of the original have been admitted in writing, the written admission is admissible<sup>18</sup> and where the original is a public document<sup>19</sup> or a document of which a certified copy is permitted by this Act or by any other law in force in India to be given in evidence,<sup>20</sup> a certified copy of the document, but no other kind of secondary evidence, is admissible.<sup>21</sup>

- 9. *Krishna v. Kishori*, (1887) 14 C. 487, 488.
- 10. *Rainey v. Bravo*, L. R. 4 P.C. 287.
- 11. I. L. R. 1959 Raj. 524: A. I. R. 1959 Raj. 280.
- 12. *Sangappa v. Shivamurthiswamy*, A. I. R. 1961 Mys. 106.
- 13. *J. S. Basappa v. Provincial Government*, Madras, (1959) 2, Andh. W. R. 393: A. I. R. 1959 A. P. 192.
- 14-16. See *Ratpal v. Udai*, 53 I.C. 607 in which a statement in a previous suit was held to be secondary evidence.
- 17. *Den v. Ross*, 7 M. & W. 402; *Brown v. Woodman*, 6 C. & P. 206; *Hall v. Hall*, 3 M. & G. 242; *Taylor, Ev.*, ss. 550-553; *Best, Ev.*, s. 483; *Wills, Ev.*, 3rd Ed., 407. The rule applies whether the original evidence be itself oral or documentary; *Taylor, Ev.*, s. 550; for examples see notes to S. 47 ante.
- 18. S. 65 post, see clause (b).
- 19. Within the meaning of S. 74, post, see S. 65, clause (e).
- 20. S. 65, clause (f)
- 21. S. 65 post; see notes to that section.

64. *Proof of documents by primary evidence.* Documents must be proved by primary evidence except in the cases hereinafter mentioned.

s. 3 ("Document.")

s. 62 (Meaning of "Primary evidence").

s. 65 ("Excepted cases.")

Steph. Dig., Art. 65; Taylor, Ev., ss. 396, 409; Phipson, Ev., 11th Ed., 751; Thayer, Cases on Evidence, 726.

### SYNOPSIS

1. Principle.
2. What is in writing shall be proved by the writing itself:  
—Reasons for rule.  
—Section embraces every writing.  
—Sec. 91 distinguished.  
—Special cases.  
—Miscellaneous.
3. Admissions :  
—Oral admissions of contents of documents.  
—Consent to allow copies to be tendered.  
—Insufficiency of proof of document, plea as to.
4. Admissibility of unregistered lease or Kirayana.

**1. Principle.** This rule is one of the most forcible illustrations of the maxim that the best evidence that the case admits of must always be produced.<sup>22</sup> It is said to be based on the "best evidence" principle; but the rule is, however, probably older than its reasons, being a survival of the doctrine of 'proffered' which required the actual production of the document pleaded.<sup>23</sup>

**2. What is in writing shall be proved by the writing itself.—**  
*Reasons for rule.* Lord Tenterden said :

"I have always acted most strictly on the rule that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments they may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule."<sup>24</sup>

An additional but important reason for the application of the rule is that the Court may acquire a knowledge of the whole contents of the instrument, which may have a very different effect from the statement of a part,<sup>25</sup> where certain documents have been marked as exhibits in the case without objection but their contents have not been put to the deponents in the course of their examination, they (the contents) cannot be made use of to draw any inference.<sup>1</sup> But once a document is properly admitted, the contents of that document are also admitted in evidence, though these contents may not be

22. Taylor, Ev., s. 396; and v. post and Introduction, ante.

23. Thayer's Cases on Evidence, 726.  
See also 6 Law Quart Rev. 75, "The superiority of written evidence"; Phipson, Ev., 11th Ed., 740.

24. Vincent v. Code, (1828) 3 C. & P. 481; and see observations of Best,

C. J., in Strother v. Barr, p. 1225, fn. 22.

25. Taylor, Ev., s. 396.

1. K. B. Singh v. M. D. U. Co-op. Assn., A. I. R. 1957 Manipur 9, 12; Pratap v. Gyanaen, A. I. R. 1951 Orissa 313.

conclusive evidence.<sup>2</sup> It is not open to a party to object to the admissibility of documents once they have been marked without objection.<sup>3</sup>

*Section embraces every writing.* This section deals with the class of cases falling within the rule that a written document can only be proved by the instrument itself,<sup>4</sup> and embraces every writing. Thus, newspapers and account-books are the best evidence of their own contents, and, therefore, a witness cannot be asked whether certain resolutions were published in the newspapers; neither can he be questioned as to the contents of his account-books; nor can a plaintiff be asked in cross-examination whether his name is written in a certain book described by the questioner, unless a satisfactory reason be first given for the non-production of the book itself.<sup>5</sup> And it is very doubtful whether the contents of handbills written or dictated at a meeting of conspirators can be proved by oral testimony.<sup>6</sup>

*Section 91 distinguished.* The provisions of this section must be distinguished from those of Section 91. The latter deals with matters which the parties have put in writing or which the law requires to be in writing. In such cases, except where secondary evidence may be given, the document is the exclusive record of that which it embodies. The parties are not at liberty to resort to other evidence.

All that the present section says is that if it is desired to prove the contents of a document, the document itself must, save in certain exceptional cases, be produced. But, if a writing does not fall within either of the classes already described, no reason exists why it should exclude oral evidence. Thus, although a certain legal relation or position has been created by a written document, yet the mere fact of such relation or position may be proved by parol or secondary evidence, without production of the document.<sup>7</sup> If a written communication be accompanied by a verbal one to the same effect, the latter may be received as independent evidence, though not to prove the contents of the writing nor as a substitute for it; the payment of money may be proved by oral testimony, though a receipt be taken; a verbal demand of goods may be shown, though a demand in writing was made at the same time; the admission of a debt is provable by oral testimony, though a written promise to pay was simultaneously given; and the like.<sup>8</sup> The rule has been stated by Best as follows :

—  
“Where the contents of any document are in question, either as a fact in issue or a sub-alternate principal fact, the document is the proper evidence of its own contents, and all derivative proof is rejected until its

- 2. P. C. Purushothama Reddiar v. S. Perumal, A. I. R. 1972 S. C. 608 (613).
- 3. Ibid, citing Bhagat Ram v. Khetu Ram, 116 I.C. 394; A. I. R. 1929 P.C. 110.
- 4 Taylor, Ev., s. 409.
- 5. Taylor, Ev., s. 409. See K. S. Bonnerji v. Sitanath, A. I. R. 1922 P. C. 209; 49 I. A. 46; I. L. R. 49 Cal. 325; 66 I. C. 140; 20 A. L. J. 294; 24 Bom. L. R. 565; 35 C. L. J. 320; 26 C. W. N. 236; 42 M. L. J. 403; 15 L. W. 452; 35 M. L. T. 182.
- 6. R. v. Thistlewood, (1820) 33 How. St. Tr. 691; Taylor, Ev., s. 409.
- 7. R. v. Holy Trinity Hall, 6 L. J. (O.S.) M.C. 24; 7 B. & C. 611; 31 R. R. 267. See also Amir Ali v. Ayukup Ali Khan, A. I. R. 1915 Cal. 39; I. L. R. 41 Cal. 347; 25 I.C. 509; 19 C. L. J. 428; Dalip Singh v. Durga Prasad, 1 All. 442.
- 8. Taylor, Ev., s. 415; see S. 59 ante.

absence is accounted for. But where a written instrument or document of any description is not the fact in issue, and is merely used as evidence to prove some fact, independent proof *aliunde* is receivable. Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it.... So, although where the contents of a marriage register are in issue, verbal evidence of those contents is not receivable, yet the fact of the marriage may be proved by the independent evidence of a person who was present at it."<sup>9</sup>

Under the Mohammedan Law marriage is a contract, but divorce is a dissolution of marriage, and, except in those cases where the husband and the wife agree to dissolve a marriage for consideration, a divorce can be purely a unilateral affair, whereby the husband puts an end to the marital relations with his wife by simply pronouncing the word "talaq" three times. The divorce may, therefore, be proved by oral evidence.<sup>10</sup>

It may be noted that the question of proof of a document is a question of procedure and can be waived. But question of relevancy of documents are questions of law which can be raised even in appeal.<sup>11</sup>

*Special cases.* There are special cases in which the document itself has to be produced and not any secondary evidence of it. Thus, when a Court has to deal with the question of whether or not a document is forged, it is of first importance that it should have the document itself before it.<sup>12</sup> So, also, when in proceedings under Section 491, Cr. P. C. 1898, the Court issues a rule to the government to produce an order of detention, it is incumbent on the government to exhibit to the Court the original order.<sup>13</sup> The Court cannot act on copies, still less on uncertified copies.<sup>14</sup>

*Miscellaneous.* Where the whole or a part of an original document is missing, the Court will admit secondary evidence, and, after reconstructing the document, grant appropriate relief.<sup>15</sup> But the Court can admit secondary evidence only when it is satisfied that the original is missing. In *Mohammad Ikram Hussain v. State of U. P.*,<sup>16</sup> as against the other evidence led to show that a girl was a minor, the party interested relied upon the report of a doctor, which mentioned that she was over 18 years of age, but the report was not

9. Best, Principles of Evidence, 2nd Ed., p. 282, cited with approval in *Balbhadr Prasad v. Maharaja of Betia*, 9 All. 351 at 356: 7 A. W. N. 49.
10. *Mst. Nalima v. Emperor*, A. I. R. 1947 Lah. 306: 229 I. C. 279; 48 Cr. L. J. 354; 48 P. L. R. 532.
11. *Subbarao v. Venkata Rama Rao*, A. I. R. 1964 A. P. 53; (1963) 2 Andh. W. R. 307.
12. See *Sarala Sundari Dassya v. Dina-bandhu Roy*, A. I. R. 1944 P.C. 11; 71 I. A. I: I. L. R. 1944 Kar. 65 (P.C.); 212 I. C. 1: 1944 A.L. J. 134; 1944 A. W. R. (P.C.) 29: 48 C. W. N. 273: (1944) 1 M. L. J. 247: 1944 M. W. N. 299; 57 L. W. 198; 10 B. R. 483; 25 P. L. T. 30.
13. *Kamla Kant v. Emperor*, A. I. R. 1944 Pat. 354: I. L. R. 23 Pat. 252.
14. *Gokulchand Seth v. Emperor*, A. I. R. 1945 Nag. 203: I. L. R. 1945 Nag. 731; 222 I. C. 343: 1945 N. L. J. 206. See also cases cited therein.
15. See *Saraswatibai v. Himatsingh*, A. I. R. 1963 M. P. 234; 1963 Jab. L. J. 415.
16. A. I. R. 1964 S. C. 1625: 1964 S. C. D. 328; I. L. R. (1964) 2 All. 423: (1964) 5 S. C. R. 86.

put in ; only reference was made to it in affidavits filed. It was held that primary documentary evidence ought to have been filed, and in the absence of the report, the direct evidence was not rebutted.

**3. Admissions.** *Oral admissions of contents of documents.* Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such documents, or unless the genuineness of a document produced is in question.<sup>17</sup> But secondary evidence may be given when the existence, conditions, or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative-in-interest.<sup>18</sup> The rule laid down by this section does not of course apply to documents which are admitted and the contents of which are not in dispute. For, a fact which is admitted need not be proved at all.<sup>19</sup> So, where a party admits by his pleading the terms of an agreement and its execution, the other party is not called upon to prove the execution of the document or put it in evidence.<sup>20</sup> Where there is an admission by the debtor of an agreement to pay the sum due on a bond, it is not necessary to prove the bond.<sup>21</sup> But the admissions must be sufficient to cover the entire claim and must relieve the plaintiff of the necessity of relying on the document or any portion of it. If the admissions are not available, or if they are indefinite or insufficient, then the plaintiff can succeed only in the ordinary way, that is, in a mortgage suit, by producing the original bond or its copy.<sup>22-23</sup>

*Consent to allow copies to be tendered.* It is further common practice to allow copies of documents to be tendered in evidence by the consent of all parties concerned.

*Insufficiency of proof of document, plea as to.* Where two courts, the trial court and the first appellate court, have acted upon a document without any objection by the defendants about the insufficiency of proof of the document, it is not open for the court in second appeal to allow the defendant to take this plea.<sup>24</sup> If the objection is confined only to the mode of proof, it must be taken at the earliest point of time when the documents are tendered in evidence ; it cannot be permitted to be raised at a subsequent stage.<sup>25</sup> Objection to mode of proof as distinct from its admissibility must be taken at the trials before it is marked as an exhibit and admitted to record.<sup>1</sup>

17. See notes to S. 22 ante.

18. S. 65, clause (b) post.

19. S. 58 ante.

20. Burjorji v. Muncherji, (1880) 5 B. 143; but a party's admission as to the contents of a document, not made in the pleadings but in a deposition is secondary evidence only. See also Ibrahim v. Parvata, (1871) 8 Bom. H. C. R. A. C. J. 163.

21. Udhao Nanaji Gadewar v. Narayan Vithoba Mangilwar, A. I. R. 1941 Nag. 95: 195 I.C. 120; 1941 N. L. J. 134.

22-23. Pearey Lal v. Hira Devi Rani, A. I.R. 1941 All. 150, 151: 195 I.C.

50: 1941 A.L.J. 33: 1941 A.W.R. (H.C.) 18: 1941 O.W.N. 239.

See also cases cited therein.

24. Ram Dass v. Board of Revenue, 1967 A.L.J. 92: 1966 A.W.R. (H.C.) 802: A.I.R. 1967 All. 481.

25. Annapurna Subnaris v. Narendra Prasad, 33 Cut.L.T. 710: A.I.R. 1967 Orissa 129.

1. Gopal Das v. Sri Thakurji, A.I.R. 1943 P.C. 83 (87); Maharaja Shree Umaid Mills, Ltd. v. Union of India, A.I.R. 1960 Raj. 92; Mira Bai v. Jai Singh, 1971 Raj.L.W. 319: A.I.R. 1971 Raj. 303.

4. **Admissibility of unregistered lease or kirayanama.** An unregistered lease or *kirayanama* is admissible for a collateral purpose, e. g., to prove the nature of the defendant's possession and the amount of rent.<sup>2</sup>

65. *Cases in which secondary evidence relating to documents may be given.* Secondary evidence may be given of the existence, condition, or contents of a document in the following cases :—

(a) When the original is shown or appears to be in the possession or power—

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;

(b) When the existence, condition, or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative-in-interest;

(c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) When the original is of such a nature as not to be easily movable;

(e) When the original is a public document within the meaning of section 74;

(f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India], to be given in evidence;<sup>4</sup>

2. Ram Kishore v. Ambika Prasad, A.I.R. 1966 A. 515; 1966 A.W.R. (H.C.) 57; Fateh Chand v. Radha Rani, 1965 A.L.J. 625; Baijnath Prasad Singh v. Madhusudan Prasad Singh, 1965 B.L.J.R. 575 (579) (no effective registration of docu-

ment of sale).  
3. Subs. by Part B States (Laws) Act, 1951, for the "States", which had been substituted by the A.O. 1950  
4. Cf the Banker's Books Evidence Act, 1891 (18 of 1891), S. 4.

(g) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

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| s. 63 ("Meaning of "secondary evidence".")             | s. 74 ("Public documents.")  |
| s. 3 ("Document.")                                     | ss. 76, 79, 89 ("Certified copies.")   |
| s. 3 ("Court.")  | s. 89 ("Presumption as to documents called for and not produced after notice to produce.") |
| s. 66 ("Rules as to notice to produce.")               |  |
| s. 22 ("Oral admissions as to contents of documents.") |  |

Taylor, Ev., ss. 429, 437, 439–460, 918, 919; Roscoe, N.P. Ev., 7–14, 157–160; Phipson, Ev., 11th Ed., 60, 63; Powell 9th Ed., 367; Steph. Dig., Arts. 72, 118, 119; Wharton, Ev., Chap. III; Greenleaf, Ev., ss. 91–97; Burr. Jones, Ev., 197–232.

### SYNOPSIS

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| 1. Object.                               | dary evidence.   |
| 2. Principle.                            | Consent or waiver.   |
| 3. Scope :                               | Secondary evidence of acknowledgment.                                    |
| —Section applies also to criminal cases. |  |
| —Collateral purposes.                    | Compliance with section, whether offends Art. 20, Constitution of India. |
| 4. Kinds of secondary evidence.          |  |
| 5. Objection to admissibility of secon-  | Draft, when admissible.  |

NOTE—Clause-wise Synopsis follows at appropriate places.

**1. Object.** Under this section, secondary evidence is admissible only of the existence or the contents of a document which is lost, but the execution of a document must be proved by primary evidence under section 67. Section 67 prescribes that, if a document is alleged to be signed by a person, proof must be given of the signature of that person. Section 47 describes the various methods of proving the handwriting of a person. The combined result of these provisions is that the signature of a person on a document may be proved either (a) by examining the person in whose presence the signature had been affixed, or (b) by examining another person who is acquainted with the handwriting of the executant and can prove his signature by his opinion.<sup>5</sup>

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5. Akshya Narayan v. Moheswar, A.I.R. 1958 Orissa 207.

**2. Principle.** The general rule having been stated in the preceding section, the present one states the exceptional cases in which secondary evidence is admissible. Some of these exceptions rest upon considerations which are obvious. This is the case with exceptions (c) and (d). The exceptions (e) and (f) are based on considerations of convenience. In the case of exception (g) it is not, properly speaking, secondary evidence which is admitted in substitution for the original but the general result as stated by a person who has examined them.<sup>6</sup> The written admission in clause (b) affords a reliable guarantee of truth. With regard to clause (a), as in the case of (c) and (d), the production of primary evidence is out of the party's power; see Commentary, post.

**3. Scope.** The last section having declared the general rules as to the proof of documents, the present deals with the exceptions to that rule, namely, the cases in which secondary evidence may be given. The conditions laid down in the section must be fulfilled before secondary evidence can be admitted.<sup>7</sup> Secondary evidence of the contents of a document cannot be admitted, without the non-production of the original being first accounted for, in such a manner as to bring it within one or other of the cases provided for in this section.<sup>8</sup> This section is not intended to be utilised for the benefit of persons, who deliberately, or with sinister motives, refuse to produce in Court a document, which is in their possession, power or control. It is designed only for the protection of persons who, in spite of best efforts, are unable, from circumstances beyond their control, to place before the Court primary evidence as required by law.<sup>9</sup> Nor can this section be invoked, in cases, where the party wilfully fails to produce the document at all relevant periods, but puts it at the time of the arguments in the Court of the last resort.<sup>10</sup> By the law of evidence administered in England which has been in a great measure, with respect to deeds, made the law of India, the first condition of the right to give secondary evidence of the contents of a document not produced in Court is the accounting for the non-production of the original.<sup>11</sup> If

6. Markby, Ev., 97; Phipson, Ev., 11th Ed., 757.
7. Anand Behari Lal v. Messrs. Dinsaw & Co. Bankers Ltd., A.I.R. 1946 P.C. 24: I.L.R. 1946 Kar. 15: 222 I.C. 195: 48 Bom.L.R. 293: (1946) 1 M.L.J. 123: 1946 M.W.N. 339: 59 L.W. 88: 1946 O.W.N. 114. See also Rasdhari Lal v. Nand Lal Mahton, A.I.R. 1933 Pat. 468.
8. Krishna Kishorilal v. Kishorilal, 14 C. 486: 14 I.A. 71; T. K. Appalacharyulu v. T. K. Venkata Ramaujacharyulu, A.I.R. 1925 Mad. 345: 85 I.C. 524: 21 L.W. 67: 47 M.L.J. 906, there was no proof of loss; Muhammad Zafar v. Zahur Husain, 1926 All. 741: I.L.R. 49 All. 78: 97 I.C. 82: 24 A.L.J. 964; Jaldhu Ananta v. Rajah Bommadevara, A.I.R. 1958

- Andh. Pra 418: 1958 Andh.L.T. 440.
9. Hirralal v. Ram Prasad, A.I.R. 1949 All. 677, 678; State of Bihar v. Charanjitlal, A.I.R. 1960 Pat. 139.
10. Brahmananda v. Kanduri, A.I.R. 1959 Orissa 126.
11. Bhubaneswari v. Harisaran, (1880) 6 C 720. See also Ameeroonissa v. Abedoonnissa, (1875) 2 I.A. 87; Gour v. Huree, (1868) 10 W.R. 338; Roop Manjoorie v. Ram Lal, (1864) 1 W.R. 145; Shookram v. Ram Lal, (1868) 9 W.R. 248; Mufeezoodeen v. Meher, (1864) 1 W.R. 213; Ishan v. Bhyrub, (1866) 5 W.R. 21; Ustoorn v. Mohun. (1874)) 21 W.R. 333; Muhammad v. Ibrahim, (1866) 3 Bom.H.C.R.A. C.J. 160; Wazeer v. Kalee, (1869) 11 W.R. 228; Krishna v. Kishori

the original of a notice is not summoned, secondary evidence of that notice is not admissible under this section.<sup>12</sup> The section provides an alternative to a bond-holder, in cases, where for various reasons production of the original is impossible; but, if a bond is in existence, production is not dispensed with by this section.<sup>12-1</sup> It must, in the first place, be shown that there is, or was, a document in existence capable of being proved by secondary evidence, and, secondly, that the circumstances are such that secondary evidence may be given, or, to use the technical expression, a proper foundation must be laid for the reception of such evidence.<sup>13</sup> Where the original is not produced at any time nor is any foundation laid for the establishment of the right to give secondary evidence, the document ought to be rejected.<sup>14</sup>

The question whether or not a party to a suit has laid sufficient foundation to entitle him to produce secondary evidence is a question of fact to be judicially determined by the trial Court. Under cl. (a) of this section it is not necessary to prove affirmatively that the original is not in the possession of any person, who, though legally bound to produce it, does not do so after notice. It is sufficient if the original 'appears to be in the possession of such person'.<sup>15</sup> But there are cases in which secondary evidence is admissible even though the original is in existence and producible, as in the case of clauses (e) and (f)<sup>16</sup> and (b) and (g) of Section 65, but ordinarily it must be shown that the document is not producible in the natural sense of the word, for this is the general ground upon which secondary evidence is admitted. But, where the original document had been placed in the custody of the law, the onus of proof did not require the plaintiff to show how it was afterwards made away with, or to satisfy the Court that the defendant was more likely to have been guilty than himself.<sup>17</sup>

A photostat copy of a handwritten leaflet was sought to be produced in evidence and it was not explained when and in what circumstances it was made and in whose possession the original was, the document was held suspicious and not admissible.<sup>17-1</sup> Original deed alleged to be in plaintiff's possession must be proved to be in such possession otherwise defendant is not entitled to lead secondary evidence.<sup>17-2</sup> Where the original is alleged to be lost in a particular manner, such loss must be proved by evidence otherwise foundation for leading secondary evidence will not have been made out.<sup>17-2</sup>

(1887) 14 C. 486; Rakhal v. Indra,  
(1887) 1 C.L.R. 155; Gurnam

Kaur v. Meja Singh, (1966-68) P.  
L.R. (Supp.) 614.

12. P. Kunhammad v. Moosan Kutty,  
A.I.R. 1972 Ker. 76 (78).

12-1. Muhammad Zafar v. Zahur Hussain,  
1926 All. 741; I.L.R. 49 All. 78 :  
97 I.C. 82 : 24 A.L.J. 964.

13. Sital Das v. Sant Ram, (1966) 3  
S.C.R. 283 : (1967) 1 S.C.J. 605 :  
(1967) 1 An.W.R. (S.C.) 119 :  
(1967) 1 M.L.J. (S.C.) 119 : A.  
I.R. 1966 S.C. 1457; Paramananda  
Sahu v. Babu Sahu, (1970) 36 Cut.  
L.T. 1211; Sanjay Cotton Co. v. Om  
Prakash, A.I.R. 1973 Bom. 40.

14. Roman Catholic Mission v. The State

of Madras, A.I.R. 1966 S.C. 1457.

15. Gurnam Kaur v. Meja Singh, (1966-  
69) P.L.R. (Supp.) 614 (616).

16. Krishna v. Kishori, (1887) 14 C.  
486.

17. Lal v. Ram, (1924) 29 C.W.N. 915.  
(P.C.).

17-1. Ashok v. Madhav Lal, A.I.R. 1975  
S.C. 1748 : 1975 U.J. (S.C.) 601:  
(1975) 4 S.C.C. 664.

17-2. Laxman Ganpat v. Ansuya Bai, A.  
I.R. 1976 Bom. 264; M. V. Reddiar  
v. V. Kaunder, A.I.R. 1971 Mad.  
471 : 84 M.L.W. 452 : (1971) 2 M.  
L.J. 128.

17-3. R. N. Das v. Santosh Kumar, A.I.  
R. 1975 Cal. 381; Atra Devi v.  
Ram Sarup, A.I.R. 1972 Pat. 183.

When one of the questions on appeal to the Privy Council was whether secondary evidence had been properly admitted on a case that had arisen for its admission, such question was decided in the affirmative on the ground that whether the evidence offered would itself prove the making of the document or not, it formed good ground for holding that there was a document capable of being proved by secondary evidence admissible with reference to Sections 65 and 66 of this Act.<sup>18</sup> Order XLI, rule 27 of the Civil Procedure Code permits admission of additional evidence but it does not alter the rules governing admission. After the appellate Court has decided to admit any document, it must be proved in accordance with the procedure prescribed under the Evidence Act. The real question before the lower appellate Court under rule 27 was whether the party could have produced in the trial the documents (certified copy of the High School Certificate and extract from the birth register) if he had exercised due diligence or whether he was not aware of the documents even after exercising due diligence. If the lower appellate Court admitted the documents without proof, the admission was erroneous.<sup>19</sup>

*Section applies also to criminal cases.* This section is applicable to both civil and criminal cases<sup>20</sup> and also in respect of matters in Revenue Law, such as the proof of mutation in the landlord's rent roll, a certified copy of which is admissible to prove the fact of mutation.<sup>21</sup> When a doctor who has issued medical certificates is not available, it is a fit case in which the prosecution should be allowed an opportunity to produce secondary evidence if it is so prayed on its behalf.<sup>22</sup>

*Collateral purposes.* Generally a compulsorily registrable document is inadmissible on the ground of want of registration but it is admissible for collateral purposes. If an original is so admissible its secondary evidence is also admissible for collateral purposes if the conditions of this section are fulfilled; thus when a party refuses to produce the original unregistered mortgage deed the other party can adduce secondary evidence for the collateral purposes of showing the nature of possession.<sup>22-1</sup>

**4. Kinds of secondary evidence.** The last four paragraphs provide what kind of secondary evidence is to be given in the particular cases mentioned in the section and clauses (b), (e), (f) and (g) establish exceptions to the general rule that there are no degrees of secondary evidence.<sup>23</sup> These paragraphs show that no provision is made for cases in which two causes for non-production of the original are combined, as for instance, when the original is a record of a Court of Justice, which has also been lost or destroyed; such cases have been known to occur in India.<sup>24</sup> But it has been held that

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- 18. Luchman v. Puna, (1889) 16 C. 753.
- 19. Radha Devi v. Ramesh Chandra, 1966 A.W.R. (H.C.) 634 (636).
- 20. See S. H. Jhabwala v. Emperor, A.I.R. 1933 All. 690 at 705 : 145 I.C. 481; 34 Cr.L.J. 967; 1933 A.L.J. 799; Manabendra Nath Roy v. Emperor, A.I.R. 1933 All. 498.
- 21. Chandranath v. Tushadika, A.I.R. 1958 S.C. 521 : 1958 S.C.J. 874.
- 22. Sri Ram v. Kashab Ram, 70 P.L.R. (D) 404 (407).

- 22-1. Rahim Bux v. Ilahi Bux, A.I.R. 1973 Raj. 294 : 1973 W.L.N. 207 : 1973 Raj.L.W. 493.
- 23. v. s. 63 ante.
- 24. See Garoo v. Durbaree, (1867) 7 W.R. 18 (record lost in transit; secondary evidence ordered to be given); Bunwarry v. Furlong, (1867) 8 W.R. 38 (record lost; direction to take further evidence); Emamun v. Hurdayal, (1864) 1 W.R. 301 (lost decree).

the rule laid down in this section that a certified copy is the only secondary evidence admissible when the original is a document of which a certified copy is permitted by law to be given in evidence does not apply where the original has been lost or destroyed. In such a case, any secondary evidence is admissible.<sup>25</sup> So where one B, an official in the Sikhur Court in the Native State of Jeypore, gave evidence of litigation there between R B and one C, and said that in his presence evidence of C was taken by the Judge, Moonshi MM, and that in his presence the suit was adjudicated and the order passed ; and he put in a document which he swore was a copy of C's deposition, in the handwriting of one of the Court *amlas*, endorsed 'copy corresponding with the original' in the handwriting and bearing the signature of the *sheristadar* of the Court ; the High Court excluded these proceedings in the Sikhur Court on the ground that they were not proved according to the mode mentioned in Section 86 of this Act. The Privy Council, however, held that that section does not exclude other proof and observed as follows :

"The assertion of BB that RB sued C that she gave evidence before Moonshi MM in his presence is primary evidence of these matters. His proof of the Sikhur records is secondary evidence and by Sections 65 and 66 of the Evidence Act, secondary evidence may be given of public documents [which these are under Section 74] without notice to the adverse party, when the person in possession of the document is out of the reach of, or not subject to, the process of the Court which is the case here."

If the Privy Council held that the effect of BB's evidence was to supply proof that the copy produced was a certified copy (there being no presumption under either Section 79 or 86) and the document was admitted as a certified copy, then it was so admitted in accordance with the last paragraph but one of the section. This, however, appears for several reasons not to be the case, for amongst others, the Privy Council say that no notice was necessary as the person in possession of the document was not subject to process. But the provisions as to notice apply to clause (a) only and not clause (e). It would appear, therefore, that it was held that the case fell under both the clauses, and that as it also fell under clause (a) any secondary evidence was admissible.<sup>1</sup> In a suit for a declaration that certain survey numbers were kept joint at a partition between the parties' ancestors in 1809, the plaintiff relied upon a certified copy of a partition deed passed between the parties in that year. The copy which was produced showed that the original document was produced in Court in a suit of 1823, and it was held that the Court relied upon the certified copy as showing the terms of the partition, as there was no reason to doubt, owing to the lapse of time, that the certified copy retained on the file of the suit of 1823 was a correct copy of the original.<sup>2</sup> When once the case for the introduction of secondary evidence is made out, a certified copy got from the Registrar's office can be admitted under Section 57, sub-

25. Kenneth v. Vayoth, (1882) 6 M. 80. In the matter of a collision between the "Ava" and the "Brenhilda," (1879) 5 C. 568; Chanreshwar v. Bisheshwar, A.I.R. 1927 Pat. 61; I.L.R. 5 Pat. 777: 101 T.C. 289: 8 P.L.T. 510.

1. Haranund v. Ramgopal, I.L.R. 27 Cal. 639: 27 I.A. I: 2 Bom.L.R. 562: (1899) 4 C.W.N. 429.  
2. Chudasama v. Chudasama, A.I.R. 1922 Bom. 177 (2); I.L.R. 46 Bom. 32: 76 I.C. 155.

section (5) of the Indian Registration Act without other proof than the Registrar's certificate of the correctness of the copy and should be taken as a true copy.<sup>8</sup>

**5. Objection to admissibility of secondary evidence.** Objection to admissibility of secondary evidence should be taken before it is admitted in evidence.<sup>8-1</sup> Once admitted without objection the Court should not ignore it without giving reasons.<sup>8-2</sup> When a certified copy is exhibited without objection to admissibility of secondary evidence, later objection was not accepted.<sup>8-3</sup> Latter objection to admissibility cannot be taken to be a secondary evidence once exhibited without objection even on the ground of want of proper notice to produce the original.<sup>8-4</sup> However, this rule does not apply when the evidence admitted is not even secondary evidence.<sup>8-5</sup> The question, whether secondary evidence was in any given case rightly admitted, is one which is proper to be decided by the Judge of first instance and is treated as depending very much on his discretion. His conclusion should not be overruled, except in a very clear case of miscarriage of justice.<sup>4</sup>

A document which is not relevant to the issues, even if admitted without objection by the opposite party, must be discarded by the appellate Court, that is, if the objection relates to the admissibility of the document itself under the law, such an objection is available to the party even at the appellate stage.<sup>5</sup> But an objection that a document, which *per se* is not inadmissible in evidence, has been improperly admitted in evidence in the trial Court, cannot be entertained for the first time in the Court of Appeal.<sup>6</sup> As their Lordships of the Privy Council observed :

"Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular

- 3. Karuppanna Gounder v. Kolanda Swami Gounder, A.I.R. 1954 Mad. 486 : (1953) 2 M.L.J. 717 : 1953 M.W.N. 799: 66 L.W. 1055.
- 3-1. Sri Chand Gupta v. Madan Lal, 1973 A.L.J. 635 : 1973 A.W.R. (H.C.) 472.
- 3-2. Collector, Cuttack v. P.C. Pani, A.I.R. 1972 Orissa 203 : (1971) 2 Cut.W.R. 202.
- 3-3. Basanta Kumar Das v. B. Das, (1974) 40 Cut.L.T. 1214.
- 3-4. Collector, Cuttack v. Rajib, A.I.R. 1972 Orissa 200 : 37 Cut.L.T. 848.
- 3-5. Kalyan Singh v. Chhoti, A. I. R. 1973 Raj. 263 : 1973 W.L.N. 240; 1973 Raj.L.W. 473.
- 4. Shookram v. Ram Lal, (1868) 9 W.R. 248, See also Harripria v. Rukmini, 19 I.A. 79 : I.L.R. 19 C. 435 (P.C.); Chuha Mal v. Haji Rahim Baksh, A.I.R. 1924 Lah. 303 : 71 I.C. 568; Pandappa Mahalingappa v. Shivalingappa Murteppa, A.I.R. 1946 Bom. 198 : 224 I.C. 169 : 47 Bom.L.R. 962; Vishwanath Ramji Karale v. Rawbai Ramji Karale, A.I.R. 1931 Bom. 105 : I.L.R. 55 Bom. 103 : 128 I.C. 901; 32 Bom.L.R. 1385; Ningawa v. Ramappa, I.L.R. 28 Bom. 94 : 5 Bom.L.R. 708; Gaya Prasad v. Jaswant Rai, A.I.R. 1930 All. 550 : 125 I.C. 460 : 1930 A.L.J. 1003; Maung Ba U v. Daw Khaw, A.I.R. 1935 Rang. 302; Mst. Mangra v. Bedi Ram, 35 I.C. 328.
- 5. Badrul Islam Ali v. Mst. Ali Begum, A.I.R. 1935 Lah. 251 : I.L.R. 16 Lah. 782 : 158 I.C. 465; Janki Nath Roy v. Mohendra Nardin Roy, Chowdhury, A.I.R. 1930 Cal. 94 : I.L.R. 57 Cal. 775: 126 I.C. 550; M. S. Ram Singh v. B. S. Surana, A. I. R. 1972 Cal. 190 (197) relying upon Gopal Das v. Sri Thakurji, A. I. R. 1943 P.C. 83; I. L. R. 1943 Ker. 69; 207 I. C. 553: 1943 A. L. J. 292; 1943 A. W. R. (P.C.) 14: 47 C. W. N. 607: (1943) 2 M. L. J. 361; 56 L. W. 593; 10 B. R. 7: 1943 O. W. N. 334, a decision of the Privy Council.
- 6. Badrul Islam Ali v. Mst. Ali Begum, A. I. R. 1935 Lah. 251;

or insufficient it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof."<sup>7</sup>

Secondary evidence of a document can be given, if the failure to produce the original document is supported by proper reasons.<sup>8</sup> If the defendant has waived proof of circumstances which justified the plaintiff in leading secondary evidence, it is not open to him in second appeal to raise a contention that the secondary evidence of the contents of the document was inadmissible.<sup>9</sup>

If an insufficiently stamped instrument (an agreement to lease) is not produced before the Court, no secondary evidence of its contents can be given even if no objection is raised as to its admissibility, for, by the terms of section 35, Stamp Act, 1899 (2 of 1899), such an instrument cannot be 'acted upon'.<sup>10</sup> A document of sale, unstamped and unregistered, cannot be received in evidence in view of section 35, Stamp Act, 1899 (2 of 1899), which cannot be deliberately circumvented by adducing secondary evidence of the contents of such document.<sup>11</sup>

**6. Consent or waiver.** The rule contained in this section which excludes secondary evidence is not so rigid as to be enforced even if no objection is taken at the trial by the party against whom the secondary evidence is offered. If a party waives proof of circumstances justifying the giving of secondary evidence, he cannot raise the objection in appeal.<sup>12</sup> Irrelevant and inadmissible evidence cannot be made relevant or admissible with the consent of a party. Consent or want of objection to the reception of evidence, which is irrelevant, cannot make the evidence relevant, but consent or want of objection to the wrong manner in which relevant evidence should be brought on record of the suit disentitles parties from objecting to such evidence in a Court of Appeal. Unless a party can be found to have been estopped from objecting to the admissibility of the evidence, evidence, not otherwise admissible

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| <p>Mahadeo Prasad v. Ghulam Mohammad, A. I. R. 1947 All. 161; I. L. R. 1946 All. 649; 1946 A. L. J. 411; 1946 A. W. R. (H.C.) 597. (See also cases cited therin); Surajbhan v. Hafiz Abdul Khalik, A. I. R. 1944 L. 1; 211 I.C. 145; 45 P. L. R. 325; Harnam Singh v. District Official Receiver, A. I. R. 1941 L. 400; 197 I.C. 581; Kundan Bai v. Venubai, A. I. R. 1952 Nag. 47; 1951 N. L. J. 523.</p> <p>7. Gopal Das v. Sri Thakurji, A. I. R. 1943 P.C. 83; I. L. R. 1943 Kar. 69; 207 I.C. 553; 1943 A. L. J. 292; 1943 A. W. R. (P.C.) 14; 47 C. W. N. 607; (1943) 2 M. L. J. 361; 56 L. W. 598; 10 B. R. 7; 1943 O. W. N. 334. See Gulab Chand v. Shco Karan, A. I. R. 1964 Pat. 45; Rani Bala v. Ram Krishna, (1969) 73 C. W. N. 751</p> | <p>(765).</p> <p>8. K. N. Dixit v. Union of India, I. L. R. (1973) 2 All. 362.</p> <p>9. Bacharbhai Narabhai v. Mohanlal Ranchhoddas, A. I. R. 1956 Bom. 196, 197; Budhe Ram v. Hira, A. I. R. 1958 H.P. 52; Ma The Nu v. Mg Ni Ta, A.I.R. 1925 Rang. 113 (1); 84 I. C. 486; Bishambhar Singh v. State of Orissa, A. I. R. 1954 S. C. 139; 1954 S. C. J. 219; 1954 S. C. R. 842; I. L. R. 1954 Cut. 398.</p> <p>10. Venkatasubba Rao v. Kesav Rao, (1967) 2 Andh. W. R. 444; (1968), 1 Andh. L. T. 14.</p> <p>11. Lachmareddy v. Sham Rao, (1966) 2 Andh. W. R. 251; (1966) 2 Andh. L. T. 290.</p> <p>12. Bacharbhai v. Mohanlal, A. I. R. 1956 B. 196; Subbarao v. Venkata Rama Rao, A. I. R. 1964 A. P. 53; (1963) 2 Andh. W. R. 307.</p> |
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sible, or which would have been liable to rejection if objection were taken to it, cannot be said to be good evidence, if admitted by the consent of parties.<sup>13</sup>

**7. Secondary evidence of acknowledgment.** Although the eighteenth section of the Limitation Act, 1963, provides that "when the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed, but no oral evidence of the contents shall be received", still this was not meant to exclude secondary evidence of the contents of the acknowledgment, under Section 65 of the Evidence Act, when a proper case for the reception of such evidence is made out.<sup>14</sup>

**8. Compliance with section, whether offends Art. 20, Constitution of India.** An attempt by a party to a proceeding to comply with the provisions of the Evidence Act so as to enable it to give secondary evidence cannot possibly amount to compelling a person to give evidence against himself within the meaning of Article 20 of the Constitution of India.<sup>15</sup>

**9. Draft, when admissible.** A draft can be accepted in evidence only if there is proof that the original has been prepared without any corrections and that it is exactly a true copy of the draft.<sup>16</sup>

#### SYNOPSIS FOR CLAUSE (a)

- 1. When original is in possession of adversary.
- 2. When original is in possession of a person out of reach of, or not subject to, process of Court.
- 3. When original is in possession of a person legally bound to produce it.
- 4. Any secondary evidence admissible.
- 5. Notice.

**1. When original is in possession of adversary.** The first case in which secondary evidence of a written document is admissible is when the document is in the possession or power of the adversary,<sup>17</sup> or other persons mentioned in this clause, who withhold it at the trial, and a notice to produce<sup>18</sup> the original has been duly served, where such notice is requisite.<sup>19</sup> The rule applies equally both in civil and criminal cases. In either mode of proceeding, in order to render the notice available, it must be first shown

- 13. Ayyavar Thevar v. Secretary of State, A. I. R. 1942 Mad. 528; 202 I.C. 274; (1942) 1 M. L. J. 485; 1942 M. W. N. 272.
- 14. Shambhu v. Ram, (1885) 12 C. 267; Wajibun v. Kadir, (1886) 13 C. 292; Chathu v. Virarayan, (1892) 15 M. 491. See also Uppi v. Mammavu, 15 Mad. 366; Narayana v. Venkataramana, 25 Mad. 220 (F.B.).
- 15. S. Hasim Raza Abidi v. Ved Prakash, 1971 A. L. J. 1889 (1891).
- 16. P. Kunhammad v. V. Moosankutty, A. I. R. 1972 Ker. 76 (77).
- 17. See Maneklal Mansukhbhai v. Hormusji Jamshedji Ginwalla & Sons, A. I. R. 1950 S.C. 1; 1950 S. C. R. 75; 1950 S. C. J. 317; 1950 A. L. J. 396; 52 Bom. L. R. 521;

- (1950) 2 M. L. J. 344; 63 M. L. W. 495; 5 D. L. R. S.C. 11; Narsidar Jekisondas v. Ravishankar Prabhshankar, A. I. R. 1921 Bom. 33; 128 I. C. 891; 32 Bom. L. R. 1435; Gopaldas v. Sri Thakurji, A. I. R. 1936 All. 422.
- 18. See S. 66.
- 19. See Taylor, Ev., s. 440; and Luchman v. Puna, (1889) 16 C. 753; Smt. Mani Devi v. Smt. Anpurna Dai, 1943 Pat. 218; I. L. R. 22 Pat. 114. In Dwarka v. Ramanand, 1919 All. 232; I. L. R. 41 All. 592; 51 I. C. 275; 17 A. L. J. 711, notice was held unnecessary as the defendant's must have known that they were required to produce the document.

that the document is in the hands or power of the party required to produce it.<sup>20</sup> The reason of this rule is self-evident, for otherwise the party calling for the document might foist upon the Court an alleged copy of an original which never had any existence. The section does not require, that, in all cases, it must be definitely proved that the document is in possession of the other side against whom it is sought to be proved, it being sufficient if it is proved that the document appears to be in his possession.<sup>21</sup> Slight evidence, however, will suffice to raise a presumption of this, where the document exclusively belongs to, or in the regular course of business ought to be, in the custody of the party served.<sup>22</sup> What is sufficient evidence is in the discretion of the Court. If papers were last seen in the hands of a defendant, it lies upon him to trace them out of his possession.<sup>23</sup> Where a will or deed is duly registered and the original is in possession of the persons who are interested to deny the same, a certified copy of it would be admissible in evidence in view of the fact that the original is not forthcoming and is being withheld by persons who are interested to deny it.<sup>24</sup> When a party has notice to produce a particular document which has been traced to his possession, he cannot, it seems, object to parol evidence of its contents being given, on the ground that, previously to the notice, he had ceased to have any control over it, unless he has stated this fact to the opposite party, and has pointed out to him the person to whom he delivered it.<sup>25</sup> Neither can he escape the effect of the notice, by afterwards voluntarily parting with the instrument, which it directs him to produce.<sup>1</sup> The documents must be traced to the possession of the party on whom notice is served or someone in privity with him, such as his banker, agent, servant, deputy, or the like. Such persons need not be served with a *subpoena duces tecum*, or even be called as a witness, but a notice given to the party himself will suffice.<sup>2</sup> Possession may be proved by showing that the document was last seen in the adversary's possession or power; or by calling his solicitor, who may be compelled to testify to its possession;<sup>3</sup> or by the admission of his counsel,<sup>4</sup> or presumably, by showing that it belongs exclusively to him, or would, in the ordinary course of business, be in his custody.<sup>5</sup> The adversary may, on the other hand, interpose evidence to disprove the possession.<sup>6</sup> Secondary evidence tendered to prove the contents of an instrument which is retained by the opposite party after notice to produce it, can only be admitted in the absence of evidence to show that it

20. Sharpe v. Lamb, 11 A. & E. 805; Muthu Venkatarama Reddiar v. Vardaraja Kounder, (1971) 2 M. L. J. 128 (129); 84 M. L. W. 452; A. I. R. 1971 Mad. 471.
21. Mst. Zaib-un-nisa v. Irshad Hussain, A. I. R. 1925 Oudh 504; 89 I. C. 284; 2 O. W. N. 505.
22. Henry v. Leigh, 3 Camp. 502. See also Robb v. Starkey, 2 C. & K. 143. See Bhubaneswari v. Harisaran, (1881) 6 C. 720. Presumptively the document is in the possession of the one to whom it belongs. Burr. Jones, s. 218.
23. R. v. Thistlewood, 33 St. Tr. 757, 758; R. v. Ines., ib. 989.
24. See Arya Pratinidhi Sabha v. Dev Raj, I. L. R. (1962) 2 Punj. 915; A. I. R. 1963 Punj. 208.
25. Sinclair v. Stevenson, (1824) 1 C. & P. 582; Knight v. Martin, Gow. R. 103.
1. Knight v. Martin, Gow. R. 103.
2. Taylor, Ev., s. 441; Partridge v. Coates, Ry. & M. 158; Burton v. Payne, 2 C. & P. 520; Sinclair v. Stevenson, (1824) 1 C. & P. 582.
3. Bevan v. Waters, (1828) 3 C. & P. 520; M. & M. 235; Dwyer v. Collins, 7 Exch. 639; see notes to ss. 126, 129 post.
4. Duncombe v. Daniell, 8 C. & P. 222; see S. 58 ante.
5. v. ante; Burr. Jones, Ev., s. 218.
6. Phipson, Ev., 11th Ed., 752; Taylor, Ev., ss. 440-441

was unstamped when last seen.<sup>7</sup> Where there is satisfactory evidence to show that the document was in the possession of the defendant and he fails to produce it, the plaintiff is within his right to produce secondary evidence, not only about the existence of the document but also about its contents.<sup>8</sup> In order to enable the plaintiff to tender the certified copy of a document as secondary evidence, it is enough for the plaintiff to prove that the original is not in his possession and so far he is concerned it is lost.<sup>9</sup> A copy of a document should not be received in evidence until all legal means have been exhausted for procuring the original. So, secondary evidence in the shape of private copies of bills maintained by a party cannot be admitted in evidence if the party in whose possession the original bills are is never called upon to produce them.<sup>10</sup> Where a document is alleged to be in the possession or power of a certain party, such party's denial in pleading that he has ever had the document is not sufficient to justify the omission of the process the law provides for his testimony, and his being called upon to produce the original. If a Judge is satisfied of a plaintiff's inability to produce an original *pattah* on which he relies, he ought to allow secondary evidence to be given of the contents of the document, but he should be satisfied, on reasonable grounds, that the evidence gives a true version of its contents, and he should require sufficient evidence of the execution of the *pattah*.<sup>11</sup>

Where the vendor, who sold the property to the plaintiff and to the defendant is common, and not a party to the suit, oral evidence of the contents of the agreement of sale, which is in possession of the vendor, is admissible in evidence when the defendant issued a notice under Section 66 post to the vendor to produce that document and he failed to produce it.<sup>12</sup>

**2. When original is in possession of a person out of reach of, or not subject to, process of Court.** Secondary evidence may also be given when the original is in the possession or power of any person who is out of reach of, or not subject to, the process of the Court.<sup>13-14</sup> Income-tax returns cannot be proved by secondary evidence, under clause (a) of this section because the Income-tax Officer in whose custody the documents are, is subject to the process of the Court. He can be summoned to attend the Court although he cannot be required to produce these documents which are classed as confidential by the Income-tax Act. Again, the Income-tax Officer cannot be described as a person legally bound to produce such documents. Neither can the returns be proved by secondary evidence under clause (e) of this section, as a return made by an assessee is not a public document within the

7. Sennandan v. Kollakiran, (1880) 2 M. 208.
8. Baboo Lal v. Nathmal, A. I. R. 1956 Raj. 126; 1956 Raj. L. W. 241.
9. Biswanath v. Dhapu Debi, A. I. R. 1960 Cal. 494 (500).
10. State of Bihar v. Charanjitlal, A. I. R. 1960 Pat. 139.
11. Shookram v. Ram Lal, (1868) 9 W. R. 248.
12. Muttha Venkatarama Reddiar v. L. E.—200

- Vardaraja Kounder, (1971) 2 M. L. J. 128 (130); 84 M. L. W. 452; A. I. R. 1971 Mad. 471.
- 13-14. See Ralli v. Gau, (1883) 9 C. 939; Mellus v. Vicar Apostolic, (1879) 2 M. 295; Sanjihil v. Mst. Parsan Koer, A. I. R. 1917 Pat. 241; 42 I. C. 617. In S. 36 of Act II of 1855, it was the document that must be out of the process of the Court; here it is the person in whose possession it is.

meaning of Section 74, as it does not form the act or record of the act of a public officer.<sup>15</sup>

No notice is required when the person in possession of the document is out of reach of, or not subject to, the process of the Court.<sup>16</sup> If a document be deposited in a foreign country, and the laws or established usage of that country will not permit its removal, secondary evidence of the contents will be admitted, because in that case it is not in the power of the party to produce the original.<sup>17</sup> And if the original document is in the custody of a person beyond the jurisdiction of the Court at the relevant time, secondary evidence can be allowed to be given.<sup>18</sup> But ordinarily, being filed in another Court is not sufficient reason for non-production.<sup>19</sup> Any secondary evidence will be admissible.<sup>20</sup> Secondary evidence of a will which is in the possession of a Notaire in the French Territory, who is not subject to the process of the Indian Court, and he himself deposes to that effect, may be admitted both under the second and third clauses of Section 65 (a).<sup>21</sup>

**3. When original is in possession of a person legally bound to produce it.** The third case in which secondary evidence is admissible under this clause is when the original is shown or appears to be in the possession or power of any person legally bound to produce it and when, after the notice mentioned in Section 66 (6) such person does not produce it. The construction of these, as of other words in this section, raises difficulties which it is not easy to satisfactorily solve. It is, therefore, necessary in the first place to state the English law upon the subject of the admissibility of secondary evidence where the party served with notice to produce a document is not compellable to produce it in evidence.

The general rule, which requires primary evidence, assumes that it can be given; when it cannot, secondary evidence may be adduced. So where a party calls for a document in the possession of another, which document the latter is entitled to refuse to produce on the ground of privilege (e. g., as being his title-deed),<sup>22</sup> secondary evidence may be given of the document, as everything has been done to obtain it.<sup>23</sup> The English rule on the point has been thus summarised : Secondary evidence may be given of the contents of a document "when the original is shown or appears to be in the possession or

- 15. See S. 54 of the Act; *Mythili Ammal v. Janaki Ammal*, A. I. R. 1940 Mad. 161; I. L. R. 1940 Mad. 329; 189 I. C. 722; 1939 I. T. R. 657; 1939 M. W. N. 1237; 50 L. W. 815; *Noone Varadarajan Chetty v. Vertukuri Kanakiah*, A. I. R. 1939 Mad. 546; 186 I.C. 7; 1936 I. T. R. 331; (1939) 1 M. L. J. 791; 1930 M. W. N. 377.
- 16. S. 66, clause 6. From S. 65 (which is not happily worded in this respect) it might be gathered that notice was necessary; see last paragraph of clause (a), and *Ralli v. Gau*, (1883) 9 C. 939.
- 17. *Burnabie v. Rallie*, 42 Ch. D. 282, 291; *Crispin v. Doglioni*, 32 L. J. P. & M. 109; *Alivon v. Furnival*, 1 C. M. & R. 277, 291, 292; *Boyle v. Wiseman*, 10 Ex. R. 647; *Quilter v. Jorss*, 14 C. B. N. S. 747. See 14 and 15 Vict. c. 99.
- 18. *Jai Singh v. Harnam Das*, I. L. R. (1964) 1 A. 553; A. I. R. 1964 A. 381.
- 19. *Gour v. Huree*, (1868) 10 W. R. 338.
- 20. S. 65.
- 21. *Muni Ammal v. Govindarajan*, A. I. R. 1958 Mad. 393; I. L. R. 1958 Mad. 415.
- 22. See Ss. 130, 131 post.
- 23. *Hibberd v. Knight*, (1848) 2 Ex. 11, 12, per Parke, B.; *Sayer v. Glossop*, ib., 409, 410, 411, per Pollock, C. B.; *Doe v. Ross*, 7 M. & W. 122, per Parke, B.; *Phelps v. Prew*, 3 E. & B. 438, 442, 443.

power of a stranger not legally bound to produce it, and who refuses to produce it after being served with a *subpoena duces tecum*, or after having been sworn as a witness and asked for the document and having admitted that it is in Court.”<sup>24</sup>

Further, according to English law, the disobedience of a person served with a *subpoena duces tecum* will not render admissible secondary evidence of the contents of the document which he is called upon to produce.<sup>25</sup> To do this, the witness must be justified in refusing the production, for otherwise the party will have no remedy, except as against him.<sup>1</sup> Again, when a document is withheld, not on the ground of privilege, but on that of lien, secondary evidence may be inadmissible. So, if a solicitor refuses to produce a deed, as claiming a lien upon it,<sup>2</sup> secondary evidence of its contents cannot be received, provided the party tendering such evidence be the person liable to pay the solicitor's charges.<sup>3</sup> But, a witness will not be allowed to resist a *subpoena duces tecum* on the ground of any lien he may have on the document called for in evidence, unless the party requiring the production be himself the person against whom the claim of lien is made.<sup>4</sup>

A solicitor, who has not acted for either of the parties to an action may be summoned as a witness on a *subpoena duces tecum* and compelled to produce documents on which he claims a lien.<sup>5</sup> He will also be ordered to produce to the trustee of a bankrupt's documents over which he has a lien, but which are the property of the bankrupt.<sup>6</sup> Where a litigant can show that the retention by his solicitor of papers over which the latter has a lien would embarrass the litigant in his action, the solicitor may be ordered to deliver up the papers on payment into Court or security given.<sup>7</sup> If a solicitor has a lien over documents belonging to his client, he is nevertheless bound to produce them for the benefit of a third person, if his client would have been bound to do so.<sup>8</sup> When a document is in the possession of a stranger within the jurisdiction, who has not been subpoenaed to produce it, secondary evidence of its contents cannot be given.<sup>9</sup>

The question then arises how far such rules, or any of them, are applicable under this Act. As already observed, no construction of this clause is free from difficulty.<sup>10</sup> In the first place, it may be noticed that every person summoned to produce a document must, if it is in his possession or power,

24. Steph. Dig., Art. 71; see Taylor, Ev., s. 457; Phipson, Ev., 11th Ed., p. 63.

25. Jesus Coll v. Gibbs, 1 Y. & C. Ex. R. 156.

1. R. v. Llanfaethly, (1853) 2 E. & B. 940; Taylor, Ev., s. 457, by an action for damages. See Acts, XIX of 1953, S. 26, X of 1855, S. 10 (Liability for damages on failure to give evidence or produce a document).

2. See Contract Act, S. 171; Kesserbhai v. Naranji, (1880) 4 B. 353.

3. Attorney-General v. Ashe, 10 Ir. Eq. R. N. S. 309.

4. Taylor, Ev., s. 458, and cases there cited.

5. Re Hawke, (1898) 2 Ch. 15.

6. Re Toleman, (1880) 13 Ch. D. 885.

7. Re Foster, (1904) 116 L. T. J. 388.

8. Re Lawrence, (1894) 1 Ch. 556.

9. Andrews v. Wirral, (1916) 1 K.B. 863.

10. In Norton, Ev., 244, 246, 248, it appears to be considered that the clause ought and was meant, to run “if any person not legally bound to produce it” the word “not” having been omitted by accident Mr. Markby also thinks probable that the word “not” has been omitted by mistake, though he concedes that no question of there being any misprint in the Act seems to have been raised in this country; Evidence Act, p. 58, v. post. If this be correct, the clause would then be in agreement with the rule of English law as above stated, and there would be no

bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of such objection is a matter to be decided on by the Court.<sup>11</sup> Assuming the present clause to have reference to that class of documents only, which a person is not justified in refusing, on the ground of privilege, to produce, in other words, documents which a person is legally bound to produce in evidence on receiving a notice to that effect, if such person does not produce it in evidence, that is either by not handing over the document if it be in Court with him, or by attending in Court with the document, he being *ex concessis*, legally bound to produce it, and its non-production being, therefore, unjustifiable, secondary evidence will be admissible forthwith upon such non-production, under the terms of this clause. It will appear, therefore, that the English rule above mentioned, according to which secondary evidence is not admissible of a document which is, without justification, withheld, is not law under this section.<sup>12</sup> Much, however, may be said in favour of a departure from the English rule upon this

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difficulties of construction on the points hereafter dealt with. One point of variance from English law is, however, suggested by Mr. Norton as arising out of a later portion of the section, viz., that whereas under that law, where a person refuses to produce a document, which he is legally compellable to produce, the party calling for the document cannot give secondary evidence and has no remedy except as against him; on the other hand, under the Act such a case may have been provided for in the second portion of clause (c) dealing with inability to produce in reasonable time. The learned author says : "Perhaps under this, too, [clause (c) portion referred to supra], a party might give secondary evidence of a document, which person having no legal right to refuse the production of, nevertheless refuses on notice to produce." ib., 248.

11. S. 162, post; R. v. Daye, (1908) 2 K. B. 333; R. v. Lord John Russell, (1839) 7 Dow. 693.

12. Mr. Markby says (Evidence Act, p. 58); "We have now to consider S. 65 (a), and to understand this we must refer to the Code of Civil Procedure. That Code only speaks of a notice to produce documents in connection with their production before the trial so that they may be inspected and preparation made to meet them (Order XI, rule 1). Still it can hardly be doubted that if A and B were in litigation and A were to give B notice to produce a document in the possession of B at the trial, and B did not do so the Court would consider this to be reasonable notice within the mea-

ing of S. 66 and would admit secondary evidence under the first clause S. 65 (a). So, again, if the document were not in the possession of A or B, but of C, a third person, and C were out of reach, secondary evidence could be produced without any notice of any kind [S. 65 (a), S. 66, proviso (6)]. But suppose C is within reach and subject to the process of the Court. By the Code of Civil Procedure, Order XVI, rule 1, a summons to produce the document must be issued, and if it is not obeyed then proceedings may be taken to compel C to produce the document, and special powers are granted for that purpose. If, however, we are to take the words 'of any person legally bound to produce it' as they stand, there is no necessity to take any steps to produce the document as secondary evidence of it at once becomes admissible. I can hardly believe that this is what was intended. I think it probable that the word 'not' has been omitted here by mistake; and that the case intended to be dealt with here is the case of a person who, though within reach of the Court, is not legally bound to produce the document. Several such cases are mentioned in Ss. 122-121. This would be quite intelligible and in accordance with English law. It must, however, be admitted that no question of there being any misprint in the Act seems to have been raised in India; if there is no misprint then, if in the case above put, C having been summoned to produce the document, omits to obey it, secondary evidence is at once admissible."

point. It may be argued, that it is not reasonable that a party's right to give evidence should be taken away by the wilful, negligent, and possibly fraudulent refusal of another to produce a document which the law requires him to produce. It may be that the person refusing to produce the original does so at his own peril, and is liable to an action for damages in which he may be required to make good to the party calling for a document the loss which he has sustained by its non-production. A remedy of this kind would, however, in many cases be illusory. Thus, a suit for several lakhs of rupees might be dismissed or decreed owing to the inability of the parties to give secondary evidence of a document, while the person in possession of the original against whom an action would lie might be a man of straw. On the other hand, the danger of collusion must not be overlooked. Where the original document was presumably in the possession of a person who was on bad terms with the party seeking to prove it, secondary evidence was held to be admissible.<sup>13</sup>

The question, however, next arises whether the Act has made any, and if so what provision for the giving of secondary evidence of documents which the person in possession is justified in refusing to produce. If, for example, a person summoned to produce a document brings it to a Court, as he must,<sup>14</sup> but, as he may, objects to its production in evidence on the ground of privilege, being his title-deed, or the like,<sup>15</sup> and the Judge decides that the objection is a valid one,<sup>16</sup> may secondary evidence, in such a case, be given by the party calling for the original, as he would be undoubtedly entitled to do according to the English rule above mentioned? According to the wording of the section, as it now stands, the person so summoned would not be a 'person legally bound to produce'. It has been suggested that in such a case, he is not *qua* such production, 'subject to the process of the Court',<sup>17</sup> for he cannot be compelled by the Judge to produce the document.<sup>18</sup> But this is open to the objection that by Section 66, clause (6), no notice to produce is necessary where a person is 'not subject to the process of the Court'. And not only is it difficult to suppose that notice would be excused in such a case, but such notice would clearly be necessary in order that the document be produced for adjudication by the Court on the question of privilege, and moreover the last paragraph of this clause expressly and plainly requires such notice to be given. Another construction is that which reads the words 'legally bound' as meaning legally bound by virtue of the *subpoena* to produce in Court. The clause would, in such case, include all persons in possession of documents, which they are summoned to produce, whether those documents be privileged or not (Section 162). But this construction is also open to objection. 'Produce' in this clause seems to mean to produce in evidence, for Section 162 makes a distinction between 'bringing to Court' and 'production'.<sup>19</sup> Further, a person is only legally bound by virtue of a process of Court, *e. g.*, a *subpoena duces tecum*. Process emanating from a party, such as a 'notice to produce' in its technical and English sense of a notice by a party or the attorney of such party, to the other party or to his attorney, strictly speaking, creates no legal obligation. The only penalty, if it be one, attached to refusal to produce on such a notice, is that secondary evidence

13. Bashituddin v. Mahadeo Singh, A. I. R. 1924 Oudh 306: 79 I.C. 663: 27 O.C. 26: 11 O. L. J. 565.

14. S. 162 post.

15. See Ss. 130, 131 post.

16. S. 162.

17. Whitley Stokes, Anglo-Indian Codes,

II, 892.  
18. S. 165 post.

19. The word "produce" only means "procure the production of or give it in evidence"; Gaya Prasad v. Jaswant Rai, A. I. R. 1930 All. 550: 125 I.C. 460; 1930 A. L. J. 1003.

may be given. If then 'legally bound' means legally bound by virtue of the *subpoena*, it is plainly unnecessary to give a person already affected with notice to produce by virtue of the *subpoena* any further notice to produce. But the section would then read "or of any person subpoenaed to produce it and when after the notice mentioned, etc." On the other hand, this argument is weakened by the fact that there has, in respect of another matter, been a clear error of draughtsmanship in the last paragraph of this clause.

Mr. Markby says that if the word "not" has been omitted in the fourth paragraph of clause (a) then by the express provisions of that section, secondary evidence is admissible, and this is also the English law.<sup>20</sup> By implication, therefore, he would consider secondary evidence inadmissible under the clause as it now stands. And this also appears to be the view taken by Mr. Field who says that "as Section 65, clause (a), para 4, admits secondary evidence of the existence, condition or contents of a document only when a person legally bound to produce it refuses after notice to do so, it may appear that neither the owner nor any one else can be called to give secondary evidence of a document which the person in possession of it is not legally bound to produce. If this be so, it is contrary to the rule of English law, which admits secondary evidence of a document in the hands of a stranger who is not compellable by law to produce it, and who refuses to do so".<sup>21</sup>

If the case is not covered by the words of the section, according to those constructions already given favouring the admissibility of secondary evidence, there has been either an intentional or accidental omission to provide for the admission of secondary evidence under the circumstances mentioned. It is difficult to assign any reason for its intentional omission. For the effect of such omission should be to establish a rule contrary to English law, and to the general principles controlling the reception of secondary evidence, which might, in many cases, cause serious and unreasonable injury to a litigant. If, therefore, it be held that this section does not make provision for the case mentioned, it may perhaps nevertheless be held upon the English cases and the general principles and considerations adverted to, that where a person is justified in refusing to produce a document on the ground of privilege, secondary evidence may be given by the party calling for the document, for he has, in the words of Parke, B.,<sup>22</sup> done everything in his power to obtain it.<sup>23</sup> It is also apprehended that the rule with regard to documents, the subject of lien, is the same under this Act as it is in England.

Where oral evidence was given to prove the contents of a letter, which was neither produced nor called for, but no objection was raised to the giving of the evidence, it was held that this was secondary evidence of the contents of a document and could not be given without satisfying the conditions of this section. Section 66 rendered it legally inadmissible, although no objection was raised to the giving of it.<sup>24</sup> This decision is unsustainable, and has been dissented from.<sup>25</sup> It fails to draw the distinction between evidence

20. Markby, Ev., Art. 94.

21. Ibid.

22. See Hibberd v. Knight, (1848) 2 Ex. 12.

23. But see Cunningham, Ev., 213.

24. Kameshwar v. Amanutulla, (1898) 26 C. 53: 2 C. W. N. 649, Rampini, J., observing that "there is no law in this country that the absence of objection to evidence, which is

legally inadmissible, makes it admissible."

25. Kishori v. Rakhal, (1903) 31 C. 155. Approved in Ram Lochan v. Harinath, A. I. R. 1922 Pat. 565; I. L. R. 1 Pat. 606; 67 I.C. 628: 3 P. L. T. 397 approving Chimnaji v. Dinkar, 11 B. 320; Lakshman v. Amrit, 24 B. 591.

which is irrelevant and relevant evidence proved in a particular manner without objection. An objection to the irregularity of proof should not be entertained in the Appellate Court where no objection on this head has been taken in the Court of first instance.<sup>1</sup>

It may be noted that secondary evidence of documents can be given only when, after the notice mentioned in Section 66, the person having the original does not produce it.<sup>2</sup> In a suit for declaration, *inter alia*, that certain property formed part of trust-properties, on the clear evidence of the plaintiff that he had seen the original deed of trust in the possession of the defendant, the defendant must have known that he would be required to produce it. As there was thus an implied notice under proviso (2) to Section 66 *post*, the requirement of Section 65 (a) is satisfied and the production of the certified copy of the deed of trust is sufficient proof of the deed itself.<sup>3</sup> Where the circumstances are that the defendant must be held to know that she will be required to produce a particular document, the case falls under proviso (2) to section 66 *post*. Therefore no notice is required to be given under that section and a certified copy of the document is admissible in evidence.<sup>4</sup>

**4. Any secondary evidence admissible.** The section itself provides that if a case falls under clause (a) any secondary evidence of the document is admissible. The same will be the position though the case may also fall under clause (f). Clause (a) is not controlled by clause (f). Thus, in the instant case, a plain copy of a waqf was admissible.<sup>5</sup> Where the original deed was either in possession of the opposite party who did not produce it despite notice or was lost, the case fell under clause (a) or clause (c). In either case any secondary evidence could be given. If a certified copy of the deed also was not available due to records of Registrar's office having been destroyed, a copy made from certified copy earlier filed in some other case by the opposite party was held admissible as any kind of secondary evidence was

- See Notes to S. 5 ante. "Objections by parties", and *Shahzadi v. Secretary of State for India*, (1907) 34 C. 1059 (P.C.). See also *Gopal Das v. Sri Thakurji*, A. I. R. 1943 P.C. 83; *I. L. R.* 1943 Kar. 69 (P.C.); 207 I. C. 553; 1943 A. L. J. 292; 47 C. W. N. 607; (1943) 2 M. L. J. 51; 56 M. L. W. 593; *Mohammad Yusaf v. Hafiz Abdul Khaliq*, A. I. R. 1944 Lah. 9; 211 I. C. 366; 45 P.L.R. 339; *Dogar Mal v. Sunam Ram*, A. I. R. 1944 Lah. 58; 212 I.C. 416; 45 P. L. R. 441; *Mst. Basanti v. Pholo*, A. I. R. 1955 H. P. 37; *U Po Kin v. U So Gale*, A. I. R. 1936 Rang. 277; 163 I.C. 408; *Mohammad Hassan v. Safdar Mirza*, A. I. R. 1933 Lah. 601; *I. L. R.* 14 Lah. 473; 144 I. C. 45; 34 P. L. R. 820; *Ramchandra Ayyar v. Ranganayaki Ammal*, A. I. R. 1941 Mad. 612; (1941) 11 M. L. J. 557; 1941 M.

- W. N. 529; 53 L. W. 483; *Biswambhar Singh v. State of Orissa*, A. I. R. 1954 S. C. 139.
- Krishnarao v. State of A. P.*, A. I. R. 1962 A. P. 249.
- Lakshmi Kanto Roy v. Nishi Kanto Roy*, 71 C.W.N. 362 (372, 373).
- Amir Bi v. Nilasandra Mosque*, Bangalore, 16 Law Rep. 271: (1968) 2 Mys. L. J. 410: A.I.R. 1969 Mys. 103 (107).
- Bibi Aisha v. Bihar Subai Sunni Majlis Avaqaf*, (1969) 1 S.C.R. 417; (1968) 1 S.C.J. 347: (1968) 2 S. C.W.R. 393: (1968) 2 Um.N.P. 1209: 1969 A.L.J. 290; I.L.R. 47 Pat. 1081: 1969 B.L.J.R. 313: 1969 M.P.W.R. 260: 1969 M.L.J. (Cr.) 209: A.I.R. 1969 S.C. 253 (254) approving the view of Wilson, J. in *In the matter of a Collision between The 'Ava' and the 'Brenhilda'*, (1879) 1 L.R. 5 Cal. 568.

admissible.<sup>5-1</sup> When record is lost, secondary evidence is admissible either by compared copy or one account of the contents.<sup>5-2</sup>

**5. Notice.** Notice requiring the person in whose custody the document is to produce the same is a condition precedent for admission in evidence of a secondary evidence under this clause.<sup>5-3</sup> But where the document is alleged to be in the possession of a party who denies possession, notice to him is not necessary as it would be an empty formality.<sup>5-4</sup>

#### SYNOPSIS FOR CLAUSE (b)

|   |   |
|---|---|
| 1. When existence, condition or contents of original have been admitted in writing. | 2. Inadmissible documents, admission as to. |
|---|---|

**1. When existence, condition or contents of original have been admitted in writing.** Oral admissions of the contents of documents are ordinarily inadmissible, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence.<sup>6</sup> The present clause, however, provides that a written admission is receivable as proof of the existence, condition, or contents of a document even though the original is in existence, and might be, but is not, produced.<sup>7</sup> A petition presented to the Collector by a donor admitting and recognising a gift of his property in favour of his wife is secondary evidence of the strongest character of the gift.<sup>8</sup> The written admission is the secondary evidence admissible in the case mentioned in this clause.<sup>9</sup>

**2. Inadmissible documents, admission as to.** This clause will not apply or avail a party where the original document is inadmissible, for want of a stamp,<sup>10</sup> or of registration.<sup>11</sup> In the undermentioned criminal case<sup>12</sup> it

- 5-1. A. Pritam Lal v. Shagubhai, A.I.R. 1975 Guj. 73 : (1975) 1 Guj.L.R. 61.
- 5-2. P. J. Jaitha v. State of West Bengal, A.I.R. 1974 Cal. 210.
- 5-3. P. C. Patnaik v. Kalidas Sen, A.I.R. 1978 Orissa 65; M. V. Reddiar v. V. Kounder, A.I.R. 1971 Mad. 471 : 84 M.L.W. 452 (1971) 2 M.L.J. 128.
- 5-4. C. S. Pati v. Ahalya Devi, A.I.R. 1974 Orissa 199.
- 6. S. 22 ante.
- 7. Cunningham, Ev., 214; Phillips and Arn., Ev., 320, 325; Goss v. Quinton, 3 M. & G. 285; Purushottam Chettiar v. Ramanuja Padayachi, (1969) 1 M.L.J. 237 (240).
- 8. Basiruddin v. Himmat Ali Mondal, A.I.R. 1915 Cal. 22 : 25 I.C. 852.
- 9. See last paragraph but two of S. 65.
- 10. Damodar v. Atmaram, (1888) 12 B. 443, 446; Jhanda Singh v. Harnam Singh, A.I.R. 1926 Lah. 415 : 94 I.C. 75 : 27 P.L.R. 260; Herbert Francis v. Muhammad Akbar, A.I.R. 1928 Pat. 134 : I.L.R. 7 Pat. 99 : 105 I.C. 502 : 9 P.L.T. 221; Lal

- Khan Sultan Ahmad v. Allah Ditta, A.I.R. 1950 Lah. 154; Doraisami Mudaliar v. Doraiswami Iyengar, 1925 Mad. 753 : 87 I.C. 382 : 48 M.L.J. 432 : 1925 M.W.N. 180; Moolchand v. Lachman, A.I.R. 1958 Raj. 72; Kartar Singh v. Mohinder Singh, 1971 Cur.L.J. 212.
- 11. Divethi v. Krishnasami, (1882) 6 M. 117; Sambayya v. Gangayya, (1890) 18 M. 308; Sheikh Ruhmatoolah v. Shuriutoollah Kaghee, 10 W.R. 51 (F.B.); P. K. Kalliani v. M. T. Narayanan, 28 I.C. 69 ; A.I.R. 1915 M. 962; Muhammad Din v. Allahditta, 95 I.C. 444 : 27 P.L.R. 268 : A.I.R. 1926 J. 101 (4); Yasin Baig v. Haranarayan Agarwalla, (1969) 35 Cut.L.T. 927 (929); Janardhan Kashinath v. Janardhan Vishwanath Sastri, 1927 Nag. 214 : 101 I.C. 839; Ma Ngwe Hmon v. Maung San Yauk, 1929 Rang. 181; Hiralal Ramanarayan v. Shankar Hirachand, 1921 Bom. 401 : I.L.R. 45 Bom. 1170 : 62 I.C. 637 : 23 Bom.L.R. 506.
- 12. R. v. Viran, 9 M. 224.

was held, that inasmuch as the record of the statement of the accused was not admissible, secondary evidence thereof could not be given, the Court observing as follows :

"Reference is made by the Sessions Judge to Section 65 of the Evidence Act, the words appearing in clause (b) of that section being quoted, but for the reasons above stated, I am of opinion that it was not open to the Magistrate to procure an admission in writing—if the affixing of his mark to the whole statement by the accused can be held to constitute an admission in writing for this purpose—in respect of the contents of previous statements."

This clause must be read with Section 22. The result seems to be this : This written admission may always be proved. The oral admission can only be proved in the cases stated in Section 65 (a), (c) and (d). Of course, admissions as to the contents of documents are frequently made by the parties or their pleaders at the hearing. The reference now under consideration has no application to such admissions,<sup>18</sup> which are governed by Section 58. The admissions spoken of in Sections 22 and 65, are evidentiary admissions. Admissions under Section 58 dispense with proof.

In order to avail of this clause, the written admission of the contents of the document, sought to be produced, has to be the admission of the person against whom it is sought to be proved, or of his representative-in-interest.<sup>14</sup> A statement as to the execution of a bond, contained in a debtor's application to the Debt Conciliation Board, cannot be regarded as an admission within the meaning of this clause.<sup>15</sup>

#### SYNOPSIS FOR CLAUSE (c)

- 1. When the original had been destroyed or lost, or cannot be produced.  
—Any other reason not arising from his own default or neglect.
- 2. Search.
- 3. Inability to produce original.
- 4. Documents in record of another Court.
- 5. Any secondary evidence is admissible.

**1. When the original has been destroyed or lost, or cannot be produced.** When the original has been destroyed<sup>16</sup> or lost<sup>17</sup> or when the party offering evidence of its contents cannot, for any other reason, not arising

- 13. Markby, Ev., Art. 59.
- 14. Hira Lal v. Ram Prasad, 1949 All. 677, 678; Brahmananda v. Kanduri, A.I.R. 1959 Orissa 126 : 25 Cut. L.T. 66.
- 15. Udhao Nanaji Gadewar v. Narayan Vithoba Mangilwar, 1941 Nag. 95 : 194 I.C. 120 : 1941 N.L.J. 194.
- 16. See Syud Abbas v. Yadeem, (1843) 3 Moo.I.A. 156; Luchmedhur v. Raghoobar, (1874) 24 W.R. 284, 285 (destruction of record during Mutiny); Kunnenh v. Vayoth, (1882) 6 M. 80; Muhammad v. Ibrahim,

- (1866) 3 Bom.H.C.R. A.C.J. 160, 162, 163; Krishna v. Kishori, (1887) 14 C. 486.
- 17. See Hurrish v. Prosunna, (1874) 22 W.R. 303; In the matter of a collision between the "Ava" and the "Brenhilda", (1879) 5 C. 568; Khetter v. Khetter, 5 C. 886; Roop Manjoorie v. Ramlal, (1864) 1 W.R. 145; Luchman v. Puna, 16 C. 753; Muhammad Zafar v. Zahur Hussain, 1926 All. 741 : I.L.R. 48 All. 78 : 97 I.C. 82 : 24 A.L.J. 964.

from his own default or neglect, produce it in reasonable time,<sup>18</sup> any<sup>19</sup> secondary evidence of the contents of the document is admissible. "If the instrument be destroyed or lost, the party seeking to give secondary evidence of its contents must give some evidence that the original once existed<sup>20</sup> and must then prove its destruction<sup>20-1</sup> either positively<sup>21</sup> or at least presumptively, as by showing that it has been thrown aside as useless<sup>22</sup> or he must establish its loss, by proof that a search has been unsuccessfully made for it, in the place or places where it was most likely to be found.<sup>23</sup> A finding that a document is lost cannot be recorded unless it is established that a thorough search had been made in places where it was likely to be found and of persons likely to have possession of the same.<sup>24</sup> Where it is alleged that the original document is wormeaten or in a very tottering condition, there should be satisfactory evidence to show that they are destroyed. If sufficient proof of the destruction of the original has not been given, secondary evidence is not admissible under the section.<sup>25</sup> Secondary evidence as to the contents of the original can be admitted in evidence only when the original is either deliberately held by the person in whose custody it was, or it is proved to have been lost.<sup>1</sup> It is obvious that loss of original must be proved by the person proposing to produce a copy before the copy is produced.<sup>2</sup> It is for the party desiring to produce secondary evidence to prove the loss of the original, and it must do so to the satisfaction of the Court. The question whether the original has been lost is proper to be decided by the trial Court, and is treated as depending very much on the discretion of the trial Judge. His conclusion should not be overruled, except in a very clear case of miscarriage of justice.<sup>3</sup> The question whether the non-production of the original is due to loss,<sup>3-1</sup> or any other sufficient reason, not arising from his own default or neglect,<sup>4</sup> is one of fact and cannot be opened in second appeal. Where, however, the party desiring to produce secondary evidence does not explain the non-production of the original, it cannot, for any reason, other than one not arising from his own default and neglect, be allowed to offer secondary evidence.<sup>5</sup> The copy of

18. See Womesh v. Shama, (1881) 7 C. 98, 100.

19. Vide page 1557 post.

20. Doed. Padwick v. Wittcomb, (1851) 6 Exch. 601.

20-1. P. Kunhammad v. Moosankutty, A. I.R. 1972 Ker. 76; 1972 Ker.L.T. 328.

21. See Mufeezoodeen v. Mehar Ali, (1864) 1 W.R. 212, 213.

22. R. v. Johnson, (1805) 7 East. 65 : 29 State Tr. 81.

23. See Bhubaneshwari Debi v. Hari-saran Surma Moitra, 6 Cal. 720 : 8 C.L.R. 327 (P.C.); Krishna Kishori v. Kishorilal, 14 I.A. 71 : 14 Cal. 486 (P.C.); Muhammad Khan v. Sheo Bhik Singh, 1929 Oudh 447 : 6 O.W.N. 859; Rangappa v. Rangaswami, A.I.R. 1925 Mad. 1005 : 88 I.C. 249 : 1925 M.W.N. 232; Ram Saran Das v. Tulsi Ram, A. I. R. 1922 Lah. 417 : 67 I.C. 565; Jaldhu Ananta Raghuram v. Rajah Bommadevara, A.I.R. 1958 Andh. Pra. 418; Bobba Suramma v. Peddi

Reddi, A.I.R. 1959 Andh. Pra. 568 (1958 Andh. Pra. 418 follow-ed).

24. Biswanath Agarwala v. Dhapu Debi Jagodia, A.I.R. 1966 Cal. 13 (22). See Amrita Devi v. Sripat Lal, A. I.R. 1962 A. 111.

1. Ram Chand v. Wazir Chand, A.I.R. 1962 Punj. 293 : 64 P.L.R. 203; Atra Devi v. Ramswaroop Prasad Singh, A.I.R. 1972 Pat. 186 (the original document was a Sada-hukum-nama).

2. S. 134, illus. (b). See also Mohan-lal Sah v. Samal Ram, A.I.R. 1961 Pat. 300.

3. Haripriya v. Rukmini, L.R. 19 I.A. 79 : I.L.R. 19 C. 438.

3-1. Bansraj v. Kaushal Kishore, A.I.R. 1973 All. 99.

4. Gaya Prasad v. Jaswant Rai, 125 I.C. 460 : A.I.R. 1930 A. 550; Chuha Mal v. Rahim, 71 I.C. 568 : A.I.R. 1924 L. 303.

5. Ramanna v. Sambamoorthy, A.I.R. 1961 A.P. 361.

an affidavit is inadmissible when its original is neither produced nor proved and no case is made out for secondary evidence.<sup>6</sup> Loss can never be proved absolutely. Oral evidence of the loss of the original document which has not been seen for many years satisfies the provisions of this clause so as to make a copy admissible.<sup>7</sup> This principle is also applicable to cases where the original is put beyond the reach of the party. Thus, where the original sale-deed is forwarded by the Sub-Registrar to the Revenue Officer direct for effecting mutation and, in consequence, the party is not in possession of the sale-deed nor can get it back from the custody of the Revenue Court, he can give secondary evidence on the basis that the document is lost.<sup>8</sup> But, where the plaintiff alleges that the document is in the possession of the defendant and his allegation is not challenged, it is a proper case in which notice, as required under clause (a), should be dispensed with, and even if the document is not in the possession of the defendant also, it must be deemed to have been lost.<sup>9</sup> Once a document is produced in Court and tendered in evidence and exhibited, the Court is responsible for its safe keeping and if the document is lost, the plaintiff must be given another chance of producing a copy or giving secondary evidence of its contents.<sup>10</sup> In such a case, no formal proof of the loss of the document is necessary.<sup>11</sup> It is not necessary for the party offering secondary evidence to show how the original document was made away with or to satisfy the Court that the opposite party was more likely to have been guilty than himself.<sup>12</sup> Where a document was mentioned in the plaint and the loss of it was mentioned in an oral pleading made while evidence was being given, when leave was asked to prove it by secondary evidence, it was held that the leave could not be refused on the ground that the loss was not "specially pleaded".<sup>13</sup>

The ground for reception of secondary evidence may stem from a statutory rule. Thus, a presumption arises from Rule 164 of the Indian Telegraph Rules, 1951, that within three months of its date, the original of an inland telegram would have been destroyed in the ordinary course. The certified copy of such a telegram is admissible in evidence.<sup>14</sup>

The rule requiring proof of destruction or loss of original before secondary evidence can be admitted applies not only when the document is being

6. Hans Raj v. State, 1966 Cr.L.J. 1132 : A.I.R. 1966 Him. Pra. 52 (58).
7. Basant Singh v. Brij Raj Saran Singh, A.I.R. 1935 P.C. 132 : 62 I.A. 180 : I.L.R. 57 All. 494 : 156 I.C. 864 : 1935 A.L.J. 847 : 37 Bom. L.R. 805 : 39 C.W.N. 1057 : 69 M.L.J. 225 : 1935 M.W.N. 768 : 42 L.W. 231 : 1935 O.W.N. 759 : 37 P.L.R. 614 : 16 P.L.T. 669; Balaram Das Agarwalla v. Kesardeo Khemka, 71 C.W.N. 51 (57) [solicitor saying that missing hundis must have been misplaced with some other papers', loss within the meaning of section 65(c) held proved.]
8. Kangabam v. Gurumayum, A.I.R. 1958 Manipur 16.
9. Vishwanath Vithoba v. Genu Kisan, A.I.R. 1956 B. 555.
10. Ram Singh v. Pat Ram, A.I.R. 1933 L. 782 (1) : 144 I.C. 812 ; 34 P.L.R. 657.
11. Chattra Kumari Devi v. Mohan Bikram Shah, A.I.R. 1931 Pat. 114 : 121 I.C. 337.
12. Lala Tulsi Ram v. Rám Saran Das, 1925 P.C. 80 : 86 I.C. 552 : 23 A.L.J. 109 : 27 Bom.L.R. 777 : 29 C.W.N. 965 : 49 M.L.J. 132 : 22 M.L.W. 86 : 2 O.W.N. 256 : 26 P.L.R. 419.
13. Kamod Singh v. Khemkarlan, A.I.R. 1927 Nag. 269 : 103 I.C. 186 : 10 N.L.J. 129.
14. State v. Ganpatlal, 1969 Raj.L.W. 537 (539).

enforced in a suit but also when a copy of it is produced merely as a piece of evidence.<sup>15</sup>

*Any other reason not arising from his own default or neglect.* The words "not arising from his own default or neglect" qualify only the latter clause, viz., any other reason due to which the party offering evidence of contents of the document cannot produce the document; these words do not qualify the first part, namely, when the document has been destroyed or lost. The conduct or negligence of the party need not be enquired into where the original is proved to be lost or destroyed.<sup>15-1</sup> Thus, where the party failed to collect the original deed from Registrar's office and consequently it was destroyed under section 85 of the Registration Act, he was allowed to file certified copy as secondary evidence.<sup>15-2</sup>

**2. Search.** What degree of diligence is necessary in the search cannot easily be defined, as each case must depend much on its own peculiar circumstances<sup>16</sup> but the party is generally expected to show that he has, in good faith, exhausted in a reasonable degree all the sources of information and means of discovery, which the nature of the case would naturally suggest and which were accessible to him.<sup>17</sup> If a witness, in whose custody the deed should be, deposed to its loss, unless there is some motive, suggested for his being untruthful, his evidence would be accepted as sufficient to let in secondary evidence of the deed.<sup>18</sup> As the object of the proof is merely to establish a reasonable presumption of the loss of the instrument, and as this is a preliminary inquiry addressed to the discretion of the Judge,<sup>19</sup> the party offering secondary evidence need not, on ordinary occasions, have made a search for the original document, as for stolen goods, not be in a position to negative every possibility of its having been kept back.<sup>20</sup>

The sufficiency of the search necessary to let in secondary evidence will vary with the importance of the document and the circumstances of the case.<sup>21</sup> If the document be important, and such as the owner may have an interest in keeping, or if any reason exists for suspecting that it has been fraudulently withheld, a very strict examination will properly be required; but if the paper be supposed to be of little or no value, a very slight degree of diligence will be demanded, as it will be aided by the presumption of destruction or loss, which that circumstance affords.<sup>22</sup> Information to the police of the theft of

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- 15. Maqbul v. Brijdeo Tewari, A.I.R. 1930 All. 529 (I): 122 I.C. 751 : 1930 A.L.J. 765.
- 15-1. Balbir Singh v. Darshan Kaur, 1976 Rev.L.R. 81 : (1976) 78 P.L.R. 239.
- 15-2. Kartar Singh v. Dasaundha Singh, 1972, Cur.L.J. 130 (Punj.).
- 16. Brewster v. Sewell, (1820) 3 B. & A. 296; Gully v. Exeter (B.P.), 4 Bing. 298. See Pardoe v. Price, 13 M. & W. 267; R. v. Gordon, 25 L.J.M.C. 19.
- 17. R. v. Saffron Hill, 22 L.J.M.C. 22 : 1 E. & B. 98; see Moriarty v. Gray, 12 Ir. Law R. & N. S. 129.
- 18. Md. Ihtisham Ali v. Jamna Prasad, A.I.R. 1922 P.C. 56 : 38 I.A. 365: 64 I.C. 299: 20 A.L.J. 968 : 24 Bom. L.R. 675 : 27 C.W.N. 8 : 24 O.C. 272. See also Muhammad Kamil v. Habibullah, 37 I.C. 794 : A.I.R. 1917 A. 130; Om Prakash v. State, A.I.R. 1957 All. 388.
- 19. Taylor, Ev., s. 23 (a).
- 20. McGahey v. Alston, 2 M. & W. 214; Hart v. Hart, 1 Hare 9.
- 21. Phipson, Ev., 11th Ed., 756.
- 22. Taylor, Ev., s. 429; Gathercole v. Miall, 15 M. & W. 319, 322, 330, 335, 336; Brewster v. Sewell, (1820) 3 B. & A. 296, 300, 303; Kensington v. Inglis, 8 East, 278; R. v. East Fairly, 6 D. & R. 153; Freeman v. Arkell, 2 B. & C. 494; Jaspat Rai v. Devi Dayal, 32 I.C. 399 : A.I.R. 1916 A. 244.

the original evidence by the police diary or file has been held to be insufficient to prove the loss of the original.<sup>23</sup> The question would not be so much whether the party has proved the exact mode and time of loss, but whether the party offering the secondary evidence is unable to produce the original for reasons not arising from his own default or neglect.<sup>24</sup> It is enough, if the party has, in good faith, exhausted all the sources and means which the nature of the case suggested, and which were reasonably accessible to him.<sup>25</sup> It is not necessary that the search should be recent or made for the purpose of the trial,<sup>1</sup> though it will be satisfactory if the search be made shortly before the trial. Hearsay evidence of the answers given by persons likely to have had the document in their custody is admissible.<sup>2</sup> Where there is one person chiefly interested in a document, enquiry should be made of him; where two persons have an equal title to its custody, as a lessor and lessee, enquiry should be made of both; though perhaps such strictness is not legally necessary.<sup>3</sup> If the party entitled to the custody of the document be dead, enquiries should generally be made of his heirs and representatives, though such steps will not be necessary should it appear that another party is in possession of the papers of the deceased.<sup>4</sup>

It has been already observed that before copies of other secondary evidence will be admissible there must be evidence of a search for the original.<sup>5</sup> Where, in a conspiracy case, letters written by the accused to his associates long ago were not found in their possession when they were arrested, it was held, that it was reasonable to assume that the letters were destroyed so that copies of letters were admissible as secondary evidence.<sup>6</sup> It is well-known and that fact may be recognized by a Court of law that original telegrams are destroyed after three months, by the Telegraph Department. So, secondary evidence of the telegrams is admissible after that period.<sup>7</sup> Whether or not sufficient proof of search for, or loss of, an original document, to lay ground for the admission of secondary evidence, has been given, is a point proper to be decided by the Judge of first instance and is treated as depending very much on his discretion. His conclusion should not be overruled, except in

23. Baru v. Sukha Singh, A.I.R. 1921 Lah. 332 (1): 4 L.L.J. 418; Asa Ram v. Sukha Singh, A.I.R. 1921 Lah. 336: 4 L.L.J. 416.
24. Manavikraman v. Nilambur Thacharakaval, 31 I.C. 579 : A.I.R. 1916 M. 928 (2).
25. R. v. Saffron Hill, 22 L.J.M.C. 22; Phipson, Ev., 11th Ed., 756; see Atal Behary Keora v. Lal Mohan Singh Roy, 49 I.C. 507 : A.I.R. 1919 C. 75.
1. Fitz v. Robbits, 2 M. & Rob. 60; Taylor, Ev., s. 435.
2. R. v. Braintree, 28 L.J.M.C. 1; R. v. Kenilworth, 7 Q.B. 642; Taylor, Ev., s. 430; Telikicherla Kandalai Venkataramanujacharyulu v. Telikicherla Kandalai Appalacharyulu, A.I.R. 1926 Mad. 1003 : 97 I.C. 785 reversing Ramaswami Chettiar v. Adappa Chettiar, 1925 Mad. 347; Dol Goyinda Das v. Makbul Sekh's Infant heir, A.I.R. 1936

- Cal. 164 : 162 I.C. 91 : 61 C.L.J. 588.
3. Taylor, Ev., para 432; Phipson, Ev., 11th Ed., p. 756. See also Mst. Zaib-un-nissa v. Irshad Husain, A.I.R. 1925 Oudh 504 : 89 I.C. 284 : 2 O.W.N. 505; Mst. Saliman v. Mukhdum Bux, A.I.R. 1928 All. 394.
4. Taylor, Ev., s. 434. See also Ramcharanlal v. Raghubir Singh, A.I.R. 1923 All. 551 : I.L.R. 45 All. 618 : 75 I.C. 387 : 21 A.L.J. 495.
5. Meier v. Beeby, (1836) 1 Moo.I.A. 41; Bhubaneswari v. Harisaran, (1880) 6 C. 723, 724; Krishna v. Kishori, (1887) 14 C. 490; Harrispuria v. Rukmini, (1892) 19 C. 428 : 19 I.A. 79 (P.C.).
6. Manabendra Nath Roy v. Emperor, A.I.R. 1933 All. 498.
7. Bishambhar Nath Tandon v. King-Emperor, 1926 Oudh 161 : 90 I.C. 706 : 26 Cr.L.J. 1602.

a clear case of miscarriage.<sup>8</sup> If a document is in existence and within the control of the party who wants to produce secondary evidence, its non-production must raise a presumption that, if produced, it would defeat the person's claim and the trial Court must exercise the greatest circumspection in deciding fundamental questions of fact, which, becoming *res judicata* between the parties, may be of vital importance to the opposite party as to whether there really has been a *bona fide* loss.<sup>9</sup>

Where the plaintiff stated the accidental destruction of a document and prayed for leave to put in evidence a registered copy, which the Court allowed, and at the same time ordered the fragments of the original bond to be produced, which was done, and the Court admitted the registered copy as evidence, the Judicial Committee reversed this finding, on the ground that the registered copy, in the absence of satisfactory evidence of the destruction of the original bond, was improperly admitted as secondary evidence. There was nothing to show that the fragments produced were fragments of the original.<sup>10</sup> In a suit by the purchaser of a debt, the plaintiff stated that in 1873, A executed a bond in favour of B to secure the repayment of Rs. 1,000, and that he had purchased the interest of B, at a sale in execution of a decree against him. The plaintiff now sued A upon the bond, making B a party. At the trial, A denied the execution of the bond, and it was not produced by the plaintiff who, having served B with notice to produce, tendered secondary evidence of its contents, B was not examined as a witness, and no evidence was given of the loss or destruction of the bond. It was held by Pontifex and Morris, JJ. (Prinsep, J., dissenting), that secondary evidence was not admissible.<sup>11</sup> Secondary evidence of the contents of a document requiring execution, which can be shown to have been lost in proper custody, and to have been lost, and which is more than 30 years old, may be admitted under this clause and Section 90 post, without proof of the execution of the original.<sup>12</sup> In the Court of Probate where a will itself has, after the death of testator, been irretrievably lost or destroyed, if its substance can be distinctly ascertained (either by the original instructions, by copy of the will, or even by the recollection of witnesses who have heard it read), probate may be granted of a copy embodying such substance.<sup>13</sup>

8. Harripria v. Rukmini, (1892) 19 C. 438; 19 I.A. 79 (P.C.); Vishwanath Ramji Karale v. Rahibai Ramji Karale, A.I.R. 1931 Bom. 105: 1. L.R. 55 Bom. 103: 128 I.C. 901; 32 Bom.L.R. 1385; Prafulla Kumar Bose v. Emperor, A.I.R. 1930 Cal. 209: I.L.R. 57 Cal. 1074: 125 I.C. 656: 31 Cr.L.J. 908: 50 C.L.J. 593; Pandu v. Bapu Das, A.I.R. 1929 Nag. 288: 121 I.C. 33; Gaya Prasad v. Jaswant Rai, 1930 All. 550: 125 I.C. 460: 1930 A.I.J. 1003 (it is a question of fact); Bashiruddin Khan v. Mahadeo Singh, 1924 Oudh 306: 79 I.C. 663: 27 O.C. 26; see also Sokram v. Ramall, (1868) 9 W.R. 248; Chuha Mal v. Haji Rahim Bakhsh, 1924 Lah. 303: 71 I.C. 568: 18 P.W.R. 1923; Maung Ba U v. Daw Kha, 1935 Rang. 502.

9. Md. Zafar v. Zahur Husain, A.I.R. 1926 All. 741: 97 I.C. 82: 24 A.L.J. 964; Hiralal v. Rau Prasad, 1949 All. 677.

10. Abbas v. Yadeem, (1843) 3 Moo. I.A. 156. As to reconstruction of records destroyed or lost, see Marakkutti v. Veeran Kutty, A.I.R. 1923 Mad. 647: I.L.R. 46 Mad. 679: 73 I.C. 1050: 44 M.L.J. 673: 1923 M.W.N. 471: 18 L.W. 21 (F.B.).

11. Womesh v. Shama, (1881) 7 C. 98. See also Brahma v. Kanduri, A.I.R. 1959 Orissa 126: 25 Cut.L.T. 66.

12. Khetter v. Khetter, (1880) 5 C. 886: 6 C.L.R. 199.

13. Taylor, Ev., para 436, and cases there cited, and see Harris v. Knight, L.R. 15 P.D. 170; Woodward v. Goulstone, L.R. 11 App. Cas. 469.

It was held prior to the Act that when a party himself fraudulently destroys a document, he is not entitled to give secondary evidence of it.<sup>14</sup> But a party in possession of a document cannot refuse to produce it and give secondary evidence because the document has been in the possession of the opposite party who might have, or had, tampered with it.<sup>15</sup>

It has, however, been held, that secondary evidence cannot be given of a document which itself is only the translation of the original, where the translation has not been of the entire document and the name of the translator had not been disclosed and where furthermore the certified copy has been signed by a person not knowing the language in which the original (here, the will) has been written.<sup>16</sup>

**3. Inability to produce original.** The second portion of this clause deals with the case of a person who, by no fault of his own, is unable to procure the production of the original. It has been said that perhaps under this portion of the clause [if the word 'not' has been omitted from the penultimate paragraph of clause (a)], a party might give secondary evidence of a document which a person having no legal right to refuse the production of, nevertheless refuses on notice to produce.<sup>17</sup> If the party interested in the production of a document appears after diligent efforts, to have had difficulty in producing it, the Court ought to give him more time.<sup>18</sup> It is not enough for a party desirous of adducing secondary evidence of the contents of a document which ought to have been registered, to show that he cannot produce it because it is not registered; he must show that its non-registration was not due to any fault or want of diligence on his part, or he must show that the party against whom he desires to use it was guilty of such fraud in the matter of non-registration that he cannot be allowed to object on that ground to the production of the secondary evidence.<sup>19</sup> In the undermentioned case,<sup>20</sup> it became necessary to prove that in July, 1877, certain immovable property vested in one KS as a purchaser at an auction-sale. A certified copy under Section 57 of the Registration Act was tendered and objected to. The case was remanded by the Appellate Court in order that *subpoena duces tecum* might be served on KS, the Court observing that if the party seeking the production of the document could not compel KS to produce it and could show that the non-production was not due to his own default or neglect, then secondary evidence could be given under this clause; and in such a case, by Section 57 of the Registration Act, a copy of the entry made in the registration record was admissible.

**4. Documents in records of another Court.** The mere fact of the original of a document being in another Court is not a sufficient reason for admitting secondary evidence of it.<sup>21</sup> But secondary evidence may be admit-

Sugden v. St. Leonards, 1 P.D. 154; see Act XXXIX of 1925 (Indian Succession), Ss. 237, 238; Phipson, Ev., 11th Ed., 447. See notes on Ss. 101–104 post sub-voc. 'wills'.

14. Abdulla v. Muhammad, (1864) 1 Bom. H.C.R. A.C.J. 177.

15. Hira v. Ganesh, (1882) 4 A. 406, 411.

16. Sri Thakur Krishna v. Kanhaiyalal, A.I.R. 1961 All. 206.

17. Norton, Ev., 247, 248.

18. Wuzeer v. Kalee, (1869) 11 W.R. 228.

19. Kumeezoodeen v. Rajjub, (1868) 9 W.R. 528.

20. Vasanji v. Haribhai, (1900) 2 Bom. L.R. 533.

21. Sreemutty Gour Mounee v. Huree Kishore Roy, 10 W.R. 338 (Civ.); Harihir Mojooddar v. Churu Majhee, 222 W.R. 355 (Civ.).

ted when the original cannot be obtained without unreasonable delay.<sup>22</sup> Where the original was filed in a suit nearly a hundred years ago, a certified copy of it was admitted.<sup>23</sup>

**5. Any secondary evidence is admissible.** Any secondary evidence may be given. That clause of this section which provides that "in case of clause (e) or (f) a certified copy of the document but no other kind of secondary evidence is admissible" seems to apply to a case in which a public document is still in existence on the public records, and that provision appears to have been intended to protect the originals of public records from the danger to which they would be subject by constant production of such documents in Courts in evidence, and the said clause does not interfere with the general rule of evidence given in clause (c), i.e., in cases where the original is destroyed or lost.<sup>24</sup> Where the original document has been destroyed and is not available, uncertified copies can be produced to prove the contents of the original, whether the original is a public document or not. Clause (c) is independent of the provisions of clauses (e) and (f) and would apply to all documents whether public or otherwise.<sup>25</sup> So where a registered deed of sale had been lost, it was held that oral evidence of the transaction might be received, and that it was not necessary to insist upon the production of a certified copy.<sup>1</sup> An office copy was admitted as secondary evidence.<sup>2</sup> Even a copy of the transliteration of the original was held to be admissible.<sup>3</sup> And in the undermentioned case it was held that oral evidence was admissible to prove the contents of a written acknowledgment which had been lost. In this case, it was said by Channell, J., that a Judge should carefully scrutinize such evidence, following the analogy of claims against the estate of a deceased person which are often disallowed unless corroborated.<sup>4</sup> Where a deed has been executed and lost or destroyed, it is not necessary that the witnesses called to give oral testimony of its contents should be attesting witnesses; if they have seen and know the contents of deed, it will be sufficient, provided the Court gives credit to them and is satisfied of the due execution.<sup>5</sup>

See also cases in Note 4 to clause (a) ante.

- 22. Jobeda Khatun v. Sheik Monabali, A.I.R. 1930 Cal. 479. See also Bishwanath Agarwalla v. Dhapu Debi, A.I.R. 1960 Cal. 494—original not in possession, deemed lost.
- 23. Chudasama Khoduba v. Chudasama Takhatsang Narasingji, A.I.R. 1922 Bom. 177 (2) : I.L.R. 46 Bom. 32 : 76 I.C. 155.
- 24. Chikka Veerasetty v. Nanjundachari, A.I.R. 1955 Mys. 139, 140 : I.L.R. 1955 Mys. 616 following Kunneeth v. Vayoth, (1882) 6 Mad. 80; Chandreshwar Prasad Narain Singh v. Bisheshwar Pratap Narain Singh, A.I.R. 1927 Pat. 61 : I.L.R. 5 Pat. 777 : 101 I.C. 289 : 8 P.L.T. 510. See also Ananda Kumar Bhattacharjee v. Secretary of State, 43 Cal. 973 : 32 I.C. 774 : 20 C.W.N. 576 : A.I.R. 1916 C. 446(2); Tara Ram Chand v. State, 1971 Cr.L.J. 1201 (1204) (Punj.).
- 25. Tara Ram Chand v. State, 1971 Cr. L.J. 1201 (1204) (Punj.).
- 1. Hurish v. Prosunno, 22 W.R. 303. See also Pearey Lal v. Nanak Chand, A.I.R. 1948 P.C. 108 : 1948 A.L.J. 231 : 50 Bom.L.R. 648 : 52 C.W.N. 785 : 61 L.W. 437.
- 2. Public Prosecutor v. Sadagopan, A. I.R. 1953 Mad. 785 : 54 Cr.L.J. 1429 : (1953) 1 M.L.J. 636 : 1953 M. W.N. 291.
- 3. Munshi Ram v. Baisakhi Ram, A. I.R. 1947 Lah. 335 : 49 P.L.R. 79.
- 4. Read v. Price, (1909) 1 K.B. 577.
- 5. Lootfoollah v. Nuseebun, (1868) 10 W.R. 24.

From the absence of signature on the carbon copy of a contract note it cannot necessarily follow that the executant's signature on the original had been taken later on.<sup>6</sup>

#### SYNOPSIS FOR CLAUSE (d)

When original is not easily movable.

**When original is not easily movable.** Secondary evidence may be given when the production of the original is either physically impossible, or highly inconvenient. Thus, inscriptions on walls<sup>7</sup> and fixed tablets, mural monuments, gravestones,<sup>8</sup> surveyor's marks on boundary trees, notices fixed on boards to warn trespassers, and the like, may be proved by secondary evidence, since they cannot conveniently, if at all, be produced in Court. For instance, on one occasion, a man was convicted of writing a libel on the wall of the Liverpool gaol, on mere proof, of his handwriting. In order, however, to let in this description of secondary evidence, it must clearly appear that the document or writing is affixed as the freehold, and cannot be easily removed; and therefore, where a notice was merely suspended to the wall of an office by a nail, it was considered necessary to produce it at the trial. If, too, a document be deposited in a foreign country, and the laws or established usage of that country will not permit its removal, secondary evidence of the contents will be admitted, because in that case, as in the case of mural inscriptions, it is not in the power of the party to produce the original.<sup>9</sup> Any secondary evidence of the contents of the original is here admissible.<sup>10</sup> The discretion exercised by the trial Court in establishing the loss of the document without taking into consideration the prerequisites set out herein, could be interfered with by the appellate Court.<sup>11</sup>

#### SYNOPSIS FOR CLAUSE (e)

1. When original is a public document.
2. What are and what are not public documents?

**1. When original is a public document.** Secondary evidence may be given when the original is a public document within the meaning of Section

6. Indore United Malva Mills v. Basantilal, 1968 M.P.L.J. 438 (445).

7. See S. 3 (definition of "document").

8. See S. 32, clause (6), ante.

9. Yeswantrao Ganpatrao v. Dattatraya Rao, 1948 Nag. 162 : I.L.R. 1947 Nag. 631 : 1948 N.L.J. 28; Permanent Trustee Company of New South Wales v. Fels, A.I.R. 1918 P.C. 229; Taylor, Ev., para 438 and authorities there cited. The case last cited in the text would not strictly come within the wording of S. 65, clause (d), which refers to originals not easily movable; in the instance given the originals are not movable at all. In Whitley Stokes' Anglo-Indian Codes, ii, 892, it is

suggested that such a case is not provided for unless perhaps by the latter part of clause (c). But it can hardly be said that the original cannot be produced in reasonable time when it cannot be produced at any time. It is apprehended that the case would come within the purview of the third paragraph of clause (a), because the document would under the circumstances be given in the possession or power of a person or persons out of reach of, or not subject to, the process of the Court.

10. S. 65.

11. Jaldu Ananta Raghuram v. Rajah Bommadevara, A.I.R. 1958 Andh. Pra. 418 : 1958 Andh.L.T. 440.

74.<sup>12</sup> This provision is intended to protect the originals of the public records from the danger to which they would be exposed by constant production in evidence.<sup>13</sup> But this does not mean that original will not be admissible.<sup>13-1</sup> In this case a certified copy<sup>14</sup> of the document is admissible; an uncertified copy cannot be used as secondary evidence.<sup>14-1</sup> But other secondary evidence of the contents has been admitted under clause (g).<sup>15</sup> This provision applies only when the public document is still in existence on the public records, and does not interfere with the general rule in clause (c) that any secondary evidence may be given when the original has been destroyed or lost.<sup>16</sup> Thus, it has been held to be irregular for the Court to accept in proof of the ownership of a motor car a mere statement made in answer to a letter written by a Municipal Corporation without the person who made the statement being called of a certified copy of the official register produced.<sup>17</sup> But oral evidence was held to be admissible when the person in possession of the document was out of reach of, or not subject to, the process of the Court.<sup>18</sup> Where a certified copy of a lost public document is preserved, other secondary evidence of the contents of it is admissible.<sup>19</sup>

This and the next clause provide for cases in which secondary evidence is admissible even though the original is in existence, but in either of these cases "a certified copy of the document, but no other kind of secondary evidence, is admissible".<sup>20</sup> Secondary evidence of the document can be given either under clause (a) or clause (e) of this section, if it is shown that the original is or appears to be in possession or power of the person against whom the document is sought to be proved, etc., or when the original is a public document,<sup>21</sup> or the case falls under any of the other clauses of this section.

**2. What are and what are not public documents?** A certificate of sale granted under the Civil Procedure Code, Act VIII of 1859, and before Section 107 of Act XII of 1879 was enacted, is a document of title, but is not

12. See notes to S. 74 post; so an examined copy of a quinquennial register was held to be evidence without the production of the original; *Oodoy v. Bishonath*, (1867) 7 W.R. 14. See as to this clause, *Krishna v. Kishori*, (1877) 14 C. 486.

12. *Kunmeth v. Vayoth*, (1882) 6 M. 80, 81; *Doe v. Ross*, 7 M. & W. 106, followed in *Chikka Veerasety v. Naunjundachari*, A.I.R. 1955 Mys. 139, 140; I.L.R. 1955 Mys. 616.

13-1. *C. H. Shah v. S. S. Malpathak*, 74 Bom.L.R. 505.

14. See Ss. 76, 77 post.

14-1. *Kalyan Singh v. Smit. Chhoti*, A.I.R. 1973 Raj. 263.

15. *Sundar v. Chandreshwar*, (1907) 34 C. 293.

16. *Anand Kumar v. Secretary of State*, 43 Cal. 973; 32 I.C. 774, 779; 20 C.W.N. 576; A.I.R. 1916 C. 446 (2); *Tara Ram Chand v. State of Punjab*, 1971 Cr.L.J. 1201; *Chandreshwar Prasad Narain Singh v. Bisheshwar Pratab Narain Singh*, 1927 Pat. 61; I.L.R. 5 Pat. 777; 101 I.C. 289; 8 P.L.T. 510; *Kunmeth v. Vayoth*, 6 Mad. 80. See also in the matter of a collision between the "Ava" and the "Brenhilda", (1879) 5 C. 568; *Bishendayal v. Khadeema*, 1862 Marshall's Rep. 213.

17. *Baijmath Shaw v. Corporation of Calcutta*, A.I.R. 1933 Cal. 178; 141 I.A. 218; 36 C.W.N. 1147.

18. *Haranund v. Rangopal*, I.L.R. 27 Cal. 639; 27 I.A. 1; 2 Bom.L.R. 562; 4 C.W.N. 429.

19. *Krishna Rao v. Muthangi Buchi*, 28 I.C. 808.

20. Penultimate paragraph of S. 65; *Krishna Kishori v. Kishorilal*, (1887) 14 Cal. 486, 491; 14 I.A. 71 (P.C.). See also *Ram Lal v. Ghansham Dass*, 1923 Lah. 150 (I); 71 I.C. 825.

21. *Biswanath v. Dhapu*, A.I.R. 1966 C. 13.

a public document so as to allow secondary evidence of it to be given under this clause.<sup>22</sup> A certified copy of *rubakari* is admissible.<sup>23</sup> A written statement filed in a previous suit is not a public document and so a certified copy of it is not admissible in evidence.<sup>24</sup> An abstract statement prepared by a *patwari*, even though based on papers in his possession and filed in a suit, is only a private document and a certified copy of it does not by itself prove the original.<sup>25</sup> A report to the police that a certain woman had been married to a certain man is not a public document and evidence of its contents cannot be given under this clause.<sup>1</sup> A private document does not become a public document by registration under the Registration Act.<sup>1-1</sup> Proceedings under Section 18 of the Land Acquisition Act are judicial as such the record of such proceedings will be a public document.<sup>1-2</sup> A warrant of arrest is a public document and can be proved only by the production of the original order or a certified copy of it. Section 87 (3), Cr. P. C., 1898 [now section 82 (3) of Cr. P. C. 1973] does not override the requirements of the Evidence Act or make the proclamation evidence that the warrants had been issued.<sup>1-3</sup>

A decree is a public document, which could be proved by a certified copy under Section 65 (e); a presumption as regards the genuineness of this certified copy could be drawn. Decrees whether of a Municipal or a foreign Court are public documents which a suitor could inspect under Section 76. In consequence a certified copy of that would be proof of the contents under Section 77. The reason is that even though the original is a public document and is available, secondary evidence thereof, viz., by means of certified copies, would be admissible to obviate the inconvenience of their removal from places of public custody.<sup>2</sup> Assessment orders under Section 54 of the Bihar Agricultural Income-tax Act 32 of 1948, are 'public documents' within the meaning of this section and hence certified copies of them could be put in evidence.<sup>3</sup> The grant of a probate is conclusive evidence of the validity and the execution of the will and of the testamentary capacity of the testator.<sup>4</sup> An income-tax return accompanied by a statement by the assessee is a public document under Section 74, and hence a certified copy thereof would be admissible under this section, even though the Court may be prohibited from requiring a public servant to produce the documents mentioned in Section 54 of the Income-tax Act. Certified copies, even though not containing any endorsement as to the person obtaining them, are nevertheless admissible.<sup>5</sup> Being a certified copy of a public document in the custody of a public officer, it is not necessary

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| <p>22. Vasanji v. Haribhai, (1900) 2 Bom. L.R. 533, per Candy, J.</p> <p>23. Radhanath v. R., 22 C.W.N. 742.</p> <p>24. Akshoy Kumar Bose v. Sukumar Dutta, A.I.R. 1951 Cal. 320.</p> <p>25. Sheo Das v. Sheo Dayal Singh, A.I.R. 1930 All. 712; 128 I.C. 770.</p> <p>1. Nawab Bibi v. Sher Zaman, A.I.R. 1930 Lah. 1067; 123 I.C. 285; 31 P.L.R. 214. See also Fazl Ahmad v. Emperor, A.I.R. 1914 Lah. 433; 23 I.C. 696; 15 Cr.L.J. 344; 139 P.L.R. 1914.</p> <p>1-1. Parsa Singh v. Smt. Prakash Kaur, (1976) 78 Punj.L.R. 21 : 1976 Rev. L.R. 93 (a case of registered will).</p> <p>1-2. P. R. Modi v. Collector Durg, A.I.R. 1975 M. P. 57.</p> | <p>1-3. K. R. Easwaramorthi Goundan v. Emperor, A. I. R. 1944 P.C. 54; 71 I.A. 83; 214 I.C. 1; 45 Cr.L.J. 721; 1944 A.L.J. 388; 46 Bom.L.R. 844; 48 C.W.N. 477. (1944) 1 M.L.J. 515; 1944 M.W.N. 440; 57 L.W. 574; 10 B.R. 667; P. K. Gupta v. State of West Bengal, 1973 Cr.L.J. 1368 (Cal.).</p> <p>2. Hulasi v. Mohanlal, I.L.R. 10 Raj. 14.</p> <p>3. Hiralal v. Ramanand, A.I.R. 1959 Pat. 56.</p> <p>4. Satyacharan v. Hrishikesh, A.I.R. 1959 Cal. 795; 63 C.W.N. 615.</p> <p>5. Somanna v. Subba Rao, A.I.R. 1958 Andh. Pra. 200; (1957) 2 Andh. W.R. 499.</p> |
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to prove the signature of the persons appearing on the original.<sup>6</sup> A notification by the Government or by its department is a public document and a certified copy thereof is admissible, if it is certified by the head of the department.<sup>7</sup>

Where a certified copy is exhibited without any objection to its admissibility being made, no objection can be made at later stage.<sup>7-1</sup>

#### SYNOPSIS FOR CLAUSE (f)

1. When original is document of which certified copy is permitted by law to be given in evidence.
2. Only certified copy is admissible.

**1. When original is document of which certified copy is permitted by law to be given in evidence.** When the original is a document of which a certified copy is permitted by this Act,<sup>8</sup> or by any other law in force in India,<sup>9</sup> to be given in evidence, a certified copy is the only evidence admissible (but v. post). The words "To be given in evidence" mean to be given in evidence in the first instance without having been introduced by other evidence.<sup>10</sup> A registered deed of sale is not a document of which a certified copy is permitted by law to be given in the first instance without having been introduced by other evidence. Section 57 of the Registration Act only shows that when secondary evidence has in any way been introduced, as by proof of the loss of the original document, a copy certified by the Registrar shall be admissible for the purpose of proving the contents of the original; that is, it shall be admitted without other proof than the Registrar's certificate of the correctness of the copy, and shall be taken as a true copy, but that does not make such a copy a document which may be given in evidence without other evidence to introduce it,<sup>11</sup> and although it could be admitted as secondary evi-

6. Somanna v. Subba Rao, A.I.R. 1958 Andh. Pra. 200: (1957) 2 Andh. W.R. 499.
7. Janu Khan v. State, A.I.R. 1960 Pat. 213: 1960 B.L.J.R. 12; Chackopydi v. State of Kerala, I.L.R. (1966) 1 Ker. 320: 1966 Ker.L.R. 125: 1966 Ker.L.T. 102: 1966 M.L.J. (Cr.) 413 (Notification under section 19 of the Kerala Forest Act 4 of 1962); Mansid Oraon v. The King, A.I.R. 1951 Pat. 380; Jai Gopal Singh v. Divisional Forest Officer, A.I.R. 1953 Pat. 310; Mathuradas v. State, A.I.R. 1954 Nag. 296; Pannalal v. State, A.I.R. 1953 M.B. 84.
- 7-1. B. K. Das v. Binayak Das, (1974) 40 Cut.L.T. 1214.
8. See S. 78; and as to this clause, Krishna v. Kishori, (1887) 14 C. 486: 14 I.A. 71 (P.C.).
9. E.g., Act XVIII of 1891 (The Bankers' Books Evidence Act). See also Civ. P. C., Order XLV, rule 15; Calcutta National Bank v. Sona-pur Tea Co., A.I.R. 1957 Cal. 9.
10. Hurrish v. Prosunno, (1874) 22 W.R. 303.
11. Ma Yin v. Ma Bok, A.I.R. 1929 Rang. 277: 123 I.C. 129(1); Badhawa Ram v. Akbar Ali, 1927 Lah. 817: 103 I.C. 752: 9 L.L.J. 428; Salar Ali v. Moheshlal Chowdhury, 34 I.C. 956: 23 C.L.J. 122; Gopal Das v. Sri Thakurji, A.I.R. 1943 P.C. 83: I.L.R. 1943 Kar. 69: 207 I.C. 553: 1943 A.L.J. 292: 47 C.W.N. 607: (1943) 2 M.L.J. 51: 56 L.W. 593: 1943 O.W.N. 334: 10 B. R. 7; Hurrish v. Prosunno, (1874) 22 W.R. 303; and although such a copy may be taken as a correct copy of some document registered in the office, this circumstance does not make that registered document evidence or render it operative against the persons who appear to be affected by its terms. A document registered in and brought from a public registry office, requires to be proved when it is desired that it should be used as evidence against any party who does not admit it quite as much as if it came out of private custody, Fiez v. Omedee, (1879) 21 W.R. 265.

dence, still its probative value is very weak.<sup>12</sup> It has been held that certified copies of income-tax returns do not come within the meaning of this section or Sections 74, 76, 77,<sup>13</sup> but that an income-tax assessment order is a public document under Section 74, and a certified copy of it would be admissible under this section.<sup>14</sup> In Section 76 of this Act a particular form of certificate is prescribed but that form is not necessary in every case. All that is required by Section 65 is that it must be a true copy of the original and there must be something to denote that it was so. In different departments a different set of rules is provided for that purpose. In the Civil Courts, for instance, a mere endorsement that it was a true copy signed by an authorised officer is sufficient. Copies which bore the seal of the Income-tax Department and bore an endorsement that they were duly copied and compared were held to be certified copies by Mathur, J., of the Allahabad High Court, although it was not known as to who actually signed the endorsement on the ground that it might fairly be presumed that the endorsement was signed by the persons who were authorised, but as was pointed out by Allsop, J., in the same case the law requires that copies of this kind must be certified to be correct. The form of the certificate is doubtless of no importance but there must be a certificate purporting to be signed by some responsible official.<sup>15</sup> A piece of paper which is a typewritten order purporting to be made under Rule 56 of the Defence of India Rules and purporting to be made by the District Magistrate bearing no signature of the District Magistrate on the document, but merely having his name typed there over the words "District Magistrate, Purnea" and without any certificate that that is a certified copy of the order made by the District Magistrate cannot be accepted as a certified copy of the order passed by the District Magistrate.<sup>16</sup> Copies, granted under sub-section (5) of Section 57 of the Indian Registration Act, can be admitted for the purpose of proving the contents of the original document. In such cases, it is as if the original itself has been produced. A certified copy of a deed can be relied upon as showing the contents of the original deed.<sup>17</sup> The contents of a mortgage-deed<sup>18</sup> or a deed of dedication<sup>18.1</sup> can be proved by the production of a certified copy of it. The certified copy of a sale-deed obtained from the office of the Sub-

- 12. Nani Bai v. Gita Bai, A.I.R. 1958 S.C. 706 : 1958 S.C.J. 925 : 1959 S.C.A. 173.
- 13. Anwar Ali v. Tafozal Ahmad, A.I.R. 1925 Rang. 84 : I.L.R. 2 Rang. 391 : 84 I.C. 487; 3 Bur. L.J. 194; Devidatt Ramniranjan das v. Shriram Narayandas, A.I.R. 1932 Bom. 291 : I.L.R. 56 Bom. 324 : 137 I.C. 381 : 34 Bom.L.R. 236.
- 14. Suraj Narain v. Seth Jhabbu Lal, A.I.R. 1944 Ali. 114 : I.L.R. 1944 All. 221 : 214 I.C. 232 : 1944 A.L.J. 118.
- 15. Suraj Narain v. Seth Jhabbu Lal, A.I.R. 1944 All. 114.
- 16. Ram Prasad Moral v. Emperor, A.I.R. 1945 Pat. 210 : I.L.R. 24 Pat. 143 : 219 I.C. 148 : 46 Cr.L.J. 538 : 11 B.R. 357 : 26 P.L.T. 201.
- 17. Karuppanna Gounder v. Kolandaswami Gounder, A.I.R. 1954 Mad. 486 : (1953) 2 M.L.J. 717 : 1953 M.W.N. 799 : 66 L.W. 1055; Chude-sama Khoduba Sartansang v. Chudasama Takhalsang Narsinghji, A.I.R. 1922 Bom. 177 (2); I.L.R. 46 Bom. 32 : 76 I.C. 155; Mst. Saliman v. Hakim Mukhdum Bux, A.I.R. 1928 All. 394. But see Basant Singh v. Brijraj Saran Singh, A.I.R. 1935 P.C. 132 : 62 I.A. 180 : I.L.R. 57 All. 494 : 1935 A.L.J. 847 : 156 I.C. 864 : 1935 A.W.R. 879 : 37 Bom.L.R. 805 : 37 P.L.R. 614 : 16 P.L.T. 669; as to proof of a will by a certified copy over 30 years old, see also Gadey Venkata Ratnam v. Gadey Sitaramayya, A.I.R. 1950 Mad. 634 : (1950) 1 M.L.J. 720 : 1950 M.W.N. 368 : 63 L.W. 588.
- 18. Vithoba Savlaram v. Shrihari Narayan, A.I.R. 1945 B. 319 : 219 I.C. 427 : 47 Bom.L.R. 116.
- 18.1. L. B. Chowdhury v. State of Bihar, 1973 B.L.J.R. 406.

Registrar is as good as the original sale-deed itself for proving the validity of the sale as being consideration.<sup>19</sup>

Section 86 of this Act contains an instance of documents to which this clause seems to refer.<sup>20</sup> The Bankers' Books Evidence Act (XVIII of 1891) is an instance of an Act, other than the present one, which permits certified copies of original documents to be given in evidence.<sup>21</sup> So also, under the Powers of Attorney Act a certified copy of an instrument deposited shall without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the High Court.<sup>22</sup> And as to production of verified copies of entries in business book, see Civil Procedure Code, Order XI, rule 19.

**2. Only certified copy is admissible.** The section itself makes it obligatory that where certified copy of a document is permitted under any law then only certified copy and no other kind of secondary evidence shall be admissible. For example, certified copy of a mortgage-deed duly registered can be obtained from the Registration department and as such no secondary evidence other than certified copy would be admissible on the ground that it was inconvenient to obtain the same.<sup>22.1</sup>

But when the original is lost or destroyed and records of the office which could issue certified copy also being destroyed and when no certified copy can be obtained, any secondary evidence is admissible.<sup>22.2</sup> In a case falling under clause (f) and also under clause (a) or (c) of the same section, any secondary evidence is admissible.<sup>23</sup>

#### SYNOPSIS FOR CLAUSE (g)

When originals consist of numerous documents, etc.

**When originals consist of numerous documents, etc.** This clause deals with cases, where there are too many documents, whether books of accounts or other documents, which are available to the Court, but which it is not convenient for the Court to examine. Clause (g) has nothing to do with documents which are not available to the Court. The very fact that clause (g) provides secondary evidence of the result, because the documents cannot conveniently be examined in Court shows that the documents are there for the Court to examine, if it so likes to do.<sup>24</sup> This provision is intended to save public time. If the point to be ascertained were, for instance, the balance in a long series of accounts in a merchant's books, evidently great inconvenience would arise, and much public time be wasted, if a witness were compellable to go through the whole of the books and to make his examination and calculations before the Court. He is allowed, therefore, to do this

- 19. Ronfi v. Ratam, (1969) 71 Punj. L.R. (D.) 17 (20).
- 20. Murrish v. Prosunno, (1874) 22 W.R. 303.
- 21. Act XVIII of 1891, S. 4.
- 22. Act VII of 1882, S. 4, clause (d).
- 22.1. Amir Chand v. Roshan Ram, 1978 R.L.R. 319.
- 22.2. A Pritamal v. Shagubhai, A.I.R. 1975 Guj. 73; (1975) 16 Guj.L.R. 61; P. J. Jaitha v. State of West

- Bengal, A.I.R. 1974 Cal. 210.
- 23. 'In the matter of a collision between the "Ava" and the "Brenhilda", (1879) 5 C. 568. See also Chandreshwar Prasad Narain Singh v. Bisheshwar Prasad Narain Singh, A.I.R. 1927 Pat. 61; I.L.R. 5 Pat. 77; 101 I.C. 289; 8 P.L.T. 510.
- 24. Kishan Lal v. Sohan Lal, A. I. R. 1955 Raj. 45; I. L. R. 1955 Raj. 191.

before he comes to be sworn, and then to give the general result of his scrutiny. He can, of course, be tested by cross-examination and the books should always, where it is practicable, be in Court and open to the opposite side's inspection and to that of the Court.<sup>25</sup> The insistence by the Legislature on the presence in the witness-box of a person who had examined the documents, or of someone "who is skilled in the examination of the documents", is intended to afford an opportunity to the opposite party to find out the truth by means of the cross-examination of such a witness.<sup>1</sup> So, a witness who has inspected the accounts of the parties, though he may not give evidence of their particular contents, will be allowed to speak to the general balance without producing the accounts; and where the question is as to the solvency of a party at a particular time, the general result of an examination of his books and securities may be stated in like manner.<sup>2</sup> But the word "result" must be construed strictly to mean the actual figures or facts arrived at. The "exception under consideration will not enable a witness to state the general contents of a number of letters received by him from one of the parties in the cause, though such letters have been since destroyed, if the object of the examination be to elicit from the witness not a fact but merely an opinion or impression; for instance, the impression which the destroyed letters produced on his mind with reference to the degree of friendship subsisting between the writer and a third party. In the other cases mentioned, the fact in question is one which simply depends on the honesty of the witness, whereas he might, from the perusal of the documents, conscientiously draw a very different opinion or inference from that which would be drawn by a jury.<sup>3</sup> In clause (g), secondary evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in the examination of such documents. The competence of the witness must, therefore, be proved to the satisfaction of the Court before such evidence is tendered. A summary of the result of an examination of account books by a person who knew the character in which they were written was held to be admissible under this clause.<sup>4</sup> So also, an abstract from mutation records prepared by a Kanungo showing a number of transfers of land in a particular tribe was held to be admissible under this clause.<sup>5</sup> In the undermentioned case it was held, that the general result of the examination of many documents may be given under this clause, even though they may be "public documents" within the meaning of clause (e) and Section 74, since the evidence was admitted not because the documents were public, but because they were such as could not be conveniently examined in Court and because the fact to be proved was the general result of the examination.<sup>6</sup>

Upon the analogy of the rule contained in this clause, if bills-of-exchange or the like have been drawn between particular parties in one invariable mode, this may be proved by the testimony of a witness conversant with their habits

- 25. Norton, Ev., 248. See also Civ. P. C., Order XXVI, rule 11 (commissions to investigate and adjust accounts).
- 1. Krishna Dayal v. Emperor, A. I. R. 1946 All. 227, 231: 227 I. C. 269: 47 Cr. L. J. 1041: 1945 A. W. R. (I.C.) 298.
- 2. Taylor, Ev., s. 462.
- 3. ib.
- 4. Mst. Phulwanti v. Janeshar Das, A. I. R. 1924 All. 625: I. L. R. 46 All. 575: 83 I.C. 782: 22 A. L. J. 521.
- 5. Sher Muhammad Khan v. Dost Muhammad Khan, A. I. R. 1925 Lah. 231: 78 I.C. 451.
- 6. Sundar v. Chandreshwar, (1907) 34 C. 293.

of business, who speaks generally of the fact without production of all the bills.<sup>7</sup> But, if the mode of dealing has not been uniform, the case does not fall within this exception, but is governed by the rule requiring the production of the writings.<sup>8</sup>

In a land acquisition proceeding, in order to compute the market value of acquired land on the basis of sales, the material on which the inference is to be based is to be placed before the Court. Where the sale-deeds are not numerous, the evidence of a person who is not an expert is not admissible under this clause. To attract the provisions of this clause, it is necessary that the original must consist of numerous documents, and the fact to be proved must be the general result, and the original must have been examined by an expert, that is, by a person who is skilled in the examination of such documents.<sup>9</sup>

*66. Rules as to notice to produce.* Secondary evidence of the contents of the documents referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is,<sup>10</sup> [or to his attorney or pleader] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case :

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it :—

- (1) When the document to be proved is itself a notice;
- (2) When, from the nature of the case, the adverse party must know that he will be required to produce it;
- (3) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (4) When the adverse party or his agent has the original in Court;
- (5) When the adverse party or his agent has admitted the loss of the document;
- (6) When the person in possession of the document is out of reach of, or not subject to, the process of the Court.

s. 33 (Meaning of "secondary evidence".)  
s. 65, cl. (a) (Proof by secondary evidence.)

s. 3 ("Document".)  
s. 3 ("Court".)

7. Spencer v. Billing, 3 Camp. (310).

8. Taylor, Ev., s. 462.

9. Collector, Raigarh v. Chaturbhuj, A. I. R. 1964 M. P. 196; 1964 M. P.

L. J. 220.  
10. Ins. by the Indian Evidence (Amendment) Act, 1872 (18 of 1872), s. 6.

Steph. Dig., Art. 72; Taylor, Ev., ss. 442—456; Civ. P. C., Order V, rule 7; Order XIII; Order XI, rules 15—18; Cr. P. C., ss. 91—94, 349; Chap. VI, ib., Penal Code, S. 175.

### SYNOPSIS

1. Principle.
2. Notice to produce :
  - Principle.
  - "Notice"—English and Indian practice.
  - Notice to stranger also.
  - By process of Court.
  - Summons.
3. "Prescribed by law"
  - Possession of document, proof of.
4. Contents of notice :
  - Form of notice.
  - Time and place of service.
  - Sufficiency of service.
  - Document called to be given as evidence.
  - Refusal to produce, effect of.
  - Rules same in civil and criminal trials.
5. Proviso:
  - (a) When the document to be

**1. Principle.** Notice is required in order to give the opposite party a sufficient opportunity to produce the document, and thereby to secure, if he pleases, the best evidence of its contents. Notice to produce also excludes the argument that the opponent has not taken all reasonable means to secure the original.<sup>11</sup> See further notes, post, as to the ground of the rule and of the provisos.

**2. Notice to produce.** In order that secondary evidence of documents referred to in Section 65 (a) may be admissible, the procedure laid down in this section must be strictly complied with.<sup>12</sup> A proper notice to produce is, in the cases mentioned in Section 65, clause (a), necessary before secondary evidence<sup>13</sup> becomes admissible.<sup>14</sup> Where oral evidence was given to prove the contents of a letter, which was neither produced nor called for, but no objection was raised to the giving of the evidence, it was held that this was secondary evidence of the contents of a document, and could not be given without satisfying the conditions of Section 65 of the Evidence Act. Section 66 rendered it legally inadmissible, although no objection was raised to the giving of it.<sup>15</sup>

11. Dwyer v. Collins, 7 Ex. 639—647.
12. Nityananda Roy v. Rashbchari Roy, 1953 Cal. 456; 54 Cr. L. J. 1108; 89 C. L. J. 204; Narsidas Jekisandas v. Ravi Shankar Prabhshankar, 1931 Bom. 33; 128 I. C. 891; 32 Bom. L. R. 1435.
13. S. 65 speaks of "existence, condition or contents" but S. 66 mentions only "contents". The question arises whether secondary evidence of "existence" or "condition" can be given in any case without notice.

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proved is itself a notice.

- (b) When from the nature of the case, the adverse party must know that he will be required to produce it.
- (c) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force.
- (d) When the adverse party or his agent has the original in Court.
- (e) When the adverse party or his agent has admitted the loss of the document.
- (f) When the person in possession of the document is out of reach, or not subject to, the process of the Court.
6. The Court may dispense with notice.
7. Objection as to admission of secondary evidence.

14. The answer is apparently 'yes.'
15. Smt. Mani Devi v. Smt. Anurna Dai, 1943 Pat. 218; I. L. R. 22 Pat. 114; 206 I. C. 126; 9 B.R. 260; Kanhaiyalal v. Jamna Lal, 1950 Raj. 47; P.C. Patnaik v. Kalidas, A. I. R. 1973 Orissa 65.
15. Kamleshwar Pershad v. Amanullah, I. L. R. 26 Cal. 53; 2 C. W. N. 649; Prafulla Kumar Bose v. Emperor, A. I. R. 1930 Cal. 209; I. L. R. 57 Cal. 1074; 125 I.C. 656; 31 Cr. L. J. 903; 50 C. L. J. 593.

Omission to give notice to the person in possession of the original document is a fatal objection to the admission of secondary evidence.<sup>16</sup> Objection to reception of secondary evidence on the ground of non-service of notice, if not taken in the trial Court, cannot be permitted to be raised in the appellate Court.<sup>17</sup> But if it has been taken in the trial Court, it does not matter that the objection was not made at the time the secondary evidence was given.<sup>18</sup>

*Principle.* The true principle on which a notice to produce a document on the trial of a cause is required is not to give the opposite party notice that such a document will be used by a party to the cause in order to enable him to prepare evidence to explain or confirm the document, but is merely to give him a sufficient opportunity to produce it, and thereby secure, if he pleases, the best evidence of the contents,<sup>19</sup> and, therefore, when a document is shown to be in Court a request to produce it immediately is sufficient.<sup>20</sup>

*"Notice"—English and Indian practice.* Section 65, clause (a) refers to documents in the possession of both parties and strangers. According to English practice, a notice to produce is used for an adversary in the cause, while a stranger legally compellable to produce a document is served with a summons to produce a *subpoena duces tecum*. A notice to produce is a notice by a party or his solicitor to another party or his solicitor, calling upon the latter to produce at the trial a particular document or documents specified in the notice.

*Notice to stranger also.* A *subpoena duces tecum* is a process used not by the party but by the Court. It is apparent from clause (a) of section 65 that the notice to produce referred to in Sections 65 and 66 is a notice served either on an adversary or a stranger.<sup>21</sup>

*By process of court.* It is a notice issued by process of Court under the Civil,<sup>22</sup> or Criminal<sup>23</sup> Procedure Code. In the mofussil, all notices are serviced through the Court, but on the original side of the High Court, the party himself or his solicitor serves a notice to produce on the opposing party or his solicitor.

*Summons.* Where, however, the person in possession of the document is a stranger to the suit, a *subpoena duces tecum* will be necessary in the High Court as in the English Courts, whose practice in this respect is followed.

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| <p>16. Subbaravulu Naidu v. Vengama Naidu, A. I. R. 1930 Mad. 743: 123 I. C. 197.</p> <p>17. Kundanbai v. Venubai, A. I. R. 1952 Nag. 47: 1951 N. L. J. 523. See also cases cited therein. See also Radha v. Laxmi, 1957 Raj. L. W. 603; Collector v. Rajib Bhoi, A. I. R. 1972 Orissa 200: 37 C. L. T. 848.</p> <p>18. Prafulla Kumar Bose v. Emperor, A. I. R. 1950 Cal. 209.</p> <p>19. Surendra Krishna Roy v. Mirza Mohammad Syed Ali, A. I. R. 1936 P. C. 15: 63 I.A. 85: 160 I.C. 29: 1936 A. L. J. 84: 38 Bom. L. R. 330: 63 C. L. J. 29: 40 C. W. N. 226: 70 M.L.J. 206: 1936 M. W. N. 22: 43 L. W. 107: 19 N. L. J. 29: 1935 O. W. N. 10: 36 P. W.</p> | <p>N. 159; Jitendra Nath v. Emperor, A. I. R. 1937 Cal. 99: 169 I.C. 977: 38 Cr. L. J. 818 (S.B.).</p> <p>20. Dwyer v. Collins, 7 Ex. 639, further notice to produce excludes the argument that the opponent has not taken all reasonable means to procure the original; but see also Bate v. Kinsey, 1 G. M. &amp; R. 38; Raghunath Misra v. Kishore, A. I. R. 1958 Orissa 260.</p> <p>21. Whitley Stokes, ii, 893.</p> <p>22. See Civ. P. C., Order V, rule 7; Order XI, rules 15–18.</p> <p>23. See Cr. P. C., 1973, ss. 91–94; Chap. VI, S. 349 and Evidence Act, ss. 162–165 post, persons omitting to produce documents after service of notice may be proceeded against under S. 175 of the Penal Code.</p> |
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3. "Prescribed by law". The notice to produce must be such as is prescribed by law,<sup>24</sup> and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case.

*Possession of document, proof of.* It must be shown that the party to whom the notice has been given has the document in his possession or power. Possession is the very foundation of notice; reasonable evidence of possession must be given, and then on proof of service of notice and non-production, secondary evidence may be offered.<sup>25</sup> Where documents, executed in favour of a wife, are summoned from her, they may be produced by her husband, whether the wife be *benamidar* of her husband or not.<sup>1</sup> Where the document is in the possession or power of the person who desires to use it as evidence, he must produce it.<sup>2</sup>

4. *Contents of notice.* "It is difficult to lay down any general rule as to what a notice to produce ought to contain, since much must depend on the particular circumstances of each case. No misstatement or inaccuracy in the notice will, however, be deemed material if not really calculated to mislead the opponent. Neither is it necessary by condescending minutely to dates, contents, parties, etc., to specify the precise documents intended. Indeed to do so may be dangerous, since if any material error were inadvertently made, the party sought to be affected by the notice might urge, with possible success, that he has been misled thereby. If enough is stated on the notice to induce the party to believe that a particular instrument will be called for this will be sufficient."<sup>3</sup>

*Form of notice.* The form of notice may be general, e. g., to produce "all accounts relating to the matter in question in this cause"<sup>4</sup> or "all letters written by the plaintiff to the defendant relating to the matters in dispute in this action".<sup>5</sup> But a notice to produce "letters and copies of letters and all books relating to this cause" has been held to be too vague to admit secondary evidence of a letter.<sup>6</sup> Similarly, a notice to produce title deeds of a date earlier than those which the adversary had admitted to be in his possession or power was held to be bad, though it might be sufficient to let in secondary evidence under clause (c) of Section 65.<sup>7</sup> Inaccuracies do not vitiate a notice unless the recipient has been misled thereby.<sup>8</sup>

*Time and place of service.* As to the time and place of the service, when not fixed by law, no more precise rule can be laid down than that it must be

24. See Civ. P. C., 1908, Order V, rule 7; Order XI, rules 12–18; Cr. P. C., 1973, Ss. 91–94; Chap. VI, s. 349.

25. See Sinclair v. Stevenson, 1 C. & P. 585; as to the order in which the evidence may be given, see S. 136 post.

1. Suchandra Bhushan Kumar Lal v. Laloo Modi, A. I. R. 1941 Pat. 202; 192 I.C. 67: 22 P. L. T. 656: 7 B. R. 317.

2. Hira v. Ganesh, (1882) 4 A. 406, 410.

3. Taylor, Ev., s. 443.

4. Rogers v. Custance, 2 M. & Rob. 181. See also Taylor, Ev., s. 443.

5. Jacob v. Lee, 2 M. & Rob. 33; Morris v. Hauser, ib., 392.

6. Jones v. Edwards, (1825) M. Cle & Yo 139. Recent decisions justify a greater laxity of practice than prevailed formerly, but it is believed that many English Judges still act upon the old principles, Taylor, Ev., 443.

7. Narsidas Jekisandas v. Ravishankar Prabhashankar, 1931 Bom. 33; 128 I.C. 891: 32 Bom. L. R. 1435.

8. Suchandra Bhushan Kumar Lal v. Laloo Modi, 1941 Pat. 202; 192 I.C. 67: 22 P. L. T. 656: 7 B. R. 317; Lawrence v. Clarke, 14 M. & W. 251.

such as to enable the party, under the known circumstances of the case, to comply with the call.<sup>9</sup>

*Sufficiency of service.* The sufficiency of the service is a question for the Judge, who must be satisfied that it was such that the recipient might, by using reasonable diligence, have complied with the notice.<sup>10</sup> Service of notice to a *pardanashin* woman on her brother living with her is sufficient.<sup>11</sup> A technical defect in service can be condoned in the absence of prejudice to the accused or clear miscarriage of justice.<sup>12</sup> If the notice has not been properly served, or if not served in sufficient time,<sup>13</sup> or if the party, calling for a document, does not take all the means in his power to compel its production,<sup>14</sup> secondary evidence will not be permitted to be given.

*Document called to be given as evidence.* When a party calls for a document for which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.<sup>15</sup>

*Refusal to produce, effect of.* When a party refuses to produce a document for which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.<sup>16</sup>

*Rules same in civil and criminal trials.* The rules with regard to the admission of secondary evidence are the same in criminal as in civil trials,<sup>17</sup> and the necessity for notice the same, though it will comparatively seldom happen that documents are required to be produced at a criminal trial and notices will consequently have but seldom to be issued.<sup>18</sup> The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.<sup>19</sup>

**5. Proviso.** Notice is not required in order to render secondary evidence admissible in any of the following cases :

(a) *When the document to be proved is itself a notice.* Notice to produce is not necessary when the document to be proved is itself a notice which has

9. Taylor, Ev., s. 445; see ib., s. 446, when the papers are in a foreign country.
10. Lloyd v. Mostyn, 10 M. & W. 483, 484.
11. Mst. Durgawati Kunwar v. Jagannath Prasad, A. I. R. 1929 All. 680; 118 I.C. 663; 1929 A. L. J. 1091.
12. Jitendra Nath v. Emperor, A. I. R. 1937 Cal. 99; 169 I. C. 977; 38 Cr. L. J. 818 (S.B.).
13. Sugg v. Bray, 54 L. J. Ch. 152; Taylor, Ev., s. 445; but if a party, on being served with a notice to produce a document, states that it is not in existence, parol proof of the contents will be received, and no objection can be taken to the lateness of the service; Faster v. Pointer, 9 C. & P. 720.
14. Shambati v. Jago, (1902) 29 C. 749.
15. S. 163 post; see notes to that section.
16. S. 164 post; see notes to that section, and see Civ. P. C., Order XI, rule 15, and Order VII, rule 18.
17. Manabendra Nath Roy v. Emperor, A. I. R. 1933 All. 498; S. H. Jhabwala v. Emperor, 1933 All. 690; 145 I.C. 481; 34 Cr. L. J. 967; 1933 A. L. J. 799. See also Prafulla Kumar Bose v. Emperor, A. I. R. 1930 Cal. 209; I. L. R. 57 Cal. 1074; 125 I. C. 656; 31 Cr. L. J. 903; 50 C. L. J. 593.
18. Norton, Ev., 251.
19. S. 89 post.

been served on the adversary,<sup>20</sup> though not on a third person.<sup>21</sup> This exception appears to have been originally adopted in regard to notices to produce, for the obvious reason, that, if a notice to produce such a document were necessary, the series of notices would become infinite. The exception has subsequently been extended to other notices, and now lets in proof by copies, if not by any species of secondary evidence, of a notice to quit : of a notice of dis-honour, provided the action be brought upon the bill, but not otherwise ; of all such notices of action, or written demands, as are necessary to entitle the plaintiff to recover.<sup>22</sup> In the case of a notice issued to the State under Section 80, C. P. C., a copy can be produced, if the original is not filed.<sup>23</sup> Section 65, read with this section, permits the plaintiff to produce the copy of the notice without summoning the original. It is for the defendant to show, by production of the original, that the document does not amount to a notice according to Section 80, C. P. C. Where the defendant fails to produce the original, he cannot have any grievance when its copy is produced by the plaintiff.<sup>24</sup>

(b) *When from the nature of the case, the adverse party must know that he will be required to produce it.* The second of the cases is where from the nature of the action, or indictment, or from the form of the pleadings, the defendant must know that he will be charged with the possession of an instrument, and be called upon to produce it.<sup>25</sup> But Sections 65 and 66 must be read together, and the Court ought not to hold that the adverse party must have known that he would be required to produce it so as to dispense with the necessity of a notice to produce, unless the original is shown or appears to be in the possession of the person against whom the presumption is drawn.<sup>1</sup> Where, however, it is clear that the original document is in the possession, or under the control, of the party objecting to the admissibility of secondary evidence, and he fails to produce it, this proviso applies and no notice to produce is necessary.<sup>2</sup> In a suit for redemption of mortgage, undoubtedly evidenced by a deed, if the defendant denies the mortgage itself, notice is not necessary.<sup>2-1</sup> Similarly when the landlord admits written tenancy agreement but does not produce it, the tenant can prove the terms of tenancy by secondary evidence.<sup>2-2</sup>

20. In re K. Sundaresa Aiyar, A. I. R. 1950 Mad. 657; (1950) 1 M. L. J. 314; 1950 M. W. N. 290; (1950) 20 Com. Cas. 260; R. v. Turner, (1910) 1 K. B. 346; Re Criminal Justice Act, 1948, (1950) 1 All E. R. 37.
21. Robinson v. Brown, (1846) 3 C. B. 754; Andrews v. Wirral, (1916) 1 K. B. 863.
22. Taylor, Ev., ss. 450-451, and cases there cited. Quare; whether the 'notices' referred to in clause (1) are notices to produce only or include also the other notices to which the doctrine has been extended by the English cases.
23. Lokchand v. Union of India, A. I. R. 1959 Raj. 231: I.L.R. (1958) 8 Raj. 855.
24. Ibid.
25. Indian Merchants Bank, Ltd. v.

- Anupchand, 1928 Lah. 236: 107 I. C. 492; Muhammad Kamil v. Habibullah, 37 I.C. 794; A. I. R. 1917 A. 130. See also Lakshmi Kanto Roy v. Nishi Kanto Roy, 71 C. W. N. 362; Mira Bai v. Jai Singh, (1971) 22 Raj. L. W. 319 (520); A. I. R. 1971 Raj. 303.
1. Per Walsh, J., in Mst. Mangra v. Bedi Ram, 35 I. C. 328; A. I. R. 1916 A. 221; I. L. R. (1972) 2 Delhi 699.
2. Sudhakar Misra v. Nilkantha Das, 1936 Pat. 129: 161 I. C. 465; C. S. Pati v. Ahalya Devi, A. I. R. 1974 Orissa 199: 40 C. L. T. 143.
- 2-1. Mira Bai v. Jai Singh, A. I. R. 1971 Raj. 303; 1971 Raj. L. W. 319; 1970 W. L. N. (I) 724.
- 2-2. Pravin S. Shah v. Govind K. Sharma, 1974 Rajdhani L. R. 128 (Delhi).

Where the plaintiff states that the original documents are in the possession of the defendant, and the latter does not deny the statement, notice under clause (a) of Section 65 can be dispensed with.<sup>3</sup>

The ordinary rule that documents should be called for from a party if wanted by the other party, does not apply to cases where the documents are in possession of a litigating party. That rule applies to cases where documents are sought to be produced from a third party. A party which fails to produce a document which is likely to throw light on the point of controversy, must be subject to an adverse inference that if the party had produced such document, it would have gone against the party's own contention on the point.<sup>4</sup>

Under the Motor Vehicles Rules, the driver and conductor of a lorry are bound to keep the registration certificate and permit with them in their lorry. In a prosecution of the driver and conductor under Section 112 of the Motor Vehicles Act, 1939, for committing a breach of the conditions of the certificate, they must be deemed to have known that they are required to produce the certificate and permit, and if they do not care to produce them, the prosecution is entitled to produce secondary evidence.<sup>5</sup> In an action of trover for converting a bond, a bill of exchange or other writing, or in a prosecution for stealing any document, the counsel for the plaintiff or the Crown may at once produce secondary evidence of its contents, even though the defendant should offer to produce the document itself.<sup>6</sup> In a suit for redemption, the plaintiffs were allowed to give secondary evidence without notice to produce the original mortgage land as the defendants must have known that they would be required to produce it in a suit for redemption.<sup>7</sup> A like rule prevails in an action on contract against a carrier for the non-delivery of written instruments, as also indictments for conducting a traitorous correspondence. It has, however, been held inapplicable in a charge of forging a deed, and no doubt can be entertained that an indictment for arson, with intent to defraud an insurance office, does not convey such a notice that the police will be required, as to dispense with a formal notice to produce. Similarly, it is the necessary (though reverse) consequence of this rule that if the maker of a note or cheque, or the acceptor of a bill, does not, as defendant in an action, deny by the plea his making or acceptance, the plaintiff who is not bound to produce the instrument as part of his case, since it is admitted on the record, may object to the defendant's giving secondary evidence of its contents for the purpose even of identification, unless a notice to produce has been duly served or unless the instrument is shown to be in Court.<sup>8</sup> It is doubtful, if a

3. *Vishwa Nath Vithoba v. Genu Kisan*, A. I. R. 1956 Bom. 555.

4. *Commissioner of Hazaribagh Municipality v. Fulchand Agarwala*, 1966 B. L. J. R. 808 (810).

5. *Jagroop v. Rex.*, A. I. R. 1952 All. 276; I. L. R. 1950 All. 411; 53 Cr. L. J. 588.

6. See *Whitehead v. Scott*, 1 M. & Rob. 2.

7. *Dwarka v. Ram Nand*, 41 A. 592; 51 I. C. 275; 17 A. L. J. 711; A. I. R. 1919 A. 232; *Mi Amin Nissa v. Misura Bi*, 31 I. C. 892; A. I.

R. 1915 L.B. 9; *Bahadur Singh v. Madho Singh*, 36 I. C. 696; A. I. R. 1916 Oudh 161; *Dinanath Rai v. Rama Rai*, A. I. R. 1926 Pat. 512; I. L. R. 6 Pat. 102; 97 I.C. 348; but see *Maung Po Ni v. Ma Shwe Kyi*, A. I. R. 1925 Rang. 7; I. L. R. 2 Rang. 397; 84 I.C. 373, where it was held that this proviso does not apply in a case against a mortgagee and that notice to produce must be given; see S. 90 post.

8. *Taylor, Ev.*, s. 452, and cases there cited.

*pro forma* defendant who has no interest in the property or in the decision of the case is an "adverse party" within the meaning of this clause.<sup>9</sup>

(c) *When it appears or is proved that the adverse party has obtained possession of the original by fraud or force.* As where, after action brought, he has received it from a witness, in fraud of a *subpoena duces tecum*.<sup>10</sup> In such cases, in *odium spoliatoris* a notice to produce is not required, to be given to him before admitting secondary evidence of the contents of the document of which he has improperly obtained possession.<sup>11</sup>

(d) *When the adverse party or his agent has the original in Court.* For the object of the notice is not, as was formerly thought, to give the opposite party an opportunity of providing the proper testimony to support or impeach the document, but merely to enable him to produce it, if he likes, at the trial, and thus to secure the best evidence of its contents.<sup>12</sup>

(e) *When the adverse party or his agent has admitted the loss of the document.* For in such cases, the notice would be nugatory.<sup>13</sup> The loss must be admitted. Under this exception, however, a party cannot call witnesses to prove the destruction of a document that has been traced into the hands of his opponent and then show its contents by secondary proof, unless he has first served a notice to produce, since (notwithstanding the evidence to the contrary) the document may still be in existence, or at any rate the opponent may dispute the fact of its having been destroyed.<sup>14</sup>

(f) *When the person in possession of the document is out of reach, or not subject to, the process of the Court.*<sup>15</sup> On this point, Secs. 65 and 66 are not happily drafted. Section 65 appears to require a notice to be given in this case, or the last paragraph of clause (a) applies to everything that has gone before; while the present clause expressly enacts that notice is not necessary.<sup>16</sup> Where a commission to take evidence is issued to any place beyond the jurisdiction of the Court issuing the commission, it is not necessary, in order to admit secondary evidence of the contents of a document, that the party tendering it should have given notice to produce the original, nor is it necessary for him to prove a refusal to produce the original.<sup>17</sup>

**6. The Court may dispense with notice.** It will be observed that under this section, besides the specified cases in which notice is not required, the Court has absolute power to dispense with the notice "in any case in which it thinks fit".<sup>18</sup> Notice may be dispensed with where the giving of it would

9. Mst. Durgawati Kunwar v. Jagannath Prasad, 1929 All. 680: 118 I. C. 663: 1929 A. L. J. 1091.
10. Leeds v. Cooks, 4 Esp. 256; Doe v. Ries, (1832) 8 Bing. 724.
11. Taylor, Ev., s. 453.
12. Dwyer v. Collins, 7 Ex. 639; see Taylor, Ev., s. 456.
13. Taylor, Ev., s. 455.
14. Doe v. Morris, 3 A. & E. 46.
15. See Bishop Mellus v. Vicar Apostolic, (1879) 2 M. 295, 301; Haranund v. Ramgopal, 27 C. 639: 4 C. W.

- N. 429.
16. See the argument in Ralli v. Gau (1883) 9 C. 939.
17. Ralli, v. Gau, *supra*.
18. Surendra Krishna Roy v. Mirza Mohammad Syed Ali, A. I. R. 1936 P. C. 15: 63 I. A. 85: 160 I. C. 29: 1936 A. L. J. 84: 38 Bom. L. R. 330: 63 C. L. J. 29: 40 C. W. N. 226: 70 M. L. J. 206: 1936 M. W. N. 22: 43 L. W. 107: 1936 O. W. N. 10: 19 N. L. J. 29: 38 P. L. R. 19.

be a mere formality.<sup>19</sup> This is a relaxation of the procedure in force in the English Courts.<sup>20</sup> Notice to produce a document has been dispensed with, where the defendant denied its existence.<sup>21</sup>

**7. Objection as to admission of secondary evidence.** Once secondary evidence by way of certified copies of registered document is admitted without objection and the documents are marked as exhibits, it is not open to the party against whom they are offered in evidence to raise any objection that the proper procedure has not been followed or the proper foundation not laid for admission of secondary evidence.<sup>22</sup>

**67. Proof of signature and handwriting of person alleged to have signed or written document produced.** If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

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| s. 3 ("Document.")                        | s. 3 ("Proved".)                               |
| s. 45 ("Expert evidence in handwriting".) | s. 47 (Non-expert evidence as to handwriting). |
| s. 73 ("Comparison of handwriting.")      |  |

#### SYNOPSIS

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| 1. Principle and scope.                | 4. Proof of execution :                 |
| 2. Proof of signature and handwriting. | —Proof by admission.                    |
| 3. Execution :                         | 5. Registration endorsement as proof of |
| —Modes of proving signature.           | execution.                              |
| —Marks.                                | 6. What is required to be proved.       |

**1. Principle and scope.** The person who makes an allegation must prove it. Notes post. This section applies only when the writing or signature on the document is disputed, i.e. alleged and denied.<sup>22-1</sup> It only reiterates the universal rule that the person who makes an allegation must prove it. What the section requires is that the signature of the person, who is alleged to have signed or made the document, must be proved.<sup>23</sup> The section does not lay down any particular mode of proof for proving that a particular writing or signature is in the hand of a particular person. The proof may be made by the direct evidence of those persons who have seen him making the writing on the particular document, irrespective of whether or not they can read the writing. To prove a thumb-mark, it is not necessary that the

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| 19. Gopal Das v. Thakurji, A. I. R. 1943 P.C. 83; I. L. R. 1943 Kar. 69 (P.C.); 207 I. C. 553; 1943 A. L. J. 292; 1943 A. W. R. 14 (P.C.); 47 C. W. N. 607; (1943) 2 M. L. J. 51; 10 B. R. 1943 O. W. N. 334; 10 B. R. 7. | 1943 A. W. R. 14; 47 C. W. N. 607; 207 I. C. 553; 56 L. W. 593; (1943) 2 M. L. J. 51; 10 B. R. 7; A. I. R. 1943 P.C. 83 (87); Subba Rao v. Venkata Rama Rao, A. I. R. 1964 Andh. Pra. 53; Dula Dei v. Jati Bewa, (1965) 31 Cut. I. T. 889. |
| 20. Cunningham, Ev., 218.   | Parmeshwari Das v. G. R. Kohli, 1972 Rev. C. J. 451; 1972 Rev. C. R. 330 (Delhi).  |
| 21. Dinanath v. Rama, A. I. R. 1926 Pat. 512; I. L. R. 6 Pat. 102; 97 I.C. 348.   | Hasan Abdulla v. State of Gujarat, A. I. R. 1962 Guj. 214; 1962 Guj. L. R. 107.  |
| 22. Collector, Cuttack v. Rajib Bhol, 37 Cut. L. T. 848 (853, 854); Gopal Das v. Thakurji, I. L. R. 1943 Kar. 69; 1943 A. L. J. 292;  | 22-1   |

person proving the affixation of the thumb-mark should be able to identify the thumb-mark. All that is required is that he should be able to identify the document on which he states that the thumb-mark was affixed.<sup>24</sup> Though an illiterate person, since he cannot identify a document on which he has seen someone writing, cannot ordinarily prove a writing or signature made by another person, but a person acquainted with the language, in which a document is written, can identify the document and when he has seen another person making a writing on it, he can prove that writing although he does not know the language in which the writing by that person was made,<sup>25</sup> or that he is illiterate.<sup>25-1</sup> This section prescribes that whenever a document is alleged to have been signed or to have been written wholly or in part by any person, the signature or the handwriting of the said person must be proved to be in his handwriting. For proving the handwriting, under sections 45 and 47, the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant.

The section does not lay down any specific mode of proof, and, therefore, the execution of a document being a question of fact, can be proved like any other fact by circumstantial evidence as well, but the circumstantial evidence must be sufficiently strong to carry conviction. Such evidence may consist of the internal evidence contained in the document itself, and the oral evidence of witnesses who may prove other surrounding circumstances.<sup>1</sup> Section 68 deals with the proof of the execution of the document required by law to be attested, and provides that such a document shall not be used as evidence until at least one attesting witness has been called for proving its execution. These provisions set out the requirements and the nature of proof which must be forthcoming, when a document is relied on in a Court of law.<sup>2</sup>

**2. Proof of signature and handwriting.** In addition to the question which arises as to the contents of a document dealt with in Sections 61–66, the further question arises when a document is used as evidence, namely, whether it is that which it purports to be; whether, in other words, it is a genuine document. The latter question is dealt with in Sections 67–73. This section presumably governs both primary and secondary evidence.<sup>3</sup> The provisions of this section apply to the proof referred to in Section 162, Cr. P. C. of statements made to the police during investigation.<sup>4</sup> The nature of the evidence will greatly depend upon the nature of the document. Proof of handwriting, signature and execution must be given. Formalities required form part of such execution of either a universal or special nature. Signature is almost universal for which sometimes but more rarely, sealing is substituted. Sometimes both are used. If a person cannot write and has no seal, he gene-

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- 24. Bheek Chand v. Parbhaji, I. L. R. 1963 Raj. 84.
- 25. Ibid; Gajraj v. Board of Revenue, 1966 A. L. J. 149 (151); 1965 A.W.R. (H.C.) 841; Ram Chandra v. Jaithmal, A.I.R. 1934 All. 990.
- 25-1. Punia Sethi v. K. Mohanty, 41 Cut. L.T. 1272.
- I. Govind Ram v. Abdul Wahab, I. L. R. 1963 Raj. 954; A. I. R. 1963 Raj. 234; see also Krishnabiharilal v. State, A. I. R. 1956 M. P. 86; Karali Prasad v. E. I. Rly. Co., A. L. E.—204
- 1. R. 1928 C. 498; 48 C. L. J. 32.
- 2. H. Venkatachala Iyengar v. B. N. Thimmajamma, A. I. R. 1959 S.C. 443, 451; 1959 S. C. R. 507; 1959 (Supp.) 1 S.C.R. 426; (1959) 2 S.C.A. 1.
- 3. Sheikh Karimullah v. Gudar Koeri, 1925 All. 56; 82 I.C. 306.
- 4. King-Emperor v. Vithu Balu Kharat, A. I. R. 1924 Bom. 510; 83 I. C. 1007; 26 Cr. L. J. 223; 26 Bom. L. R. 965.

rally makes a mark, and some other person writes his name. Attestation (as to which, see Sections 68–72) is sometimes an imperative formality. This section is not restricted to the proof of the handwriting of the executant only but relates also to the proof of the signature of an attesting witness.<sup>5</sup>

**3. Execution.** Whatever the document may be, it cannot be used in evidence until its genuineness has been either admitted or established by proof, which should be given before the document is accepted by the Court.<sup>6</sup> Although under this section no particular kind of proof is required for the purpose of establishing the fact of execution, it must nevertheless be shown to the satisfaction of the Court that the mark or signature denoting execution was actually fixed to the document by the person who professed to execute it. But it is settled law that the mere identification of the signatures of the witnesses of any document does not amount to proving of the execution of the document.<sup>7</sup> The correctness of the contents of a document, if in issue, should be proved by calling the executant of the document as a witness. It is futile to merely prove the signature or the handwriting of the person who signed or wrote it. For he is the only person who can depose to the correctness of the contents of the document.<sup>8</sup> Conclusions, based on mere comparison of handwriting, must at best be indecisive, and yield to the positive evidence in the case.<sup>9</sup> The execution or authorship of a document may be proved like any other fact by direct as well as circumstantial evidence, for this section does not lay down any particular mode of proof; such circumstantial evidence may consist of the internal evidence contained in the document itself.<sup>10</sup>

If the plea taken is that the executant has not signed a document and that the document is a forgery, the party seeking to prove the execution of the document need not adduce evidence to show that the party who signed the document knew the contents of the document. But if it is pleaded that the party who signed the document did not know the contents of the document, then it may, in certain circumstances, be necessary for the party seeking to prove the document to place material before the court to satisfy it that the party who signed the document had the knowledge of its contents.<sup>11</sup>

*Modes of proving signature.* The modes of proving a signature are as follows :

(i) by calling a person who signed or wrote a document ;

5. Ponnuswami Goundan v. Kalyana sundara Iyer, A. I. R. 1934 Mad. 365; I. L. R. 57 Mad. 662; 149 I.C. 257; 66 M. L. J. 712; 1934 M. W. N. 384; 39 M. L. W. 571.
6. Markby, Ev., Act. 60. See Banke Lal v. Swami Dayal, 56 I.C. 328; 7 O. L. J. 207; 23 O.C. 72; A. I. R. 1920 Oudh 11 (2).
7. Deputy Commissioner of Partabgarh v. The Universal Film Co. (India), Ltd., A. I. R. 1950 All. 696; Kangabam Bira Singh v. Manipur Drivers' Union Co-operative Association, A. I. R. 1957 Manipur 9; Kahanchand v. Mst. Jawandi, A. I. R. 1923 Lah. 174; 79 I.C. 500.
8. Madholal Sindhu v. Asian Assurance Co., Ltd., A. I. R. 1954 Bom. 305.
9. Kishore Chandra Singh Deo v. Ganesh Prasad Bhagat, A. I. R. 1954 S. C. 316; 1954 S.C.R. 919; 1954 S. C. J. 395; I. L. R. 1954 Pat. 313; (1954) 1 M.L.J. 622; 1954 S. C. A. 979; 33 Pat. 313; 9 D. L. R. (S.C.) 257. See also S.C. Gupta v. Emperor, A. I. R. 1924 Rang. 17; I. L. R. 1 Rang. 290; 76 I.C. 425; 25 Cr. L. J. 185.
10. Narayan v. The Chamber of Commerce, (1969) 20 Raj. L. W. 107 (110).
11. Dattatraya v. Rangnath, 1971 S. C. D. 366; (1971) 1 Civ. App. J. 328 (S.C.) A. I. R. 1971 S. C. 2548 (2549).

- (ii) by calling a person in whose presence the document was signed or written;
- (iii) by calling a handwriting expert;
- (iv) by calling a person acquainted with the handwriting of the person by whom the document is supposed to be signed or written;
- (v) by comparing, in Court, the disputed signature or writing with some admitted signature or writing;
- (vi) by proof of an admission by the person who is alleged to have signed or written the document that he signed or wrote it;
- (vii) by the statement of a deceased professional scribe, made in the ordinary course of business, that the signature on the document is that of a particular person.

A signature is also proved to have been made, if it is shown to have been made at the request of a person by some other person, e. g., by the scribe who signed on behalf of the executant;

- (viii) by other circumstantial evidence.<sup>12</sup>

The word "signing" means the writing of the name of a person so that it may convey a distinct idea to somebody else that what the writing indicates is a particular individual whose signature or sign it purports to be.

*Marks.* A mark is a mere symbol, and does not convey any idea to the person who notices it and very often probably even to the person who made it.<sup>13</sup> This section has not provided for the case of marks and seals, as to the proof of which however, see notes Section 47 ante, and Section 73, which assume that seals are capable of proof. But, it has been held that thumbmarks are not exempt from the provisions of this section.<sup>14</sup> This section merely states with reference to documents what is the universal rule in all cases that the person who makes an allegation must prove it. It is in no way restrictive as to the kind of proof which may be given; the proof may be by any of the recognized modes of proof, and amongst others by statements admissible under Section 32; and thus handwriting may be proved by circumstantial evidence.<sup>15</sup> In that respect, the rule is precisely the same as it stood before. It leaves it, as before, entirely, to the discretion of the presiding Judge of the fact to determine what satisfies him that the document is a genuine one.<sup>16</sup> So in the undermentioned case,<sup>17</sup> it appeared that the evidence which was given in support of the document upon which the defendant's case depended was that of a *Kazi* before whom the vendor came and admitted

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- 12. Kangabam Bira Singh v. Manipur Drivers' Union Co-operative Association, Ltd., A. I. R. 1957 Manipur 9.
- 13. Nirmal v. Saratmani, (1898) 2 C. W. N. 642, 648; as to "signature" including a mark, see notes to S. 47 ante.
- 14. Ramanemma v. Basavayya, A. I. R. 1934 Mad. 558; 151 I.C. 990; 1934 M. W. N. 443; 40 L. W. 277.
- 15. Abdulla v. Cannibal, (1887) 11 B. 690; Govardhan Das v. Ahmadi Begam, 1953 Hyd. 181; I. L. R. 1953 Hyd. 140; and as to the methods of proof, see Sec. 47 ante.
- 16. Neel v. Jugobundho, (1874) 12 B. L. R. App. 18, per Markby, J.
- 17. ib.

the deed to be his, and caused it to be registered, bringing witnesses to his execution thereof. Upon that evidence, the lower Court came to the conclusion that the deed was proved ; but it was contended in appeal that the present section rendered it necessary that direct evidence of the handwriting of the person who was alleged to have executed the deed should have been given by some person who saw the signature affixed. But the Court, making the observations cited above, held, that it was not so expressly stated in this section and that that was not the intention of the Legislature.<sup>18</sup> So also this Act does not require the writer of a document to be examined as a witness ; nor does the present section require the subscribing witnesses to a document to be produced.<sup>19</sup>

It is commonly the practice with Subordinate Judicial Officers, when taking the evidence under this section, merely to record that the witness verified the document without specifying the manner of proof of the document. In *Gunga Persad v. Inderjit Singh*,<sup>20</sup> the Judicial Committee said :

"The documentary evidence on which the defendant's case principally rested consisted of two documents and the endorsements of payment thereon, which purported to have been signed by the plaintiffs ; because, these, if really signed by them, were proofs of settled accounts comprehending most of the disputed payments. In this country, or any country where the administration of justice is conducted with any degree of formality and regularity, one would have expected to find that these documents had been put into the hands of the plaintiffs ; and that they had been called upon to admit or deny their alleged signatures, and that the proof of those documents to be given by the defendants would have been far more specific than a mere statement that they were identified and verified, as the Judge says, by the witnesses ; the witnesses would have been called upon to state whether they saw BS sign the first, or BS and J sign the second, or if not, whether they could speak to the handwriting, and generally what took place on the two occasions on which the accounts are vaguely said by one of the witnesses to have been adjusted."<sup>21</sup>

As to the presumptions which exist in the case of documents thirty years old, see Section 90 post.

**4. Proof of execution.** Execution consists in signing a document written out and read over and understood, and does not consist of merely signing a name upon a blank sheet of paper. Mere identification of a signature on a document does not necessarily amount to proof of execution of the document by the person whose signature is thus proved.<sup>21-1</sup> To be executed, a document must be in existence ; where there is no document in existence there cannot be execution.<sup>22</sup> Thus, where, in a suit on a promissory note, the defendant denies execution and alleges that he had given the plaintiff only a blank sheet of paper bearing his thumb-impression for executing a lease deed, the onus rests on the plaintiff both to prove the fact of execution and the advance of consideration.<sup>23</sup> "Executed" means completed. 'Execution' is, when app-

18. *Neel v. Juggobundho*, (1874) 12 B. L. R. App. 18, per Markby, J.

19. *Abdool v. Abdoor*, (1874) 21 W. R. 429; as to attesting witnesses, see S. 68.

20. (1875) 23 W. R. 390.

21. Ib.

21-1. *Doraiswamy v. Rethnammal*, (1978) 1 M. L. J. 456; 91 L. W. 28; A. I. R. 1978 Mad. 78.

22. *Sheikh Ebabd Ali v. Muhammad Farree*, 35 I.C. 56.

23. *Seitha v. Koyam*, A. I. R. 1957 Ker. 63; 1957 Ker. L. J. 334.

lied to a document, the last act or series of acts which completes it. It might be defined as formal completion. Thus, execution of deeds is the signing, sealing, and delivering of them in the presence of witnesses. Execution of a will includes attestation. In each class of instruments, we have to consider when the instrument is formally complete.<sup>24</sup> To "execute" is to go through the formalities necessary for the validity of a legal act (e. g., a bequest, agreement, mortgage, etc., hence to complete or give validity to the instrument by which such act is effected) by performing what the law requires to be done, as by signing, sealing, etc. Sealing is not, generally speaking, necessary in India but the execution of a document must still mean something more than the mere signing by the party.<sup>25</sup>

Thus, the contract on a negotiable instrument is, until delivery, incomplete and revocable.<sup>1</sup> A document is executed, when those who take benefits and obligations under it have put, or have caused to be put, their names to it. Personal signature is not required, and another person, *duly authorized*, may by writing the name of the party executing, bring about his valid execution, and put him under the obligations involved.<sup>2</sup> The ordinary meaning of executing a document is signing a document as a consenting party thereto. To treat the fact of signature as a physical fact, apart from the circumstance that the signature is intended as an expression of assent to the document, is to go out one's way to be wrong. In the case of a *bakalam* signature, a person whose name is put with his authority in evidence of his assent to a document is "executant".<sup>3</sup> In the case of a document which is not valid without attestation, execution not only means signing by the executant but it means and includes attestation as well, which is the last of the series of acts necessary to give completeness and formal validity to the deed.<sup>4</sup>

*Proof by admission.* The execution of documents to the validity of which attestation is not necessary, may be proved by the admissions of the party against whom the document is tendered, whether such admissions are of an evidentiary nature, or made for the purposes of the trial only. In the case of attested documents, the admission of a party to such document of its execution by himself is sufficient proof of its execution as against him (Section 70 post), whether such admission be evidentiary or made at the trial for the purpose of dispensing with proof. When there had been no admission as to the execution of a document which has been produced, it becomes necessary to prove the handwriting, signature, or execution thereof.<sup>5</sup> Where the executant merely admits his initials with a date without reference to the year of the

- 24. Bhawanji v. Devji, (1894) 19 B. 635, 638, per Farran, J.
- 25. Arjun Chandra Bhadra v. Kailas Chandra Das, A. I. R. 1923 Cal. 149 (2); 70 I.C. 532; 36 C. L. J. 373; 27 C. W. N. 263.
- 1. See Bhawanji v. Devji, *supra*.
- 2. Puran Chand Nahatta v. Manmootho Nath Mukherjee, A. I. R. 1928 P. C. 38; 55 I.A. 81; I. L. R. 55 Cal. 532; 108 I.C. 342; 26 A. L. J. 121; 30 Bom. L. R. 783; 47 C. L. J. 396; 32 C. W. N. 629; 54 M. L. J. 473; 1928 M. W. N. 149; 27 L. W. 336.
- 3. Manmootho Nath Mukherjee v. Puran

- Chand Nahatta, A. I. R. 1925 Cal. 703; 88 I.C. 33; 29 C. W. N. 539 affirmed by the Privy Council in A. I. R. 1928 P.C. 38, *supra*.
- 4. Jai Karandas v. Protap Singh, A. I. R. 1940 Cal. 189; I. L. R. (1939) 2 Cal. 479; 187 I.C. 718; 43 C. W. N. 1084; Arjun Chandra Bhadra v. Kailas Chandra, *supra*; Baliram Chandra v. Kamulja, A.I.R. 1924 Nag. 367 : 78 I.C. 330.
- 5. See Phipson, Ev., 11th Ed., pp. 21, 22; Taylor, Ev., s. 972 et seq., S. 149; Om Prakash v. The State, A. I. R. 1957 All. 388; 1958 All. W. R. (H.C.) 8.

date on a torn scrap of paper, the contents of which were not written by him, such admission does not amount to admission of execution of the document. Execution of a document means that the executant signed or put his thumb-mark impression only after the contents of the document had been fully stated and read by the executant before he put a signature thereon.<sup>6</sup>

Where the writing bears the signature of a party who admits it, the statement must be held to be proved by such admission and it is not further necessary to adduce other evidence.<sup>7</sup>

When a document is exhibited without any objection by the opposite party, its contents are also admitted in evidence, though they may not be conclusive.<sup>7-1</sup> Documents once exhibited without objection cannot be objected to even in appellate Court for want of formal proof.<sup>7-2</sup> In the undernoted case, however, it was held that there is no reason why authorship of personal letters should be accepted without proof of handwriting or signature merely because they were exhibited,<sup>7-3</sup> and that the consent given for exhibiting a document without formal proof does not dispense with the requirement to prove the contents or the truth thereof.<sup>7-4</sup>

As to the various methods of proving handwriting, see Section 47 ante, and the notes, to that section. The English cases with regard to deeds and their sealing are not of much importance in this country where writings under seal or, as they are technically called "deeds", are not generally required and contracts under seal have no special privilege attached to them, being treated on the same footing as simple contracts. According to English law, where the signature of a deed has been proved and the attestation clause is in the usual form, sealing<sup>8</sup> and delivery may be presumed, so if signature and sealing are proved, delivery will be presumed.<sup>9</sup> Where the seal of a corporation is not judicially noticed,<sup>10</sup> it may be proved by any one who knows it, no witnesses are required to the affixing of such seal, and attestation is not necessary unless the Articles of Association otherwise provide. The presumption is that the seal has been properly affixed.<sup>11</sup>

If the writing which is tendered in evidence is one which receives its character from being passed from one hand to another, the delivery, if necessary,

- 6. State of Orissa v. Khetra Mohan Singh, A. I. R. 1965 Orissa 126.
- 7. Vallabhdas v. Assistant Collector, A. I. R. 1965 S.C. 481.
- 7-1. P. C. Purushothama Rediar v. Perumal, A. I. R. 1972 S. C. 608; (1972) 1 S. C. C. 9; (1972) 1 S. C. J. 469; (1972) 1 M. L. J. (S.C.) 83; (1972) 1 Andh. W. R. (S.C.) 83; (1972) 2 S. C. R. 646; (1971) 46 Ele L. R. 509; Harnath Malhotra v. Dhanoo Devi, A. I. R. 1975 Cal. 98; Panibudi Ganda v. Bidesi Majhi, (1974) 1 Cut. L. R. (Cr.) 147; L. A. O. v. Madan Gajendra, (1975) 41 Cut. L. T. 869; see also I. E. I. G. Ltd. v. Hanover Insurance Co., I. L. R. (1973) 2 Cal. 392.
- 7-2. P. C. Purusothama Rediar v.

- perumal, supra; K. Co. Ltd. v. State of West Bengal, A. I. R. 1973 Cal. 325: I. L. R. (1973) 2 Cal. 60.
- 7-3. Banarsidas v. Faqir Chand, A. I. R. 1976 Punj. 24; 1975 Rev. L. R. 567.
- 7-4. K. Thevar v. R. Thevar, A. I. R. 1975 Mad. 257; 87 M. L. W. 777; (1974) 2 M. L. J. 260.
- 8. See note 5 post.
- 9. Taylor, Ev., s. 149; Roscoe, N. P. Ev., 18th Ed., 137.
- 10. v. S. 57 ante.
- 11. Moises v. Thornton, 8 T. R. 307; see as to this case, Taylor, Ev., s. 1852; as to the presumption of genuineness of certain seals, see S. 82 post, and as to comparison of seals, S. 73 post.

must be proved. So until delivery a *hundi* is not clothed with the essential characteristics of a negotiable instrument.<sup>12</sup> No particular form of delivery is necessary.<sup>13</sup> Lastly, certain special rules exist as to the proof of execution of documents which are required by law to be attested.<sup>14</sup> An attested document not required by law to be attested may be proved as if it were unattested.<sup>15</sup> In respect of the proof of plans, it is not a sufficient reason for admitting a plan in evidence, that a witness says it was prepared in his presence, unless the witness also says that to his own knowledge the plan is correct.<sup>16</sup>

**5. Registration endorsement as proof of execution.** It has been held, in some cases, that the effect of registration endorsement is not to prove execution as is required by Section 67, but only to prove an admission made by the executant to the Registrar or Sub-Registrar in solemn circumstances; and the Sub-Registrar's certificate is admissible not to prove execution of the deed but merely to prove the admission of execution.<sup>16-1</sup> The effect of the admission is, in every case, a separate question. The fact of registration may be useful in deciding whether presumption under Section 90 should be made.<sup>16-2</sup> Section 70, Evidence Act, has no application, as it refers only to cases where the admission is by a party to the suit made in the suit itself.<sup>17</sup> But as pointed out by their Lordships of the Privy Council :

"The registration is a solemn act to be performed in the presence of a competent official appointed to act as Registrar whose duty it is to attend the parties during the registration and see that the proper persons are present and are competent to act and are identified to his satisfaction ; and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order."<sup>18</sup>

So, where the signature or thumb-impression of the executant appears on the Registrar's endorsement and the Registrar apparently satisfied himself by enquiries from a witness to execution and registration that the executant was the person who had executed the document and admitted its execution before him, the admission of the execution of the document by the executant is proved by the endorsement of the Sub-Registrar in view of the provisions of Sections 59 and 60.<sup>19</sup> A Sub-Registrar's endorsement, duly made under Section 60,

12. Bhawanji v. Devji, (1894) 19 B. 635, 638.
13. Phipson, Ev., 9th Ed., p. 544, and cases there cited; see as to the presumption in favour of the due execution of instruments, Taylor, Ev., ss. 148, 149; and as to the presumption of delivery, *v. ante*.
14. Ss. 68-71 post.
15. S. 72 post.
16. R. v. Jora, (1874) 11 Bom. H. C. R. 242, 246.
- 16-1. Ram Krishna v. Mohd. Kasim, A. I. R. 1973 Bom. 242; I. L. R. 1975 Bom. 391; 76 Bom.L.R. 104; 1973 Mah.L.J. 511.
- 16-2. 1971 A. P. L. J. 61; see however Irudayam v. Salayath Mary, A. I. R. 1973 Mad. 421, where it is held that in absence of other proof certificate of registration is *prima facie* proof of execution.
17. Rani Huzur Ara Begum v. Deputy Commissioner of Gonda, A. I. R. 1941 Oudh 529, 548; 196 I. C. 747; 1941 A. W. R. (C.C.) 274; 1941 O. W. N. 906; Bulakidas Hardas Mahesari v. Sh. Chotu Paikan, A. I. R. 1942 Nag. 84; I. L. R. 1942 Nag. 661; 200 I.C. 194; 1942 N. L. J. 214 (see also the cases cited in these two cases). Salimatul Fatima v. Koylashpoti Narain Singh, I. L. R. 17 Cal. 903. But see Patti Lakshmayya v. Garlapati, A. I. R. 1958 Andh. Pra. 720.
18. Gangamoyi Debi v. Troiluckyanath, 33 I. A. 60; I. L. R. 33 Cal. 537; 3 C. L. J. 349; 10 C. W. N. 522 (P.C.).
19. Agha Walayat Shah v. Mst. Mahbub, A. I. R. 1942 Pesh. 83; 204 I. C. 327; 1942 Pesh. L. J. 85.

Registration Act, is relevant for proving the execution of the document.<sup>20</sup> In *Gopal Das v. Thakurji*,<sup>21</sup> a registered receipt purporting to be by one Parshottam Das contained the endorsement by the Registrar that execution was admitted by the present Parshottam Das. Their Lordships of the Privy Council observed :

"The Registrar's endorsement shows that in 1881 a person claiming to be this Parshottam Das and to have become son of Harish Chandra by adoption made by his widow Manki Bahu, presented the receipt for registration and admitted execution. He was identified by two persons, one Sheo Prasad and the other Girja Prasad, who was the scribe of the document and was known to the Registrar. What remains to be shown is that the person admitting execution before the Registrar was this Parshottam Das and no imposter. The question is one of fact except in so far as there was a matter of law a presumption that the registration proceedings were regular and honestly carried out. It seems clear that any objection to the sufficiency of the proof upon this point would have been idle, the circumstances being such that the evidence of the due registration is itself some evidence of execution as against the plaintiffs. Wills and documents which are required by law to be attested raise other questions but this receipt was not in that class."

In this connection, documents which are required by law to be attested must be distinguished from documents which are not so required to be attested. As regards the latter class of documents, it must now be regarded as settled by the decision of their Lordships of the Privy Council in *Gopal Das v. Thakurji*,<sup>22</sup> that evidence of due registration is itself some evidence of execution against the party so making the admission.<sup>23</sup> Where a document is registered, a certified copy of it bears the necessary endorsements of the Sub-Registrar before whom the executant acknowledged the execution and was duly identified. Sections 58, 59 and 60, Registration Act, provide that the facts mentioned in the endorsements may be proved by those endorsements provided the provisions of Section 60 have been complied with.<sup>24</sup> A Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution. If there are suspicious circumstances attending the execution of the document, such endorsement cannot be resorted to for the purpose of holding that the execution has been proved.<sup>25</sup>

It appears from a reading of Sections 57 and 60 of the Registration Act and of this Section that mere production of a certified copy of a registered

20. *Harnam Singh v. Official Receiver*, A. I. R. 1941 Lah. 400; 197 I.C. 581; *Brij Raj Saran v. Alliance Bank of Simla*, A. I. R. 1936 Lah. 946; I. L. R. 17 Lah. 686; 169 I. C. 157; 39 P. L. R. 83.

21. A. I. R. 1943 P.C. 83; I. L. R. 1943 Kar. 69 (P.C.); 207 I. C. 553; 1943 A. L. J. 292; 1943 A. W. R. 14 (P. C.); 47 C. W. N. 607; (1943) 2 M. L. J. 51; 56 L. W. 593; 1943 O. W. N. 334; 10 B.R. 7, reversing *Gopaldas v. Sri Thakurji*, A. I. R. 1936 All. 422.

22. A. I. R. 1943 P.C. 83; I. L. R. 1943 Kar. 69 (P.C.); 207 I.C. 553;

1943 A. L. J. 292; 1943 A. W. R. 14 (P.C.); 47 C. W. N. 607; (1943) 2 M. L. J. 51; 56 L. W. 593; 1943 O. W. N. 334; 10 B.R. 7, reversing *Gopaldas v. Sri Thakurji*, A. I. R. 1936 All. 422.

23. *Kalu Nimbaji v. Bapurao Chinkaji*, A. I. R. 1950 Nag. 6; I. L. R. 1949 Nag. 521; 1949 N. L. J. 226.

24. *Pandappa v. Shivalingappa*, A. I. R. 1946 Bom. 193; 224 I. C. 169; 47 Bom. L. R. 962. See also the cases cited therein.

25. *Jagannath v. Mst. Dhiraja*, A. I. R. 1918 Oudh 120; 46 I.C. 279; 5 O. L. J. 191.

document is insufficient to prove the execution of the document, although it is sufficient to prove the contents of the document. But the certificate of the Registrar under Section 60 of the Registration Act is admissible in evidence to prove to some extent the admission of execution made by the executant before the Registrar. There remains, however, the possibility that an imposter may have approached the Registrar and admitted the execution of the document. The admission of execution before the Registrar does constitute a relevant piece of evidence which can legitimately be taken into consideration along with the other evidence in the case.<sup>1</sup>

Registration does not dispense with the necessity of proof of execution when the same is denied. Proof of execution of the document (a sale-deed in the instant case) will have to be furnished as in the case of any other document under the present section.<sup>2</sup>

**6. What is required to be proved.** If the only plea taken is that the executant of a document has not signed it and that the document is a forgery, the party seeking to prove the execution need not adduce evidence to show that the party who signed it knew the contents of the document.<sup>3</sup>

**68. Proof of execution of document required by law to be attested.** If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence :

<sup>4</sup>[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

s. 3 ("Document".)  
s. 3 ("Evidence".)  
s. 3 ("Court.".)  
s. 3 ("Proof".)

ss. 45, 47, 67, 73 (Proof of handwriting.)  
.s. 17 ("Admission.")  
ss. 89, 90 (Presumption of attestation.)

Steph. Dig., Arts. 66–69; Taylor, Ev., ss. 1839–1861; Act X of 1865, Sections 50, 331; Act XXI of 1870, Section 2; Act IV of 1882, Sections 59, 123; Phipson, Ev., 11th Ed., 718–719; Harris, Law of Identification, Sections 327–381.

1. Rajeshwari v. Varalakshamma, A. I. R. 1964 A. P. 284.
2. Bhutkani Nath v. Kamaleswari, A. I.R. 1972 Assam 15 (17).
3. Dattatraya v. Ranganath, 1972 M.P.

4. L.J. 336, 338 (S.C.).  
Ins. by the Indian Evidence (Amendment) Act, 1926 (31 of 1926), S. 2.

## SYNOPSIS

1. Principle.
2. Scope.
3. Documents required by law to be attested :
  - Wills.
  - Mortgage deeds.
  - Charge.
  - Sale-deeds.
  - Gifts.
  - Bonds.
  - Other deeds and account books.
  - Production of certified copy.
4. Attestation.
5. Attesting witness :
  - (a) General.
  - (b) Party.
  - (c) Scribe.
- (d) Sub-Registrar and identifying witnesses.
- (e) If can be fastened with knowledge of the contents of the document.
6. At least one attesting witness must be called.
7. Non-compliance and failure to object, effect of.
8. Proof of due attestation.
9. Proviso :
  - "Specifically denied".
  - Wills.
10. Non-compliance with section : Admissibility of document.
11. Summary.
12. When attesting witness need not be called.

**1. Principle.** Attestation of documents is a common formality, and in some cases is imperative. The object with which it is made or required is to afford proof of the genuineness of the document. The attesting witnesses have this to vouch for the truth of their evidence that not only do they now say that at the time when they were present they saw and witnessed the execution, but they are able to go on to say: "I put my signature on the instrument at the time by way of saying then what I am saying now, namely, that it was executed and that I saw it 'executed'."<sup>5</sup> The principle underlying this section is, that any document, the execution of which is not properly proved, is not admissible in evidence and should not be used.<sup>6</sup>

It is clear that the provisions of the law prescribing attestation would be defeated if a document required to be attested were to be allowed to be used in evidence otherwise than in accord with the provisions of the following Sections (68–71). Formalities imposed by law as barriers against perjury and fraud must be strictly observed.<sup>7</sup> On the other hand, the fate of a document is not necessarily at the mercy of the attesting witnesses. The mere fact that they repudiate their signatures or the like does not invalidate the document, if it can be proved by evidence of a reliable character that they have given false testimony.<sup>8</sup> Where, however, attestation is optional, a party is free to give such evidence as he pleases, the case not being one in which the law has required a particular form of proof. See notes, *post*.

**2. Scope.** The section applies only to documents which are required by law to be attested by witnesses, such as wills. If, however, a document is not required to be attested, but the parties get it attested by witnesses, this superfluous act does not attract the provisions of this section.<sup>9</sup> When a do-

5. Abinash Chandra v. Dasrath, A.I.R. 1929 Cal. 123; I.L.R. 56 Cal. 598; 114 I.C. 84; 48 C.L.J. 281; 32 C.W.N. 1228.
6. Muni Akhayyama v. Maistry Pa-paiyah, A.I.R. 1956 Mys. 36.
7. Arjun Chandra Bhadra v. Kailash Chandra Das, A.I.R. 1923 Cal. 149 (2); 70 I.C. 532; 36 C.L.J. 373;

- 27 C. W. N. 263; Ramanathā Sastrigal v. Alagappa Chettiar, A.I.R. 1956 Mad. 682.
8. Mahraj Lal Bihari v. Anjumanun-nissa, 48 I.C. 538; A.I.R. 1918 Oudh 437.
9. Ram Kishore v. Ambika Prasad, A.I.R. 1966 A. 515; 1966 A.W.R. (H.C.) 57, 58.

cument is produced and tendered as evidence, the first point for consideration is whether it is one which the law requires to be attested. There are many such documents in England. In India they are comparatively few. Sections 68 to 72 contain the rules relating to the admission in evidence of attested documents. Sections 68-71 apply only to documents required by law to be attested. Their general object is to give effect to the law relating to the attestation of documents, which is itself enacted for the purpose of ensuring the genuineness of certain documents in respect of which claims are made. An attested document not required by law to be attested may be proved as if it were unattested.<sup>10</sup>

The law as laid down in Section 68 is imperative and does not, on the face of it, admit of any relaxation, except in the cases provided for in Sections 69, 70 and 71.<sup>11</sup> The rule is so stringent and mandatory that even in a case where the document is lost and secondary evidence is permitted, an attesting witness has nevertheless to be called. Consequently, the omission to examine the attesting witnesses is fatal unless it be proved that all of them had been dead or had become incapable of giving evidence.<sup>12</sup>

The provisions of this section must be complied with, whether the document tendered is the original or only a copy of it.<sup>13</sup> But the section would be applicable only if the execution is disputed and has to be proved.<sup>13-1</sup> All that it says is, that the execution of a document cannot be regarded as proved unless one attesting witness at least has been called for that purpose. But, where the execution is admitted and is not to be proved, it is not necessary to call any attesting witness,<sup>13-2</sup> unless it is expressly contended that the attesting witness has not witnessed the execution of the document.<sup>14</sup>

Where a document required by law to be attested is sought to be used in evidence not as the basis of suit or for deriving any title therefrom but only for some collateral purpose such as to prove any admission contained therein, the provisions of this section do not apply and calling of attesting witness is not necessary.<sup>14-1</sup>

### 3. Documents required by law to be attested. The words "required by law" apply to documents which by statute require to be attested.

The law as to attestation of documents is contained in various enactments. Thus, that relating to attestation of wills is contained in Section 63 (c) of the Succession Act; and the mode of proving documents required by

10. S. 72 post; see Daitary v. Jugabundhoo, (1875) 23 W.R. 293, 295.
11. Shib Chandra v. Gour Chandra Paul, A.I.R. 1922 Cal. 160 : 68 I.C. 86 : 27 C.W.N. 134. See also Awadh Ram Singh v. Mahbub Khan, A.I.R. 1924 Oudh 255 : 79 I.C. 725 : Gobinda Chandra Pal v. Pulin Behari Banerjee, A.I.R. 1927 Cal. 102 : 98 I.C. 147 : 31 C.W.N. 215 (section not controlled by S. 90); Jadunath v. Isar Jha, A.I.R. 1939 Pat. 47 : 178 I.C. 198.
12. Jaldhu Ananta Raghuram v. Rajah Bommadevara, A.I.R. 1958 Andh.

- Pra. 418 : 1958 Andh.L.T. 440.
13. Sheikh Karimullah v. Gudar Koeri, A.I.R. 1925 All. 56; 82 I.C. 306; Jadunath v. Isar Jha, A.I.R. 1939 Pat. 47 : 178 I.C. 198.
- 13-1. Amar Singh v. Gosai, A.I.R. 1972 Guj. 74; I.L.R. (1972) Guj. 151.
- 13-2. Panchanan Roy v. Brajgopal, I.L.R. (1972) 1 Cal. 669.
14. Komalsing v. Krishnabai, 1946 Bom. 304; I.L.R. 1946 Bom. 146 : 225 I.C. 372 : 48 Bom.L.R. 83.
- 14-1. Brindaban Sahu v. Chaitanya Sahu, (1975) 1 Cut.W.R. 257 (1975) 41 C.L.T. 597.

law to be attested has been laid down in Sections 68 to 72 of this Act. It is not essential that in order to prove documents required by law to be attested—

- (a) the signatures of all the attesting witnesses ought to be identified, or
- (b) the attesting witnesses should identify each other, or even know each other, or
- (c) the attesting witnesses should be able to identify the signature of each other.

It is not permissible to add to the statutory requirements of the mode of proving documents required by law to be attested. All that has to be proved is that (1) each of the attesting witnesses saw the executant signing the document, or received from him a personal acknowledgment of his signature; and (2) that each of the witnesses signed the document in the presence of the executant.<sup>15</sup>

*Wills.* There are but few documents which are required by law to be attested in India. Wills made after the first day of January, 1866, by persons other than Hindus, Mohammedans, or Buddhists,<sup>16</sup> wills made by Hindus, Jainas, Sikhs and Buddhists, on or after first day of September, 1870, in the territories subject to the Lieutenant-Governor of Bengal and in the towns of Madras and Bombay, or relating to immovable property situated within those limits<sup>17</sup> and wills made by any Hindu, Buddhist, Sikh or Jaina on or after the 1st day of January, 1927<sup>18</sup> must be attested.<sup>19</sup>

According to Mohammadan law a will may be made either verbally or in writing and no special form or solemnity for making and attesting it is prescribed. It is sufficient if it can be proved that it is really and truly the will of the testator. A Mohammadan will is not therefore required by law to be attested.<sup>20</sup>

In deciding how a will is to be proved, the Court must refer to the provisions of Sections 67 and 68 of this Act. These prescribe the requirements and the nature of proof which must be satisfied. It is *prima facie* true that a will has to be proved, like any other document, except as to the special requirement of attestation prescribed by Section 63 of the Succession Act. It would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters. Still, the propounder must show that the will was signed by the testator, that the testator, at the relevant time, was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. In case the execution of the will is surrounded by suspicious circumstances, the Court would

15. Krishna Kumar v. The Kayasth Pathshala, I.L.R. (1965) 1 All. 483 : A.I.R. 1966 A. 570 (576).

16. Act XXXIX of 1925 (Indian Succession Act), S. 58.

17. ib., S. 57 (a) and (b).

18. Act XXXIX of 1925 (Indian Succession Act) S. 57 (c).

19. ib., S. 63 (c). As to whether strict affirmative proof of due attestation is absolutely necessary, see Sibo v. Hemangini, (1899) 4 C.W.N. 204. Cf. Hindu Transfers and Bequests Act (Madras Act I of 1914).

20. Aba Satar, *In re*, 7 Bom.L.R. 558.

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testator must be regarded as sufficient compliance with Section 63 of the Indian Succession Act.<sup>19</sup>

As regards documents required by law to be registered as well as attested such as mortgage-deed,<sup>20</sup> or a deed of gift,<sup>21</sup> there is some divergence of opinion. In some cases, it has been held, that the signatures of the registering officer and of the identifying witnesses affixed to the registration endorsement are a sufficient attestation within the meaning of the Transfer of Property Act and its subsequent amending Act,<sup>22</sup> and if the conditions for a valid attestation under the Transfer of Property Act are fulfilled, there is nothing in law to prevent a Registrar from being treated as an attesting witness even though the signature of the Registrar might have been made *alio intuitu*, to satisfy the requirements of the Registration Act.<sup>23</sup> The person who identifies the executant of a document before the Sub-Registrar can be an attesting witness, if before he signs the documents as an identifying witness he receives a personal acknowledgment from the executant of his signature.<sup>24</sup> In other cases, it has been held, that the signature of the Sub-Registrar and of the witnesses identifying the execution at registration are not sufficient attestation of the deed for the purpose of the Transfer of Property Act, even assuming that the Sub-Registrar and identifying witnesses did receive from the executant a personal acknowledgment of his signature or mark and that they did sign in the executant's presence.<sup>25</sup> In order that a signature of a person may be treated as that of an attesting witness, it must be shown that

19. Parshotam Ram v. Kesho Das, A. I. R. 1945 Lah. 3; I. L. R. 1944 Lah. 495. See also Mohammad Hasan v. Ali Haider, A. I. R. 1925 Oudh 337; 85 I. C. 509; 12 O.L.J. 1; Sarada Prasad v. Triguna Charan Roy, A. I. R. 1922 Pat. 402; I. L. R. 1 Pat. 300; 70 I.C. 402; 1 Pat. L. R. 263; Theresa v. Francis, J. Misguita, A. I. R. 1921 Bom. 156; I. L. R. 45 Bom. 999; 61 I.C. 587; 23 Bom. L. R. 399; Totaluddi Peada v. Mohar Ali, 26 Cal. 78; Amarendra Nath v. Kashi Nath, 27 Cal. 169; Mir Syed Hasan v. Mst. Taiyaba Begum, 26 I. C. 547; 1 O. L. J. 591; Ganpat Rao Yadd Rao v. Nago Rao Vinayak Rao, A. I. R. 1940 Nag. 382; 1940 N. L. J. 437; Mst. Shamo-un-nisa v. Ali Asghar and others, A. I. R. 1936 Oudh 87; 159 I.C. 780; 1935 O. W. N. 1576; Sri Ram v. Mohammad Abdul Rahim, A. I. R. 1938 Oudh 69; I. L. R. 15 Luck. 723; 192 I. C. 882; 1938 O. W. N. 67. See also Rup Rao v. Ram Rao, A. I. R. 1952 Nag. 88; I. L. R. 1952 Nag. 189; 1952 N. L. J. 86.
20. S. 59, T. P. Act.
21. S. 123, T. P. Act.
22. Veerappa Chettiar v. Subrahmanyam Ayyar, A. I. R. 1929 Mad. 1; I. L. R. 52 Mad. 123; 116 I. C. 367

- (F.B.); Ramanatha v. Alagappa, A. I. R. 1956 Mad. 682; Radha Mohan v. Nirpendra Nath, A. I. R. 1928 Cal. 154; 105 I.C. 422; 47 C. L. J. 118; Ramcharan v. Bhairon, A. I. R. 1931 All. 101; I. L. R. 53 All. 1; 131 I.C. 241; 1930 A. L. J. 1561. See H. Venkata Sastri and Sons v. Rahilna Bi, I. L. R. 1962 M. 111; 74 L. W. 701; A. I. R. 1962 Mad. 111 (F.B.), where a Full Bench of five Judges have overruled the decision in Veerappa Chettiar v. Subramanya Iyer, I. L. R. 52 Mad. 123 and dissenting from the view in A. I. R. 1932 All. 527 and A. I. R. 1948 Bom. 322.
23. Neelima Basu v. Joharlal Sarkar, A. I. R. 1934 Cal. 772; I. L. R. 61 Cal. 525; 151 I.C. 1063; 38 C. W. N. 753. See also Thakur Das v. Topan Das, A. I. R. 1929 Sind 217; 120 I.C. 499.
24. Chunni Bai v. Girdharilal, A. I. R. 1934 Nag. 1; 150 I.C. 1007; 16 N. L. J. 319.
25. Lachman Singh v. Surendra Bahadur A. I. R. 1932 All. 527; 139 I.C. 1; 1932 A. L. J. 653 (F.B.), dissenting from H. Venkata Sastri and Sons v. Rahilna Bi, A. I. R. 1962 Mad. 111; Dharamdas v. Kashinath, A. I. R. 1959 C. 243; 1958 Cal. L. J. 123.

that person signed the document intending to act as an attesting witness. If the endorsement of the Registrar does not show *animo attestandi* the document cannot be said to have been attested on account of such endorsement.<sup>25-1</sup> The signature made by the Sub-Registrar while he made the endorsement on the document admitting it to registration and the signatures of the identifying witnesses made by them, when they identified the executant before the Sub-Registrar, cannot be regarded as the signatures of attesting witnesses.<sup>1</sup> One of the essentials of attestation is that each of the attesting witnesses must have signed the instrument in the presence of the executant. Where the Sub-Registrar and identifying witnesses affix their signatures to the registration endorsement under Sections 58 and 59, Registration Act, admitting execution of a deed, but it is not proved that signatures were made in the presence of the executant, the signatures cannot be said to prove 'due attestation'. Sections 58, 59 and 60, Registration Act are of no avail. The endorsements made at the time of registration are relevant to the matter of registration only.<sup>2</sup> So, where there is no evidence that the Sub-Registrar signed the endorsement on a gift deed in the presence of the executant, the mere endorsement of the Sub-Registrar on the deed, even if admissible, cannot by itself prove the execution and attestation of the gift deed.<sup>3</sup>

Endorsement by a Sub-Registrar on a deed is by itself no proof of his signing it in the presence of the executant, since he is not bound to sign before the executant under the Registration Act. Therefore, in the absence of other evidence to prove that the Sub-Registrar affixed his signature to the registration endorsement on a document in the presence of executant, he cannot be said to be a valid attesting witness within the meaning of Section 3, Transfer of Property Act.<sup>4</sup>

Ordinarily, attesting witness to a deed is one who sees the execution of the deed and signs it, and being an act of the witness testifying to the genuineness of the signatures of the executant, he should have necessary intention to do so. But, under the definition of the word 'attested' under section 3 of the Transfer of Property Act, as it stands now, there could be a valid attestation, even in cases where the witness has not personally witnessed the execution of the deed but has received from the executant a personal acknowledgment of his signature to the deed. But even, in such cases, before a witness to a document can be held to be an attesting witness to it, he should have the animus to attest. A person could, however, be proved to be an attesting witness, even though he did not describe himself as such. For, it is not the designation or name that decides the question but the character that the witnesses fill. Nor is it necessary that an attesting signature should appear in any particular place in the document.

25-1. *Malipat v. M. C. Tirupalu Reddy*, A. I. R. 1971 A. P. 319.

1. *Timmavva Dundappa v. Channava Appaya*, A. I. R. 1948 Bom. 322, 326; 50 Bom. L. R. 260. (See also cases cited therein); (*Mst.*) *Chandrani Kuar v. Sheonath*, A. I. R. 1931 Oudh 146: 132 I.C. 337; 8 O. W. N. 194, dissented from in *H Venkata Sastri and Sons v. Rahilna Bi*, A. I. R. 1962 Mad. 111.

2. *Surendra Bahadur v. Behari Singh*,

A. I. R. 1939 P. C. 117; I. L. R. 1939 Kar. 222; 181 I.C. 216.

3. *Sakharam v. Shushila Bai Namdeo*, A. I. R. 1953 Nag. 339; I. L. R. 1953 Nag. 507; 1953 N. L. J. 425. See also *Ramanatha v. Alagappa*, A. I. R. 1956 Mad. 682.

4. *Neelima Basu v. Johar Lal Sarkar*, A. I. R. 1934 Cal. 772; I. L. R. 61 Cal. 525; 151 I.C. 1063; 38 C. W. N. 753.

Subject to other qualifications of an attesting witness being satisfied, a registering officer or the identifying witnesses before the registering officer, who subscribe only to the registration endorsement, could be an attesting witness to the document itself. But the mere presence of their signatures would not by themselves be sufficient to satisfy the requirements of a valid attestation. It should be shown by evidence that any or all of the persons did in fact intend to and did sign as attesting witness as well and it would be open to the parties to adduce such evidence.<sup>5</sup>

In *Girja Datt v. Gangotri Datt*,<sup>6</sup> the Supreme Court accepted the position that identifying witnesses appending their signatures to the registration endorsement (who did not describe themselves as attesting witnesses) could be attesting witnesses, if they had the animus to attest. This would show that a person can be proved to be an attesting witness notwithstanding the fact that he did not describe himself as such. In *Venkata Sastri & Sons v. Rahilna Bi*,<sup>7</sup> the Full Bench held that signatures of the registering officer and/or of the identifying witnesses affixed to the registration endorsement under sections 58 and 59 of the Registration Act would amount to valid attesting signatures to the document within the meaning of Section 59 of the Transfer of Property Act, if the conditions for a valid attestation under Section 3 of that Act have been satisfied and the persons affixing the signature thereto had the animus to attest. It may be recalled that in *Gopal v. Thakurji*,<sup>8</sup> the Judicial Committee held that the evidence of due registration is itself some evidence of execution.

(e) *If witness can be fastened with knowledge of the contents of the document.* Legally, the witness only identifies the executant and may not be fastened with the knowledge of the contents of the document. But it may be otherwise under the circumstances of a particular case. Thus, where the witness is related to the executant, and knows that he has no interest in the property and still identifies him, and avoids the answer to questions relating to the document, it may legitimately be inferred that he knew that the executant was not transferring the property to the transferee.<sup>9</sup>

**6. At least one attesting witness must be called.** Where a document is required by law to be attested, and there is an attesting witness available, then, subject to the proviso, at least one attesting witness must be called.<sup>10</sup> When the original document is in the possession of another and not forthcoming after notice to produce, and secondary evidence is given of its contents, the Court shall presume that the document was duly attested.<sup>11</sup> The Court,

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- 5. Veerappa Chettiar v. Subramania Ayyar, A. I. R. 1929 M. 1: (1928) 55 M. L. J. 794; I. L. R. 52 Mad. 123 (F.B.), partly overruled; Lachman Singh v. Surendra Bahadur, (1932) I. L. R. 54 All. 1051; 139 I. C. 1; A. I. R. 1932 A. 527 (F.B.), dissenting from in Timmava Dundappa v. Channava Appaya, A. I. R. 1948 Bom. 322 supra and Surendra Bahadur v. Behari Singh, I. L. R. 1939 Kar. 222; 181 I. C. 216; A. I. R. 1939 P.C. 117: (1939) 2 M.L.J. 762 referred.
- 6. A. I. R. 1955 S.C. 346.
- 7. A. I. R. 1962 Mad. 111: 74 L. W. 701 (F.B.).
- 8. I.L.R. 1943 Kar. 69 (P.C.); A. I. R. 1943 P.C. 83.
- 9. Abdul Hasem v. Mahiuddin, A. I. R. 1967 Assam 9: I.L.R. (1964) 16 Assam 237.
- 10. Rajammal v. Chinnathal, A. I. R. 1976 Mad. 4: (1975) 88 M. L. W. 518; Seth Beni Chand v. Kamla, (1976) 4 S.C.C. 554.
- 11. S. 89 post. The rule is, therefore, not limited to the case of possession by the adverse party.

in such a case, shall presume, that is, it shall regard attestation as proved unless and until it is disproved. And the person so refusing to produce, if he be a party to the suit, cannot rebut this presumption by subsequent production of the document.<sup>12</sup> The section is not clear whether it is necessary to call an attesting witness who can be produced, when the original document is not forthcoming for any reason and is therefore not itself "used as evidence" and secondary evidence of its contents is tendered under Section 65 ante. It seems that an attesting witness must be produced even though the document is lost or destroyed,<sup>13</sup> since a document is "used as evidence", whether the mode of proof by which it is brought before the Court is primary or secondary only.<sup>14</sup>

There is a presumption of due attestation in the case of documents thirty years old. The Court may, in such cases, dispense with proof of attestation.<sup>15</sup> Merely taking out summons and warrants is not enough to comply with the provisions of Section 68 but the processes of the Court such as are mentioned in Order XVI, rule 10, Civil Procedure Code, have all got to be exhausted.<sup>16</sup>

The expression "called" in the section is not used in the sense of "summoned". As pointed out in *Moti Chand v. Lalta Prasad*,<sup>17</sup> the expression 'called' used in the section clearly means *tendered* for the purpose of giving evidence.<sup>18</sup>

The section requires that at least one attesting witness must be called. Even if the only attesting witness alive is the opposite party, he must be called.<sup>19</sup> But it is not necessary to call all the attesting witnesses alive.<sup>19-1</sup> The production of one attesting witness satisfies the requirements of the section and no adverse inference can be drawn from the fact that other attesting witnesses have not been called.<sup>20</sup>

Where one of the witnesses who have attested a mortgage-bond is available, the execution of such bond cannot under Section 69 be proved otherwise than by the evidence of such witness even when the object of proving such execution has reference only to a personal covenant to pay which is severable from the security created by the bond.<sup>21</sup>

12. S. 164 post.

13. Gillies v. Smithers, 2 Stark, R. 528; Keeling v. Ball, Peake Add. Cas., 88; Taylor, Ev., s. 1843; for the case in which the names are unknown v. post.

14. Sheikh Karimullah v. Gudar Koeri, A. I. R. 1923 All. 56; 82 I. C. 306; Jadunath Misra v. Isar Johra, A. I. R. 1939 Pat. 47; 178 I.C. 198: 5 B. R. 65; Brajraj Singh v. Yogendra Pal Singh, A. I. R. 1952 M. B. 146.

15. S. 90 post. Gobinda Chandra v. Pulin Behari, A. I. R. 1927 Cal. 102, 104; 98 I. C. 147: 31 C. W. N. 215.

16. Gobinda Chandra v. Pulin Behari, A. I. R. 1927 Cal. 102, 104: 98 I. C.

147: 31 C. W. N. 215; Piyari Sundari Dasi v. Radha Krishna Dutta, 27 C. W. N. 60 (notes).

17. 40 All. 256; 44 I.C. 596; A. I. R. 1918 A. 201.

18. Ruprao Ranoji v. Ramrao Bhagwant Rao, A. I. R. 1952 Nag. 88; I. L. R. 1952 Nag. 189: 1952 N. L. J. 86.

19. Dhira Singh v. Motilal, 63 I.C. 266. 19-1. Naranjan Singh v. Parga Singh, 1971 Cur. L.J. 195 (Punj.).

20. Lachminarayan v. Zahirul Said Alvi, A. I. R. 1923 Nag. 322: 76 I. C. 772; Naraini v. Pyare Mohan, A. I. R. 1972 Raj. 25 (28).

21. Veerappa v. Ramasami, (1907) 30 M. 251.

The fact that the witness is considered hostile does not excuse examination.<sup>22</sup> Under this section, it is not necessary that an attesting witness should prove execution of a deed. It is sufficient that he is called, and if he does not recollect or denies the execution, the document can be proved by other evidence.<sup>23</sup>

It is necessary to call an attesting witness under this section not merely to prove the signature of the executant, but to prove attestation as well, and if such witness turns hostile or refuses to prove execution or attestation, other witnesses may be called for the same purpose.<sup>24</sup> It cannot be said that when one attesting witness is called and is disbelieved, other evidence of due execution and attestation is not necessary.<sup>25</sup> No doubt only one attesting witness need be called. If that attesting witness speaks to attestation by the attesting witnesses, well and good, but if he does not do so, it is necessary to prove that the deed was properly attested by the other attesting witnesses.<sup>1</sup> For the application of the section, however, a witness must be available, that is, the production of the witness must not be legally or physically impossible. Thus, if all the witnesses be proved to be out of the jurisdiction of the Court, or dead, or incapable of giving evidence, as if they be insane,<sup>2</sup> the next following section will be applicable.

The provision in section 57 (5) of the Registration Act, 1908, that all copies given thereunder shall be signed and sealed by the registering officer and shall be admissible for the purpose of proving the contents of the original document, does not do away with the provisions of Section 68 of the Evidence Act, 1872, by which one attesting witness at least, if alive, shall be called for proving the execution of the document before it is used as evidence.<sup>3</sup>

22. Gobinda Chandra v. Pullin Behari, A. I. R. 1927 Cal. 102; 98 I.C. 147; 31 C. W. N. 215; Peda Manik-yam v. Periagadu, A. I. R. 1932 Mad. 148; 135 I.C. 532; 34 L. W. 663. See also Kalicharan v. Suraj Bali, A. I. R. 1941 Oudh 89; 191 I. C. 215; 1940 O. W. N. 1077; Tula Singh v. Gopal Singh, 38 I.C. 604; Dhir Singh v. Motilal, 63 I.C. 206; 1921 J. 29(3).
23. Sarjoo v. Jagatpal Singh, A. I. R. 1942 Oudh 201; 197 I.C. 686; 1941 O.W.N. 1298. See also S. 1 and notes, post.
24. Jai Karandas v. Protapsingh, A.I.R. 1940 Cal. 189; I.L.R. (1939) 2 Cal. 479; 187 I.C. 718; 43 C.W.N. 1084; Mst. Bashiran v. Mohammad Husain, A.I.R. 1941 "Oudh 284; I.L.R. 16 Luck. 615; 193 I.C. 161; 1941 O.W.N. 249; Hason Ali v. Gurdas Kapali, A.I.R. 1929 Cal. 188; 116 I.C. 726; 33 C.W.N. 248; 49 C.L.J. 16; Ayenati Shikdar v. Mohammad Esmail, A.I.R. 1929 Cal. 441; 49 C.L.J. 347; Lachminarayan v. Zahir Ali Said Alvi, A.I.R. 1923 Nag. 322; 76 I.C. 772.
25. Surendra Bahadur v. Behari Singh,

A.I.R. 1939 P.C. 117; I.L.R. 1939 Kar. 222; 181 I.C. 216; 1939 A. L.J. 492; 41 Bom.L.R. 1047; 43 C.W.N. 669; (1939) 2 M.L.J. 762; 1939 O.W.N. 450.

1. Mirza Mohamed v. Jambulingam Chettiar, A.I.R. 1941 Rang. 122; 195 I.C. 221; Vishnu Ram Krishna v. Nathu Vithal, A.I.R. 1949 Bom. 266; 51 Bom.L.R. 245.
2. Assomeah v. Chetty, 1 I. C. 637; Taylor, Ev., s. 1851, with respect to capability of giving evidence, it has been held in England that the attesting witness must be called, though subsequently to the execution of the deed he has become blind, and that the Court will not dispense with his presence on account of illness, however, severe; ib., s. 1843-a; but both of these decisions have been doubted or reluctantly, followed, and it is submitted that under this Act in both of these cases the witness would be incapable of giving evidence under the terms of the section.
3. Mira Bai v. Jai Singh, 1971 Raj.L. W. 319; A.I.R. 1971 Raj. 303 (305).

**7. Non-compliance and failure to object, effect of.** Objection regarding the mode of proof, as distinguished from objection to admissibility of a document has to be taken at the time when it is being exhibited and not at a later stage.<sup>3-1</sup> Where a piece of evidence not proved in the proper manner has been admitted without objection, it is not open to the opposite party to challenge it at a later stage of the litigation.<sup>3-2</sup> But, where evidence has been received without objection in direct contravention of an imperative provision of the law, the principle on which unobjectionable evidence is admitted, be it acquiescence, waiver or estoppel, none of which is available against a positive legislative enactment, does not apply.<sup>4</sup> Although proof of the document may be waived, this does not affect the legal character of the document or its validity.<sup>5</sup>

**8. Proof of due attestation.** All acts, performance of which would be necessary for validity of a document are inclusive within the expression 'execution', so mere admission of signature on a deed required to be attested will not be sufficient to prove due execution; attestation should have to be proved.<sup>5-1</sup>

The question as to the mode in which a mortgage or a gift can be legally effected ought not to be confounded with the question as to how the mortgage-deed or the deed of gift should be legally proved. The absence of proper attestation invalidates the transaction either as gift or mortgage.<sup>6</sup> Section 59 of the Transfer of Property Act requires that a mortgage bond in order to be valid must be executed in the presence of two attesting witnesses. Section 68 of the Evidence Act further requires that one at least of the attesting witnesses to a mortgage bond should be called, if there is any alive. But that does not in any way affect the requirement of Section 59 of the Transfer of Property Act. Section 68 of the Evidence Act lays down that in order to prove a mortgage bond, one of the attestors must be called. It would be competent for that attestor or for any other witness to prove that the execution was in the presence of two attestors and it is not necessary to call two attestors. There may be cases where all the attesting witnesses are dead, when the requirements of the law would be satisfied by any evidence which would show that the document was executed in the presence of two attesting witnesses.<sup>7</sup> Similarly the requirement of section 123 of the Transfer of Pro-

3-1. *Net Ram v. Harkesh*, 1973 Cur. L. J. 373; *Sri Chand Gupta v. Madan Lal*, 1973 A.L.J. 635; 1973 A.W.R. (H.C.) 472.

3-2. *Bhagwan Das v. Khem Chand*, A.I.R. 1973 P. & H. 477.

4. *Shib Chandra v. Gour Chandra*, A.I.R. 1922 Cal. 160; 68 I.C. 86; 35 C.L.J. 473; 27 C.W.N. 134; *Harek Chand v. Bishun Chandra*, 8 C.W.N. 101; *Banwari Prasad v. Mst. Bigni Kuer*, A.I.R. 1927 Pat. 131; 101 I.C. 277; 8 P.L.T. 7; *Ponnammal v. Kalithitha Moodelly*, 13 M.L.J. 143. See also *Gopal Das v. Thakurji*, A.I.R. 1943 P.C. 83; I.L.R. 1943 Kar. 69 (P.C.); 207 I.C. 553; 1943 A.L.J. 292; 47 C.W.N. 607; (1943) 2 M.L.J. 51; 56 L.W. 598; 10 B.R. 7; *Harlal v. Ghasi*, (1969)

20 Raj.L.W. 262 (263) (thumb-marked document); *Chandubai v. Jagjivanlal*, A.I.R. 1958 Raj. 110.

5. *Baijnath Singh v. Brijraj Kuar*, A.I.R. 1922 Pat. 514; I.L.R. 2 Pat. 52; 68 I.C. 383; 4 P.L.T. 239.

5-1. *Indra Bewa v. Gouri Prasad*, (1976) 1 C.W.R. 59.

6. *Balbhadar Singh v. Lakshmi Bai*, A.I.R. 1930 All. 669; 125 I.C. 507; 1930 A.L.J. 623; *Paban Khan v. Badal Sardar*, 1921 Cal. 276; 66 I.C. 906; 34 C.L.J. 498; 26 C.W.N. 951.

7. *Namburumal Chettiar v. Raghavarachariar*, A.I.R. 1921 Mad. 701; 71 I.C. 390; 14 L.W. 563. See also *Uttam Singh v. Hukam Singh*, I.L.R. 39 All. 112; 38 I.C. 651; 15 A.L.J. 167; A.I.R. 1917 A. 89.

erty Act is not affected. Under section 68, Evidence Act it is permitted to call only one witness but he or other witnesses should prove the attestation by two witnesses. That is, the two attesting witnesses signed after seeing the executant sign or on receiving personal acknowledgment of the executant.<sup>7-1</sup>

Only one attesting witness need be called if that attesting witness speaks to attestation by the attesting witnesses.<sup>7-2</sup> But if he does not do so, it is necessary to prove that the deed was properly attested by those other attesting witnesses.<sup>8</sup> Again, although the Succession Act requires that a will has to be attested by two witnesses, this section permits the execution of the will to be proved by only one attesting witness being called. But it is important to note that at least one witness should be in a position to prove the execution of the will. If that attesting witness can prove the execution of the will, the law dispenses with the evidence of the other attesting witness. But if that one attesting witness cannot prove the execution of the will then his evidence has to be supplemented by the other attesting witness being called to prove the execution,<sup>9</sup> or by giving other evidence.

Where a mortgagee sues to enforce his mortgage and the execution and attestation of the deed are not admitted, the mortgagee need prove only this much that the mortgagor signed the document in the presence of an attesting witness and one man attested the document, provided the document on the face of it bears the attestation of more than one person; but if the validity of the mortgage be specifically denied, in the sense that the document did not effect a mortgage in law then it must be proved by the mortgagee that the mortgage-deed was attested by at least two witnesses.<sup>10</sup>

When attestation is not specifically challenged and when a witness is not cross-examined regarding the details of the attestation, it is sufficient for him to say that it was attested by the other witness and himself. That is enough to prove the attestation. The law will then assume that when the witness swears that it was attested, the "witness" means that 'attested according to the forms required by law'. If the other side wants to challenge that statement, it is their duty, quite apart from raising it in the pleadings, to cross-examine the witness along those lines.<sup>11</sup> So also, where it is impossible to call any attesting witnesses and where all that can be proved is their handwriting, it will be presumed, until the contrary is shown that the persons who purported

7-1. N. Ramaswamy Padayachi v. C. Ramaswamy Padayachi, A.I.R. 1975 Mad. 88; K. Nookaraju v. P. Venkatrao, A.I.R. 1974 A.P. 13.

7-2. Narain v. Pyare Mohan, A.I.R. 1972 Raj. 25 : 1971 W.L.N. (1) 488.

8. Mirza Mohamed Osman v. Jambulingam Chettiar, A.I.R. 1941 Rang. 122 : 195 I.C. 221; T. Gangayya v. B. Subamma, A.I.R. 1921 Mad. 472 : 69 I.C. 284 : 41 M.L.J. 305 : 1921 M.W.N. 747: 14 L.W. 344. See also Zoharul Hussain v. Maha-deo Ramji Deshmukh, A.I.R. 1949 Nag. 149 : I.L.R. 1948 Nag. 621 : 1949 N.L.J. 340.

9. Vishnu Ram Krishna v. Nathu Vithal, A.I.R. 1949 Bom. 266 : 51 Bom.L.R. 245.

10. Lachman Singh v. Surendra Bahadur Singh, I.L.R. 54 All. 1051 : A.I.R. 1932 All. 527 : 139 I.C. 1 : 1932 A.L.J. 653 (F.B.). See also Surendra Bahadur Singh v. Behari Singh, A.I.R. 1939 P.C. 117; Amir Hussain v. Abdul Samad, A.I.R. 1937 All. 646 : I.L.R. 1937 All. 723 : 171 I.C. 743 : 1937 A.L.J. 710 : 1937 A.W.R. 641.

11. Kuwarlal Amritlal v. Rekhla Koduram, A.I.R. 1950 Nag. 83 : I.L.R. 1950 Nag. 321 : 1950 N.L.J. 197.

to have signed were, in fact, attesting witnesses.<sup>12</sup> In a Calcutta case, there was affirmative testimony of one attesting witness that he was present, saw the execution of the mortgage-deed in question and became an attesting witness. There was testimony of another witness, that, at the request of the mortgagor, he became an attesting witness. There was the further fact, that on the same day, when the document was later on presented for registration, this second witness identified the executant, who, in his presence, admitted execution before the registering officer. At that time, the signatures of these witnesses appeared as those of attesting witnesses on the face of the document presented for registration. It was held that in such circumstances, the Court could legitimately draw the inference that the requirements of the law were fulfilled.<sup>13</sup> The rule that a signature is proved to have been made if it is shown to have been made at the request of the person in question by some other person who signed on behalf of the first person as executant of the document,<sup>14</sup> applies also to the signature of an attesting witness to a document.<sup>15</sup>

**9. Proviso.** The proviso was inserted by Act XXXI of 1926. This is a useful provision and saves time and expense. The object of attestation being to provide proof of the genuineness of a document, such proof is unnecessary where execution being not specifically denied must be taken to be admitted. The peculiar nature of a will makes it an exception to this rule.

Under the amended Section 68, Evidence Act, it is not necessary to call an attesting witness where a document has been registered, unless its execution by the person by whom it purports to have been executed, is specifically denied.<sup>16</sup> In the Full Bench case of *Lachman Singh v. Surendra Bahadur Singh*,<sup>17</sup> a distinction was drawn between the cases : "(1) where the execution and attestation of the deed are not admitted", and "(2) where the validity of the mortgage is specifically denied". In the former case, the Full Bench held that "the mortgagee need prove only this much that the mortgagor signed the document in the presence of an attesting witness and one man attested the document, provided the document on the face of it bears the attestation of more than one person". In the latter case "it must be proved by the mortgagee that the mortgage-deed was attested by at least two witnesses". It follows, therefore, that where the mortgagor has merely not admitted the execution or attestation of the document and has put the mort-

- 12. *Mirza Mohamed Osman v. Jambulingam Chettiar*, A.I.R. 1941 Rang. 122 : 195 I.C. 221.
- 13. *Benoy Bhushan Roy v. Dhirendra Nath Dey*, A.I.R. 1924 Cal. 415 : 74 I.C. 178 : 38 C.L.J. 114; *Mahaluxmi Bank v. Kamakhyalal Goenka*, A.I.R. 1958 Assam 56.
- 14. *Deo Narain Rai v. Kukur Bind*, I.L.R. 24 All. 319 : 1902 A.W.N. 127 (F.B.).
- 15. *Ram Charan v. Bhairon*, A.I.R. 1931 All. 101 : I.L.R. 53 All. 1 : 131 I.C. 241 : 1930 A.L.J. 1561.
- 16. *Ram Charan v. Bhairon*, A.I.R. 1931 All. 101 : I.L.R. 53 All. 1 : 131 I.C. 241 : 1930 A.L.J. 1561; *Yakub Khan v. Gulzar Khan*, A.I.R. 1928 Bom. 267 : I.L.R. 52 Bom. 219 : 111 I.C. 287 : 30 Bom.L.R. 565;

- Gobinda v. Chanana Singh*, A.I.R. 1933 L. 378 : 147 I.C. 847; *Soma Sundaram Chettiar v. Muthirulappa Pillai*, A.I.R. 1933 M. 432 : 147 I.C. 464 : 1933 M.W.N. 141 : 37 L.W. 677; *Shio Ratan Singh v. Jagannath*, A.I.R. 1937 Oudh 149 : I.L.R. 12 Luck. 681 : 165 I.C. 404 : 1936 O.W.N. 1113; *Perumal v. Abdul Rauf*, A.I.R. 1929 Sind 235; 120 I.C. 91; *Badeo Upadhyay v. Rai Behari Singh*, A.I.R. 1927 Oudh 555 (2) : 104 I.C. 344; *Lakho Tewari v. Lalit Koeri*, A.I.R. 1927 Pat. 403 : 104 I.C. 622; *Gurnam Kaur v. Meja Singh*; (1966-68) P.L.R. (Supp.) 614 (617, 618).
- 17. A.I.R. 1932 All 527 : I.L.R. 54 All. 1051 : 199 I.C. 1 : 1932 A.L.J. 653 (F.B.).

gagée to proof, then there being no specific denial of attestation, the attestation of one witness is regarded by the Full Bench as being sufficient. It is only in the case where there is not only want of an admission but a specific denial of the validity of the mortgage that the mortgagee is called upon to prove attestation of two witnesses.<sup>18</sup> Where a certified copy of a registered deed of gift was produced and the opposite party did not specifically deny that it was a copy of the deed of gift executed, it was held that the production of an attesting witness was not essential.<sup>19</sup> This section, however, dispenses with, only the necessity of calling an attesting witness to prove a registered document, the handwriting or signature on the document. Even though it is registered it has to be proved in accordance with the other provisions of the Act by other witnesses, if the execution of the document is not admitted though not specifically denied.<sup>19-1</sup> It has been held in several cases that the word "execution" in this proviso means and includes, in the case of a document which is not valid without attestation, not only signing by the executant but attestation as well which is the last of the series of acts necessary to give completeness and formal validity to the deed.<sup>20</sup> Denial of execution therefore includes denial of attestation and if execution is denied, not only execution but also attestation must be proved by calling at least one attesting witness.<sup>21</sup> In *Biswanath Singh v. Kayestha Trading and Banking Corporation Co. Ltd.*,<sup>22</sup> it was held that the mere fact that the defendant pleaded that he did not admit the genuineness of the bond in suit was not sufficient to put the plaintiff to proof of attestation. But where the defendant only denied the execution of the document but stated in his written statement that it was not genuine, it was held that there was specific denial within the meaning of this proviso.<sup>23</sup> In *Surendra Bahadur Singh v. Behari Singh*,<sup>24</sup> where in a suit on mortgage the defendant pleaded that he did not admit the execution of the mortgage-deed, it was held by their Lordships of the Judicial Committee that the execution of the mortgage-deed was specifically denied by the defendant within the meaning of the proviso.

Despite the admission of the execution of a deed by the defendant-mortgagor, it is incumbent to prove the due attestation of the mortgage if the plaintiff-mortgagee wants to take advantage of the transaction as a mortgage unless attestation is admitted. All that the proviso to Section 68 lays down is that in such a case the document may not be proved by any attesting wit-

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- 18. *Amir Husain v. Abdul Samad*, A.I.R. 1937 All. 646 : I.L.R. 1937 All. 723 : 171 I.C. 743 : 1937 A.L.J. 710 : 1937 A.W.R. 641; *Mst. Azizunnissa v. Siraj Husain*, A.I.R. 1934 All. 507 : 152 I.C. 146 : 1934 A.L.J. 817 : 1934 A.W.R. 302.
- 19. *Nandlal v. Mst. Lukhmi*, A.I.R. 1939 Lah. 414.
- 19-1. *Laxman v. Anusuiya*, A.I.R. 1976 Bom. 264.
- 20. *Hare Krishna Panigrahi v. Jogneswar Panda*, A.I.R. 1939 Cal. 688 : 187 I.C. 644 : 69 C.L.J. 454 : 43 C.W.N. 1025; *Rajni Kanta Barui v. Bon Behari Sarkar*, A.I.R. 1952 Cal. 7 : I.L.R. (1953) 1 Cal. 120 : 56 C.W.N. 9; *Kalicharan v. Suraj Bali*, A.I.R. 1941 Oudh 89 ; 191 F.C. 215 : 1940 A.W.R. (C.C.) 466. See also *Jai Karan Das v. Protap Singh*, A.I.R. 1940 Cal. 189 : I.L.R. (1939) 2 Cal. 479 : 187 I.C. 718 : 48 C.W.N. 1084; and the cases cited therein. But see *Pravaschandra Pati v. Jagmohan Das*, I.L.R. 1960 Cut. 214.
- 21. *Kalicharan v. Suraj Bali*, supra. See also *Banarsidas v. Collector of Saharanpur*, A.I.R. 1936 All. 712 : 165 I.C. 498 : 1936 A.L.J. 1262 : 1936 A.W.R. 887.
- 22. A.I.R. 1929 Pat. 422 : I.L.R. 8 Pat. 450; 119 I.C. 405; 10 P.L.T. 379.
- 23. *Kalicharan v. Suraj Bali*, supra.
- 24. A.I.R. 1939 P.C. 117.

ness but all the same due attestation must be proved.<sup>25</sup> But a mortgagee who has admitted the execution in the trial Court and the first appellate Court, cannot in second appeal take a new plea that mortgagor had failed to satisfy the requirements of section 59 of the Transfer of Property Act, 1882.<sup>1</sup>

*"Specifically denied".* For a denial to be a specific denial, it is not necessary that attestation should be denied. In other words, it is not necessary that there should be a denial of the validity of the document on the ground that it was not properly attested.<sup>2</sup>

The words "specifically denied", used in the proviso, do not mean more than this, that the denial in question should relate to the specific document which is sought to be denied and that the denial should leave no room for doubt that the particular document is denied by the person against whom it is sought to be used. The proviso does not lay down that the denial should be contained in the written or oral pleadings. But specific denial should be made sufficiently before the actual hearing so that the party relying on the document may be able to prove execution by producing an attesting witness.<sup>2-1</sup>

A mere denial, noted even on the back of the document or on the list accompanying the document, is enough,<sup>3</sup> but a mere allegation that the transfer was a sham and nominal transaction entered into in order to defeat the creditors does not amount to a denial of execution.<sup>4</sup> A statement that the defendant had no knowledge of the mortgage-deed in suit does not amount to a specific denial.<sup>5</sup> There is no specific denial where the defence is, not that the deed has not been executed, but that the execution of the deed had been brought about by the fraud of the plaintiff.<sup>6</sup> The proviso speaks of a "specific denial". Some meaning must be given to the word 'specific'. It must mean something over and above a general denial. Accordingly, it is not sufficient to have a mere general denial to attract the provisions of this proviso.<sup>7</sup> In interpreting the word 'specifically' help can be drawn from the interpretation of the same word as used in Order VIII, Rule 3, C. P. C. It should be presumed that when the Legislature added the proviso to Section 68 containing this word, it was aware of the word as used in C. P. C. It is used in contradistinction to the word 'generally'.<sup>7-1</sup> The section contemplates a distinction between the position where execution is not admitted and a posi-

25. Sita Dakuani v. Rama Chandra Nahak, I.L.R. 1967 Cut. 593 : (1967) 33 Cut.L.T. 811.
1. Dondapani Gondo v. Hrushikesh Patnaik, (1969) 35 Cut.L.T. 821 (828).
2. Abdul Rahman v. Ghuru Khan, A.I.R. 1944 Oudh 99 : 209 I.C. 622 : 1943 O.W.N. 136.
- 2-1. Sarat Chandra v. Chandramani, A.I.R. 1972 Orissa 222 : 38 Cut.L.T. 445.
3. Gurcharan v. Ram Bharose Singh, A.I.R. 1943 Oudh 218 : 207 I.C. 72 : 1943 O.W.N. 105.
4. Vedachala Chettiar v. Ameena Bi, A.I.R. 1944 Mad. 121 : 212 I.C. 379 : (1944) 1 M.L.J. 28 : 57 L.W.

- 7 (F.B.).
5. Bhima Singh Kishore Singh v. Fakir Chand, A.I.R. 1948 Nag. 155 : I.L.R. 1947 Nag. 649. See also Yakub Khan v. Gulzar Khan, A.I.R. 1928 Bom. 267 : I.L.R. 52 B. 219; 111 I.C. 287 : 30 Bom.L.R. 565; but see Baban Charan v. Purna, 25 Cut.L.T. 291.
6. Nund Kishore Lal v. Kanee Ram Tewary, I.L.R. 29 Cal. 355, followed by Mitter, J. in Ayenti Shikdar v. Mohammad Ismail, A.I.R. 1929 Cal. 441 : 49 C.L.J. 347.
7. Dashrath Prasad v. Lallo Singh, 1951 Nag. 343 : 1951 N.L.J. 616.
- 7-1. Dhiren Bailung v. Bhutuki, A.I.R. 1972 Gau. 44.

tion where execution is specifically denied.<sup>8</sup> Where the defendant pleads that "the paragraph of the plaint is denied, and the plaintiff is put to the proof of the fact stated therein. Plaintiff must prove that a legal and valid gift has been made to her", there is a specific denial of the execution of the document within the meaning of the proviso.<sup>9</sup> When a witness says that a document has been executed and his statement is not challenged regarding the details it would be presumed that there was due execution according to law in just the same way as when a witness says that a document was attested, it will be presumed that it was attested with all the formalities which the law prescribes for that particular type of document.<sup>10</sup> But it is not enough if an attesting witness merely states that the executant has signed in his presence and he witnessed the execution of the document. In addition to this, there must be some more evidence to show that the other attesting witness was also present at the time when the executant signed the document in token of execution, or at least he attested the document after he had received from the executant a personal acknowledgment of his signature or mark, etc. In other words, if the document is required by law to be attested by at least two witnesses, no valid attestation can be said to have been proved unless there is evidence that the two attesting witnesses, one of whom has been examined in the case, have signed the document after witnessing the signature of the executant or receiving from him a personal acknowledgment of his signature.<sup>11</sup> A third party (that is a party to the suit but not to the deed) can deny execution and require proof of attestation when the executant of the document admits execution.<sup>12</sup> If any of the defendants to a suit denies that any of the alleged executants executed the deed, the plaintiff must produce one of the marginal witnesses to prove the document. The fact that the deed is registered and none of the executants of the deed has denied its execution will not absolve the plaintiff from producing an attesting witness.<sup>13</sup> The denial of execution might be either by the person executing it or by any one sought to be bound by it. Thus, in a suit for redemption, where the mortgage is denied, the plaintiff has to prove both the factum of the execution and its due attestation under the provisions of the Transfer of Property Act, as against the sons of the mortgagor.<sup>14</sup> In a suit for redemption of a usufructuary mortgage, though execution was not denied by the mortgagor, the deed had not been attested, it was held that the mortgage had become invalid but that a decree could be given on the basis of the mortgagor's title.<sup>15</sup> The proviso to Section 68 only removes the necessity of calling an attesting witness to prove the execution of the document therein referred to and does not purport to relieve the party of the necessity of proving a mortgage in the form prescribed under Section

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- 8. Jhillar Rai v. Raj Narain, A.I.R. 1935 All. 781 at 784 : 156 I.C. 45 : 1935 A.L.J. 1072.
- 9. Ghansilal v. Bhuridevi, I.L.R. 1964 Raj. 259 : A.I.R. 1964 Raj. 39.
- 10. Dashrath Prasad v. Lallo Singh, 1951 Nag. 343 : 1951 N.L.J. 616.
- 11. Zaharul Hussain v. Mahadeo Ramji, A.I.R. 1949 Nag. 149 : I.L.R. 1948 Nag. 621 : 1949 N.L.J. 340; but see Mst. Hava v. Lakumal, A.I.R. 1944 Sind 61 : I.L.R. 1943 Kar. 420 : 212 I.C. 561; see also Kumbara v. Lakkanna, A.I.R. 1959 Mys. 148.
- 12. Mst. Chandra Kali v. Babhuti Prasad, A.I.R. 1943 Oudh 416 : 211 I.C. 18 : 1943 O.W.N. 382; Nikunja v. Suchitra, A.I.R. 1955 Tripura 17. See also cases cited therein.
- 13. Radha Ballab v. Deoki Nandan, A.I.R. 1932 All. 320 : 140 I.C. 115 : 1932 A.L.J. 207; Ebrahim Mandal v. Akshya Konar, 62 C.L.J. 25 : 40 C.W.N. 151.
- 14. Periakaruppa Moopan v. Adaikalam, 69 Mad.L.W. 815.
- 15. Arab Ali v. Farid Ali, A.I.R. 1961 Assam 48.

59, Transfer of Property Act.<sup>16</sup> Although the words "Indian Registration Act", used in the proviso, appear to make the proviso applicable only to documents registered under that particular Act, the clear policy of the law in this regard is that there is special sanctity attaching to registration, and the proviso applies also to documents registered under the Indian Registration Act in force prior to 1908.<sup>17</sup> The proviso is retrospective in the sense that it affects document already in existence, provided that the operation of receiving them in evidence takes place after the amendment came into force.<sup>18</sup> But it cannot be applied to a case decided before the amendment came into force.<sup>19</sup>

*Wills.* In the case of wills the proviso has no application and at least one attesting witness must be called whether the execution of the will is specifically denied or not.<sup>20</sup> A will cannot be proved by mere production of a certified copy from Registration department without calling an attesting witness, whether the execution is denied<sup>20-1</sup> or admitted. Registration by itself does not dispute the suspicious circumstances if there are any in respect of a will.<sup>20-2</sup> Even if the attesting witness has participated in registration process, he will have to be examined in proof of attestation, copy of registration showing his participation will not obviate that necessity.<sup>20-3</sup> Although where an instrument requiring attestation is subscribed by several witnesses it is in general sufficient to call only one of them (Indian Evidence Act, Section 68), in the case of wills, it is desirable that all witnesses capable of being called should be examined to remove all suspicion of fraud.<sup>21</sup>

Although the section permits the execution of a will to be proved by calling only one attesting witness, it is important to note that at least one witness should be in a position to prove the execution of the will. If that attesting witness can prove the execution of the will, the law dispenses with the evidence of the other attesting witness. But if that one attesting witness cannot prove the execution of the will, then his evidence has to be supplemented by the other attesting witness being called to prove the execution.<sup>22</sup> In order to prove the due attestation of a will, the propounder has to prove that the two witnesses saw the testator sign the will and they themselves signed the same in the presence of the testator.<sup>23</sup>

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| <p>16. R.M.A.R.M. Chettiar Firm v. U. Htaw, A.I.R. 1933 Rang. 6 : I.L.R. 11 R. 26 : 141 I.C. 700; Kartar Singh v. Didar Singh, A.I.R. 1934 L. 282 : 149 I.C. 1109; Balappa v. Asanigappa, A.I.R. 1960 Mys. 234.</p> <p>17. Jadunath Mitra v. Isar Jha, A.I.R. 1939 Pat. 47 : 178 I.C. 198.</p> <p>18. Muthuraman Chettiar v. Subramanian Chettiar, A.I.R. 1933 Mad. 612 : 144 I.C. 89; Somasundaram Chettiar v. Muthirulappa Pillai, 1933 Mad. 432 : 147 I.C. 464 : 1933 M.W.N. 141 : 37 L.W. 677.</p> <p>19. Banwarilal v. Gopinath, A.I.R. 1931 All. 411 : 131 I.C. 557 : 1931 A.L. J. 342.</p> <p>20. Rup Rao v. Ram Rao, A.I.R. 1952 Nag. 88 : I.L.R. 1952 Nag. 189 :</p> | <p>1952 N.L.J. 86.</p> <p>20-1. Jagdish v. Rajendra, A.I.R. 1975 All. 395 : 1975 A.W.C. 302; K. Nookaraju v. P Venkat Rao, A.I.R. 1974 A.P. 13.</p> <p>20-2. R. P. Saha v. K. Dasi, (1971) 75 C.W.N. 63.</p> <p>20-3. K. Nookaraju v. P. Venkat Rao, A.I.R. 1974 A.P. 13.</p> <p>21. Surendra Krishna Mandal v. Rance Dassee, A. I. R. 1921 Cal. 677; I.L.R. 47 Cal. 1043; 59 I. C. 814; 33 C. L. J. 34.</p> <p>22. Vishnu Ram 'Kishore' v. Nathu Vithal, A. I. R. 1949 Bom. 266: 51 Bom. L. R. 245.</p> <p>23. Girja Dutt v. Gongotri Dutt, A.I.R. 1955 S.C. 346.</p> |
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In cases where attestation is not required to validate a will, it would be enough if the Sub-Registrar who has registered it, proved the due execution of the will by the executant in a sound disposing state of mind ; the endorsement under Section 60 of the Registration Act was itself evidence of the admission of execution.<sup>24</sup> So also, when execution is not specifically denied, attestation can be proved by any other method, without recourse to the provisions of this section.<sup>25</sup> The principle is also extended to cases where although the principal executant admits execution, the other parties sought to be made liable, do not. Thus, in a suit on a mortgage, the executant admitted execution. But his minor sons who had been impleaded did not admit it but put the mortgagee to proof regarding payment of consideration. It was held that the plaintiff had to prove both execution of the document and its attestation, on the principle that while a party to an attested document could admit its execution, a third party would not be bound by such admission. In such a case, if the original mortgage-deed is not filed, the burden of proving the mortgage as against the minor sons rests on the mortgagee.<sup>1</sup> Where the defendant alleges that the mortgage had not been executed according to law and that he had not received consideration, that would amount to a 'specific denial' of execution. Consequently, if the plaintiff fails to prove due execution, the mortgage is not admissible in evidence.<sup>2</sup> "Specifically denied" means specifically denied by the party against whom the document is sought to be used and not by the executant alone. The denial has to be from the party who is entitled to, or is interested in, disputing execution. Secondly, the denial has to be of the execution of the document. Other contentions not distinctly related to the factum of execution could not constitute a specific denial of execution.<sup>3</sup> Where the defendant (mortgagor) admitted execution in his written statement, but later on his written statement had been struck out, the position would be as if it was non-existent ; and hence the plaintiff has to prove execution and attestation; although of course the quantum of proof would not be as heavy as in the case of specific denial.<sup>4</sup>

**10. Non-compliance with section : Admissibility of document.** The Madras High Court has held in one case that a mortgage for more than 100 rupees which has been prepared and accepted, but which is not attested, is invalid ; and that it cannot be used in proof of a personal covenant to pay.<sup>5</sup> But this view has not been accepted by the Calcutta High Court, which has held that an unattested mortgage, so far as it creates a mere money or personal liability, does not require to be attested, and if so, Section 68 of this Act does not apply. Therefore it was held that though a document purporting to hypothecate immovable property was not registered and attested, a personal decree could be passed on it, inasmuch as it was evidence of a money-debt.<sup>6</sup> And a Full Bench of the Madras High Court has held that a document which

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| 24. Mehtab Singh v. Amrik Singh, A.I.R. 1957 Punj. 146; I. L. R. 1957 Punj. 418.<br>25. Prayas Chandra Pati v. Jagmohan Das, I. L. R. 1960 Cut. 214.<br>1. Brahmananda v. Kanduri, A.I.R. 1959 Orissa 126; 25 Cut. L. T. 66.<br>2. Baban Charan v. Purna, 25 Cut.L.T. 291.<br>3. Kumbara v. Lakkanna, A. I. R. L. E.-208 | 1959 Mys. 148.<br>4. Syed Mustaque v. Ahmadulla, 1959 M. P. L. J. (Notes) 217.<br>5. Madras Deposit Society v. Oonna malai Ammal, (1894) 18 M. 29; overruled, v. post.<br>6. Sonatun v. Dino, (1898) 26 C. 222; Tofaluddi v. Mahra, 26 C 78; Dhana Mohammed v. Nastulla Molla, A. I. R. 1926 Cal. 637: 92 I.C. 948. |
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purports to be a mortgage, but is not one owing to the lack of the attestation required by Section 59 of the Transfer of Property Act, is not a document which requires attestation within the meaning of the present section and so (whether it is registered or unregistered) it is admissible to prove the personal covenant to pay, since this covenant does not require attestation.<sup>7</sup> But in a later case in that High Court (approved by the Privy Council)<sup>8</sup> and in a Full Bench decision of the Allahabad High Court,<sup>9</sup> it has been held that a document which purports to be a mortgage but is invalid as one for want of due attestation under Section 59 of the Transfer of Property Act cannot operate as a mortgage or to create a charge on immovable property within the meaning of Section 100 of that Act.

There seems to be a conflict of opinion as to whether a document properly attested can be used for any purpose when an attesting witness has not been called as required by this section. It has been held by the Calcutta High Court that the law as codified in this section is not confined to cases where the attested instrument was the ground of action, but that it applied also to cases where it was used in evidence for collateral purposes, and that the stringent wording of the section does not permit the use of the instrument as evidence for any purposes whatsoever unless and until it is proved in strict accordance with the provisions of the section. The rigor of the English law on which the present section is founded has been to a certain extent lessened by the proviso as contained in Section 70 of the Evidence Act.<sup>10</sup> Similarly, the Oudh Chief Court has held that no distinction should be drawn between documents which are the basis of the suit and those whose production is required for collateral purposes, so far as their admissibility in evidence is in question.<sup>11</sup> On the other hand, it has been held by the Allahabad High Court that this section applies only if a document is relied upon as one requiring attestation, and that non-compliance with its provision does not prevent the document from being used in evidence for any other or collateral purpose. Thus, the section does not apply to a document which is merely to be proved for the purpose of an admission contained in it.<sup>12</sup> In an earlier case in the same court a duly registered mortgage-deed was sued on, but owing to the failure of the plaintiff to examine the attestor, the document was rejected as inadmissible in evidence. It was held that it was admissible for the purpose of interpreting the rights and obligations of parties even though as an indepen-

7. Pulaka Kunhu v. Thiruthipalli, 1 I. C. 1 (F.B.); 32 M. 410 overruling Madras Deposit Society v. Oonnamalai Ammal, (1894) 18 M. 29 and following Sadakarvaur v. Tadepally, (1907) 30 M. 284. See also Venkata Jagannath v. Venkata Kunara, A. I. R. 1931 Mad. 140; I. L. R. 54 Mad. 163; 135 I. C. 17; 33 L. W. 95. The same view was taken by the Allahabad High Court in Mathra Pershad v. Chedilal, A. I. R. 1915 All. 254; 29 I. C. 363; 13 A. L. J. 553, and the Sind Court in Ghansham Singh v. Mohamed Yacoob, A. I. R. 1933 Sind 237; 146 I.C. 694.
8. Shamu v. Abdul, I. L. R. (1912) 35 M. 607 (P.C.); Samoo v. Abdul,

- I. L. R. (1908) 31 M. 337 following Rayzuddi v. Kalinath, I. L. R. 33 C. 985.
- Collector, Mirzapur v. Bhagwan, I. L. R. (1913) 35 A. 164 (F.B.).
- Shib Chandra v. Gour Chandra, A. I. R. 1922 Cal. 160; 68 I.C. 86; 27 C. W. N. 134.
- Awadh Ram v. Mahbub Khan, A. I. R. 1924 Oudh 255; 79 I.C. 725; 10. O. L. J. 525; Bharat Singh v. Sheodut, A. I. R. 1926 Oudh 266; 91 I.C. 189.
- Shyamlal v. Lakshmi Narain, A. I. R. 1939 All. 269; I. L. R. 1939 All. 366; 181 I.C. 612; Mahadeo Prasad v. Ghulam Mohammad, A. I. R. 1947 All. 161; I. L. R. 1946 All. 649.

dent legal document it was itself inadmissible. It was held that by the terms of this section when its provisions are not complied with, a document cannot be used as evidence at all as a document either requiring attestation or in fact attested; but this does not prevent it from being used in evidence as something else or for any other purpose. This section is subject to the limitation, that if the document were produced in some other proceeding for the purpose of proving the handwriting of the scribe, it could not be objected to on the ground that no attesting witness being called to prove it, it could not be used in evidence at all.<sup>13</sup>

**11. Summary.** Subject to the proviso, the rules regarding attestation may be thus summarised :

(1) An attested document not required by law to be attested may be proved as if it was unattested.<sup>14</sup>

(2) The Court shall presume that every document called for and not produced after notice to produce, was attested in the manner prescribed by law.<sup>15</sup>

(3) There is a presumption of due attestation in the case of documents thirty years old. The Court may in such cases dispense with proof of attestation.<sup>16</sup>

(4) Where a document is required by law to be attested, and there is an attesting witness available, then, subject to the proviso, at least one attesting witness must be called.<sup>17</sup>

(5) If there be no attesting witness available, or if the document purports to have been executed in a foreign country, it must be proved by other evidence that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.<sup>18</sup>

(6) The admission of a party to an attested document of its execution will, so far as such party is concerned, supersede the necessity of either calling the attesting witnesses or of giving any other evidence.<sup>19</sup>

(7) If the attesting witness available denies or does not recollect the execution of the document, its execution may be proved by other evidence.<sup>20</sup>

**12. When attesting witness need not be called.** No attesting witness need be called in the following cases :

(1) When the document is a registered one and its execution is not specifically denied.<sup>21</sup>

13. Moti Chand v. Lalta Prasad, I. L. R. 40 A. 256; 44 I.C. 596; A. I. R. 1918 A. 201.

14. S. 72 post. Corresponding with S. 37 of the repealed Act II of 1855 and with S. 26 of the Common Law Procedure Act, 1854.

15. S. 89 post. The rule is not limited to the case of possession by the adverse party. See Taylor, Ev., para. 1847.

16. S. 90 post; Gobinda Chandra v.

Pulin Behari, A. I. R. 1927 Cal. 102; 198 I. C. 147; 31 C. W. N. 215.

17. S. 66.

18. S. 69. See Taylor, Ev., para 1851.

19. S. 70 post, which is the same as S. 38 of Act II of 1855.

20. S. 71 post; Vishnu Ramkrishna v. Nathu Vithal, 1949 Bom. 266: 51 Bom. L. R. 245.

21. S. 68 proviso.

(2) When there is no attesting witness available.<sup>22</sup>

(3) When a party to the document against whom it is sought to be used, admits its execution.<sup>23</sup>

(4) When the document is not required by law to be attested.<sup>24</sup>

(5) When the document is called for and not produced.<sup>25</sup>

(6) When the document is thirty years old and there is a presumption of due attestation.<sup>1</sup>

(7) When the document is a will admitted to Probate in India, in which case it may be proved by the Probate.<sup>2</sup>

\*69. *Proof where no attesting witness found.* If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

#### SYNOPSIS

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| 1. Scope.   | quired.  |
| 2. When no such attesting witness "can be found". | 3. Proof required under the section :<br>—Proof of handwriting.<br>—"Signature" includes mark. |
| —Enquiry—Degree of diligence re-                  |  |

1. **Scope.** If there be no attesting witness available, or if the document purports to be executed in the United Kingdom, the attestation of at least one attesting witness and the signature of the person executing the deed must be proved by other evidence to be in their handwriting.<sup>3</sup> This rule will apply when the document purports to have been executed in the United Kingdom, or the witnesses are dead,<sup>4</sup> insane,<sup>5</sup> or out of the jurisdiction<sup>6</sup> or when they cannot be found after diligent enquiry, or have absented themselves by collusion with the opposite party.<sup>7</sup> It does not apply where the witness is found but does not depose to prove the document.<sup>7-1</sup>

2. **When no such attesting witness "can be found".** The words "can be found" in the section are not very appropriate and must be interpreted to include not only cases where the witness cannot be produced because he cannot be traced but also cases where the witness for reasons of physical or mental disability, or for other reasons, which the Court considers sufficient,

22. S. 69.

man v. Subramanian, A. I. R. 1933 Mad. 612; 144 I. C. 89.

23. S. 70 post.

5. Bam Jassa Kunwar v. Sahu Narain Das, A.I.R. 1946 All. 178; 224 I.C. 125; 1945 A.L.J. 537.

24. S. 72 post.

6. Assoomeah v. V.S.R.M. Chetty, A.I.R. 1919 L.B. 2; 61 I.C. 637.

25. S. 89 post.

7. Taylor, Ev., s. 1851.

1. S. 90 post.

7-1. Doraiswamy v. Ratnammal, A.I.R. 1978 Mad. 78.

2. S. 91, Exception 2.

3. See Taylor, Ev., 1851.

4. Venkataramayya v. K. Gattaya, A.

I. R. 1927 Mad. 662; 101 I.C. 498;

53 M. L. J. 16; see also Muthura-

is no longer a competent witness for the purpose, as is provided in Section 68 of the Act.<sup>8</sup>

*Enquiry—Degree of diligence required.* The degree of diligence required in seeking for the attesting witnesses to document, the attestation of which is required to be proved by an attesting witness, is the same as in the search for a lost paper. The principle is in both cases identical.<sup>9</sup> The enquiry must be strict, diligent, honest and satisfactory to the Court. It should be made at the residence of the witness, if known, and at all other places where he may be expected to be found and also, in general of his relatives and others who may be able to give information concerning him.<sup>10</sup> In order that this section may be applied, mere taking out of the summons, or the service of summons upon an attesting witness, or the mere taking out of warrant against him is not sufficient. It is only when the witness does not appear even after all the processes under Order XVI, rule 10, which the Court considered to be fit and proper, had been exhausted that the foundation will be laid for the application of this section. The party, namely, the plaintiff, must move the Court for processes under Order XVI, rule 10, C. P. C. when a witness summoned by him has failed to obey the summons, but when the plaintiff does move the Court but the Court refuses the process asked for, there is no reason why this section cannot be invoked.<sup>11</sup> If an instrument be necessarily attested by more than one witness, the absence of them all must be duly accounted for in order to let in secondary evidence of the execution.<sup>12</sup>

**3. Proof required under the section.** Even if it is proved that no attesting witness can be found, the section requires proof of not only attestation but also execution of the document by proof of the signature of the executant.<sup>13</sup>

In a case in the Allahabad High Court, where the mortgagor and all the marginal witnesses were dead, it was held that proof that his signature and the signatures of two of the witnesses were in their handwriting raised a presumption of due execution and was sufficient proof unless this was rebutted.<sup>14</sup>

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| <p>8. Bam Jassa Kunwar v. Sahu Narain Das, A.I.R. 1946 All. 178, 183 : 224 I.C. 125 : 1945 A.L.J. 537.</p> <p>9. Taylor, Ev., s. 1855 and cases there cited; v. ante, S. 65.</p> <p>10. Assoomeah v. V.S.R.M. Chetty, A.I.R. 1919 L.B. 2 : 61 I.C. 637.</p> <p>11. Amal Shanker Sen v. The Dacca Co-operative Housing Society, Ltd., A.I.R. 1945 Cal. 350 : 49 C.W.N. 377; Hare Krishna Panigrahi v. Jogneswar Panda, A.I.R. 1939 Cal. 688: 187 I.C. 644 : 69 C.L.J. 454 : 48 C.W.N. 1025; Gobinda Chandra v. Pulin Behari, A.I.R. 1927 Cal. 102: 198 I.C. 147 : 31 C.W.N. 215; Mst. Shahzadi Begum v. Muhammad Qassim, A.I.R. 1928 Pat. 356 : I.L.R. 7 Pat. 312 : 110 I.C. 756.</p> <p>12. Taylor, Ev., s. 1856; Deorao v. Dhondirao, A.I.R. 1928 Nag. 244 : 110 I.C. 163; Cunliffe v. Sefton, 2 East 183; Bright v. Doed Tatham,</p> | <p>A. &amp; F. 22 : Whitelook v. Musgrave, 1 C. &amp; M. 511.</p> <p>13. Deorao v. Dhondirao, A.I.R. 1928 Nag. 244: 110 I.C. 163; Kaban Chand v. Mst. Jawandi, A.I.R. 1923 Lali. 174 : 79 I.C. 500; Doraiswamy v. Ratnammal, A.I.R. 1978 Mad. 78.</p> <p>14. Uttram Singh v. Hukum Singh, A.I.R. 1917 All. 89 : I.L.R. 39 All. 112: 38 I.C. 651 : 15 A.L.J. 167 followed in Venkataramanayya v. K. Guttayya, A.I.R. 1927 Mad. 662 : 101 I.C. 498 : 53 M.L.J. 216. See also, Ponnuswami v. Kalyansundara, A.I.R. 1930 Mad. 770 : 125 I.C. 231, confirmed on L.P. Appeal in Punnuswami v. Kalyansundara, A.I.R. 1934 Mad. 365 : I.L.R. 57 Mad. 662 : 149 I.C. 257; see Wright v. Sanderson, (1884) 9 P.D. 149.</p> |
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And in another case in the same Court, where a mortgage-deed purported to be attested by several witnesses and the mortgagee called one who gave evidence that he had seen the mortgagor sign, and had signed himself, it was held, that, in the absence of questions on this point or rebutting evidence, the execution of the mortgage-deed was sufficiently proved.<sup>15</sup>

In a Bombay case, the two attesting witnesses and the person in whose favour the document was executed were all dead, and the executant, who was alive, denied his signature on the document. The signatures of the attesting witnesses were identified by two witnesses who were their relatives and knew their handwriting and nothing was brought out in the cross-examination of the witness which would affect their credibility or shake their evidence in any other manner. It was held that, in the circumstances, the evidence of the two witnesses was sufficient to establish that the document was executed by the executant, because there was no other conceivable way in which proof of the document should have been given.<sup>16</sup> Where the mortgagor, the mortgagee and all the attesting witnesses had died, and the mortgagee's son gave evidence that he was present at the time of the execution of the mortgage-deed and the executant signed the document in his presence and that of the attesting witnesses whose signatures he identified, it was held that the requirements of the section were satisfied.<sup>17</sup>

*Proof of handwriting.* As to proof of handwriting, see Sections 45, 47, 67 ante, and Section 73 post. As the section requires proof that the attestation of one attesting witness at least is in his writing, it may be said that it implies that the witness knew how to write. Such an implication is against the fact that the majority of attesting witnesses in India are workmen.<sup>18</sup>

"Signature" includes mark. The Act further contains no definition of the term "signature". But having regard to the definition of the word given in the General Clauses Acts of 1887 and 1897,<sup>19</sup> Registration Act,<sup>20</sup> and the Civil Procedure Code,<sup>21</sup> and the general policy of our law,<sup>22</sup> the term includes the affixing of a mark. In the case last cited, it was argued that, as the only attesting witness examined was a marksman, the bond in suit was not legally proved as required by Section 59 of the Transfer of Property Act and by Section 68 of this Act which, read with Section 69, shows that an attesting witness must be one who can sign his name. It was, however, held that this contention was not correct; that there was no good reason for holding that a marksman cannot be an attesting witness within the meaning of Section 59 of the Transfer of Property Act and Section 68 of this Act; that according to the general policy

15. *Shib Dayal v. Sheo Ghulam*, A.I.R. 1917 All. 103 : I.L.R. 39 All. 241 : 38 I.C. 694; and see *Ramdei v. Munna Lal*, A.I.R. 1917 All. 27 : I.L.R. 39 All. 109 : 38 I.C. 175 : 14 A.L.J. 1041.
16. *Nooruddin v. Mahomed Oomer*, A.I.R. 1956 Bom. 641 following *Abdulla Paru v. Gannibai*, I.L.R. 11 Bom. 690.
17. *Bhairon Singh v. Ganga Narain*, A.I.R. 1935 All. 527 : 157 I.C. 693 : 1935 A.W.R. 542.
18. The attesting witnesses to a will must affix their signatures and not merely their marks, *Nitya v. Nagendra*, (1885) 11 C. 429; *Fernandez v. Alves*, (1879) 3 B. 382; and see *Bissonath v. Doyaram*, (1880) 5 C. 738; but see *Amayee v. Yalumalai*, (1891) 15 M. 261, 269.
19. Act I of 1887, S. 3, clause 12; Act X of 1897, S. 3, clause 52.
20. Act XVI of 1908, S. 3.
21. Act V of 1908, S. 2 and see Act XXXIX of 1925 (Indian Succession), S. 63.
22. *Pran Krishna v. Jadu Nath*, (1898) 2 C.W.N. 603, 605.

of our law a signature includes a mark, and that there was no reason why the case of a mortgage-deed should form an exception. It was further argued that marksmen in this country often only touch the pen, and even the mark, generally a cross, is not made by them, but is made by the writer of the deed. But, it was held that in this case no question arose as to whether a mark made by a person other than the witness can be sufficient, the mark being shown to have been made by the witness himself.<sup>23</sup> In the case of an illiterate executant, his mark is his signature,<sup>24</sup> but not so in the case of a person who is able to write his name.<sup>25</sup> The rule that a signature is proved to have been made, if it is shown to have been made at the request of the person in question by some other person who signed on behalf of the first person as executant of the document;<sup>1</sup> has been held to apply to the signature of an attesting witness also.<sup>2</sup> In a case in the Allahabad High Court, where a mortgage-deed purported to have been executed by three illiterate mortgagors (marksmen), and attested by more than two witnesses, and all the mortgagors and witnesses were dead, a later deed of usufructuary mortgage, executed by one of these mortgagors and by representatives of the other two and recognizing the genuineness of the said mortgage, was tendered (*inter alia*) in proof of its execution, and it was contended that this section does not forbid in direct evidence and should be supplemented by the English rules; but it was held, that this section reproduces part only of the English law on this subject and does not permit a party to rely on presumption, or other evidence, if he is unable to comply with its provisions.<sup>3</sup>

*70. Admission of execution by party to attested document.*  
The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

#### SYNOPSIS

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|--------------------------------------|---|
| 1. Principal.                        | purposes of the suit.                           |
| 2. Scope.                            | 5. Admission by heir of party to such document. |
| 3. Admission of execution.           |   |
| 4. Admission must have been made for |   |

**1. Principle.** The necessity for calling the attesting witnesses and the reasons for the exception have been stated in *Whyman v. Garth*,<sup>4</sup> by Pollock, C. B., in the following terms :

"The attesting witness must be called to prove the execution of a deed, for this reason that by an imperative rule of law the parties are supposed to have agreed *inter se* that the deed shall not be given in evidence without his being called to depose to the circumstances attending its execution. If, there-

23. Pran Krishna v. Jadu Nath, (1898) 2 C.W.N. 603 as to proof of marks.
24. Govind Bhikaji Mahajan v. Bhau Gopal Lad, A.I.R. 1916 Bom. 123; I.L.R. 41 Bom. 384; 39 I.C. 61; 19 Bom.L.R. 147.
25. Sadananda Pal v. Emperor, I.L.R. 32 Cal. 550; 2 Cr.L.J. 405.
1. Deo Narain Rai v. Kukur Bind,
- I.L.R. 24 All. 319; 1902 A.W.N. 127 (F.B.).
2. Ramcharan v. Bhairon, A.I.R. 1931 All. 101; I.L.R. 53 All. 1; 131 I.C. 241; 1930 A.L.J. 1561.
3. Gobardhan v. Hori, 35 A. 364; 19 I.C. 121; 11 A.L.J. 379.
4. (1853) 8 Ex. 803 at 807; 22 L.J. Ex. 316; 91 R.R. 771.

fore, the attesting witness is not called, the deed cannot be read, because this agreement cannot be broken, but any agreement may be waived by the parties to it. If then in the course of the proceedings in the cause the party to the deed admits the execution, or if by his pleadings he does not require the execution to be proved, he may be very reasonably said to have waived the agreement, and the other party, accepting the waiver, does not call the attesting witness."

**2. Scope.** Where the execution of a document required by law to be attested is admitted there is no necessity to call an attesting witness in proof of the execution as required by Section 68.<sup>5</sup> The admission of a party to the document, so far as such party is concerned,<sup>6</sup> supersedes the necessity either of calling the attesting witnesses or of giving any other evidence.<sup>7</sup> This provision is a relaxation of the English rule, according to which the attesting witnesses must be called, even although the deed be one, the execution of which is admitted by the party to it.<sup>8</sup>

The section applies only to a document duly attested.<sup>9</sup>

**3. Admission of execution.** The admission contemplated in this section is an admission of execution in the manner in which a document required by law to be attested is to be executed.<sup>10</sup> The word "execution" designates the whole operation including signing by the executant and attestation by the witnesses.<sup>11</sup> Where, therefore the mortgagor admits execution of the mortgage bond, it means that he admits its valid execution including therein the valid attestation thereof. It is thereafter unnecessary for the mortgagee to proceed to prove attestation. But if the mortgagee does proceed to lead evidence and the evidence falls short of proof of due attestation, then also the mortgagee is entitled to succeed in the action on the footing that the document is a valid mortgage bond. On the other hand, if such evidence adduced by the mortgagee shows positively that the documents has not been attested in accordance with law, then despite admission of its execution by

5. Somasundaram Chettiar v. Muthiruppappa Pillai, A.I.R. 1933 Mad. 432 : 14 I.C. 464 : 1933 M.W.N. 141 : 37 L.W. 677.
6. As against other parties the document must be proved in accordance with S. 68; Nibaran v. Nagendra Chandra, 22 C.W.N. 444 : 44 I.C. 984 : A.I.R. 1919 C. 1024. So also execution must be proved against a minor; Nageswar v. Bachu, 53 I.C. 79 : 4 Pat.L.J. 511 : A.I.R. 1919 Pat. 411.
7. S. 70, which is the same as S. 38, Act II of 1855.
8. See Shob Chandra v. Gour Chandra, A.I.R. 1922 Cal. 160 : 68 I.C. 86; 35 C.L.J. 473 : 27 C.W.N. 134; Taylor, Ev., s. 1843.
9. Hira Bibi v. Ram Harilal, A.I.R. 1923 P.G. 203 : 52 I.A. 362 : I.L.R. 5 Pat. 58 ; 89 I.C. 659 : 3 Pat. L.R. 296 ; 6 P.L.T. 575 : 2 O.W.N. 641; Sita Dakuani v. Ramachan-

- dra Nahak, I.L.R. 1967 Cut. 593 : (1967) 33 Cut.L.T. 811 (820); reversing Ram Nahak v. Sita Dakuani, I.L.R. 1970 Cut. 368 : A.I.R. 1970 Orissa 82 (84).
10. Arjun Chandra Bhadra v. Kailash Chandra Das, A.I.R. 1923 Cal. 149 (2) : 70 I.C. 532 : 36 C.L.J. 373 : 27 C.W.N. 263. See also Sheikh Davood Rowther v. Ramanathan Chettiar, A.I.R. 1938 Mad. 43 : I.L.R. 1938 Mad. 523 : 176 I.C. 309 : 1938 M.W.N. 1203 : 46 L.W. 610.
11. Baliram v. Kamalija, A.I.R. 1924 Nag. 367 : 78 I.C. 330; Sheikh Davood Rowther v. Ramanathan Chettiar, A.I.R. 1938 Mad. 43 : I.L.R. 1938 Mad. 523 : 176 I.C. 309 : 1938 M.W.N. 1203 : 46 L.W. 610. See also Jaikarandas v. Protapsing, A.I.R. 1940 Cal. 189 : I.L.R. (1939) 2 Cal. 479 : 187 I.C. 718 : 43 C.W.N. 1084.

the mortgagor, the mortgagee would fail.<sup>12</sup> The execution contemplated by this section is not a mere signing of the document but a due execution or execution in accordance with what the law requires for a particular document.<sup>13</sup> The admission by the executant of a mortgage bond, that it has been signed by him, cannot dispense with the proof of attestation.<sup>14</sup> So, if a question of attestation is put in issue, it is incumbent upon the plaintiff to prove that the document has been duly attested before this section can be relied on.<sup>15</sup> It is clear from the pronouncement of their Lordships of the Privy Council in *Hira Bibi v. Ram Hari Lal*,<sup>16</sup> that where the attestation is disputed, the plaintiff is not relieved of the obligation of calling an attesting witness under Section 68, Evidence Act. In a Calcutta case,<sup>17</sup> where the defence was, not that the document—a mortgage-deed—was not executed, but that the executant executed it understanding that it was a power-of-attorney, Jack, J., held, that the admission of execution, not being clear and unqualified, was not such as to make this section applicable. But Mitter, J., following *Nand Kishore Lal v. Keree Ram Tewary*,<sup>18</sup> held that the provisions of this section were attracted. It has been held by a Bench of the Orissa High Court that "this approach is clearly illegal. Mere admission of the thumb-impression or the signature on a blank sheet of paper does not mean an admission of execution, which means that the executant must have signed or put his thumb-impression only after the document is fully read out."<sup>19</sup>

**4. Admission must have been made for purposes of the suit.** The admission here spoken of, which relates to the execution, must be distinguished from the admission mentioned in Section 22 ante, and from that mentioned in Section 65, clause (b) ante, which relate to the contents, existence or condition of a document. The section relates only to the admission of a party in the course of proceedings in which the document is produced, made (for instance) in the pleadings or by the party in his examination.<sup>20</sup>

12. *Ram Nahak v. Sita Dakuani*, I.L.R. 1970 Cut. 368 : A.I.R. 1970 Orissa 82 (86) reversing *Sita Dakuani v. Ram Chandra Nahak*, I.L.R. 1967 Cut. 593 : (1967) 33 Cut.L.T. 811.
13. *Sheik Davood Rowther v. Ramanathan Chettiar*, 1938 Mad. 43 : 176 I.C. 309 : 46 L.W. 610; *Arjun Chandra Bhadra v. Kailash Chandra Das*, A.I.R. 1923 Cal. 149(2) : 70 I.C. 532 : 36 C.L.J. 373 : 27 C.W.N. 263.
14. *Rajani Kanta Barui v. Bonbehari Sarkar*, A.I.R. 1952 Cal. 7 : I.L.R. (1953) 1 Cal. 120 : 56 C.W.N. 9.
15. *Sheikh Davood Rowther v. Ramanathan Chettiar*, supra; *Arjun Chandra Bhadra v. Kailash Chandra Das*, supra; *Benoy Bhushan v. Dharendra Nath Dey*, A.I.R. 1924 Cal. 415 : 74 I.C. 178 : 38 C.L.J. 114; *Hare Krishna Panigrahi v. Jogneswar Panda*, A.I.R. 1939 Cal. 688 : 89 C.L.J. 454 : 43 C.W.N. 1025; *Harinath Ghose v. Nepal Chandra Rai*, I.L.R. (1987) 1 Cal. 507 : 41 C.W.N. 306; *Ebrahim Mandal v. Akshay Konar*, 40 C.W.N. 151 : 62 C.L.J. 25.
16. A.I.R. 1925 P.C. 203 : 52 I.A. 362; I.L.R. 5 Pat. 58 : 89 I.C. 659 : 23 A.L.J. 815 : 27 Bom.L.R. 1144 : 42 C.L.J. 148 : 30 C.W.N. 364 : 49 M.L.J. 240 : 22 L.W. 373 : 1925 M.W.N. 28 : 6 P.L.T. 575 : 3 Pat. L.R. 296 : 2 O.W.N. 641.
17. *Ayenati Shikdar v. Mohammad Esmai*, A.I.R. 1929 Cal. 441 : 49 C.L.J. 347.
18. I.L.R. 29 Cal. 355 : 6 C.W.N. 395.
19. *Radhanath Swain v. Madhusudan Senapati*, A.I.R. 1956 Orissa 58.
20. *Raj Mangal Misir v. Mathura Dubain*, A.I.R. 1915 All. 363 : I.L.R. 38 All. 1 : 30 I.C. 578 : 13 A.L.J. 881; *Banwari Prasad Singh v. Mst. Bigni Kuer*, A.I.R. 1927 Pat. 131 : 101 I.C. 277 : 8 P.L.T. 7; but see *Nageswar v. Bachu*, 53 I.C. 79 : 4 Pat.L.J. 511 : A.I.R. 1919 Pat. 411.

It does not include evidential admissions made before, and sought to be proved by witnesses in a suit.<sup>21</sup>

The certificate of admission of execution endorsed by a registering officer cannot be used as an admission of registration under this section.<sup>22</sup> So also, an admission made to an attesting witness,<sup>23</sup> or in a power-of-attorney.<sup>24</sup> The section speaks of an admission by a party to an attested document of its execution by himself, that is, of its execution by the party concerned. An admission by the representative of a party to an attested document of its execution by the party cannot be treated as an admission of the party to an attested document of its execution by himself.<sup>25</sup>

The view here taken that the admission of a party (at any rate during the course of the trial) will dispense with the necessity of calling the attesting witnesses appears to be at variance with the undermentioned case<sup>1</sup> in which it was held that the only effect of Section 70 is to make the admission of the executant sufficient proof of execution and that the section is not sufficient to dispense with the necessity of proof of attestation to make a mortgage valid under Section 59 of the Transfer of Property Act. It seems to have been assumed in *Abdul Karim v. Salimun*,<sup>2</sup> which was not referred to in the last case, that provided the admission was made during the course of the trial, it would have the effect here submitted. Section 70 is a special provision dealing with attested documents. If the admission of the executant has not the effect of dispensing with proof of attestation, there was no necessity for the section at all, as recourse may be had to the general provisions of the Act relating to admissions, if the admission of execution is to be used only in the sense of an admission of signing only. Attestation is only a form of solemn proof required in certain contested cases by special legislative enactment, and it is difficult to understand why witnesses should be called to prove document against a party who formally admits that it is a valid document as against him.

- 21. Sheikh Davood Rowther v. Ramana-than Chettiar, A.I.R. 1938 Mad. 43 : I.L.R. 1938 M. 523 : 176 I.C. 309 : 1938 M.W.N. 1203 : 46 L.W. 610; Deorao v. Dhondhirao, A.I.R. 1928 Nag. 244 : 110 I.C. 163; Ban-wari Prasad Singh v. Mst. Bigni Kuer, A.I.R. 1927 Pat. 181 : 101 I.C. 277 : 8 P.L.T. 7; Raj Mangal Misir v. Mathura Dubain, A.I.R. 1915 All. 383 : I.L.R. 38 All. 1 : 30 I.C. 578 : 13 A.L.J. 881; Abdul Karim v. Salimun, (1899) 27 C. 190; Gur Charan v. Ram Bharose Singh, A.I.R. 1943 Oudh 218 : 207 I.C. 72 : 1943 O.W.N. 105, and Priyanath v. Bissessur, 1 C.W.N. ccxxii, in which it was held that the admission of execution of a mort-gage in the recitals of subsequent further charges rendered the calling of an attesting witness to the mort-gage unnecessary, the further charges having been proved in the usual way by the evidence of attesting wit-nesses. And see Nageswar v. Bachu, A.I.R. 1919 Pat. 411 : 53 I.C. 79 : 4 Pat.L.J. 511; Aung Rhi v. Ma Aung Kawa Pru, A.I.R. 1924 Rang. 139 (2); I.L.R. 1 Rang. 557 : 77 I.C. 362.
- 22. Timmavua Dundappa Budhial v. Channava Appaya Kanasgeri, A. I. R. 1948 Bom. 322 : 50 Bom.L.R. 260; Abdul Karim v. Salimun, I.L.R. (1899) 27 Cal. 190; Rajmangal Misir v. Mathura Dubain, A.I.R. 1915 All. 383 : I.L.R. 38 All. 1 : 30 I.C. 578 : 13 A.L.J. 881.
- 23. Abdul Karim v. Salimun, I.L.R. (1899) 27 Cal. 190.
- 24. Sheik Davood Rowther v. Ramana-than Chettiar, A.I.R. 1938 Mad. 43 : I.L.R. 1938 Mad. 523 : 176 I.C. 309.
- 25. Benoy Bhushan Roy v. Dhirendra Nath Dey, A.I.R. 1924 Cal. 415 : 74 I.C. 178 : 38 C.L.J. 114.
- 1. Jogendra Nath v. Nitai Charan (1903) 7 C.W.N. 384, ref. to in Arjun Chandra Bhadra v. Kailas Chandra Das, 1923 Cal. 149 (2) : 70 I.C. 532 : (1922) 36 C.L.J. 373 : 27 C.W.N. 263; but see Asharfi v. Nannhi, A.I.R. 1922 All. 153 (1) : I.L.R. 44 All. 127 : 64 I.C. 11 : 19 A.L.I. 855.
- 2. 27 C. 190.

It is, therefore, respectfully submitted that this decision, if it has the effect here attributed to it, is erroneous. The observation, moreover, was *obiter*, as in the case it was found that there was proof of attestation independent of the admission. It has been held that Section 70 was intended to dispense with the calling of attesting witnesses and with formally proving execution in a case where the party admitted it. Therefore, where, in the pleadings, there was admission of execution of an attested document, but the Lower Appellate Court found as a fact that none of the attesting witnesses had seen the executants put their signatures on the deed and therefore deemed it not proved, its decision was reversed on appeal.<sup>3</sup> It has been held that execution of a document means something more than mere signing by the party and includes delivery and signing in the presence of witnesses where witnesses are necessary. Admission in this section means admission of a party to a document which is on the face of it an attested document. No admission is effectual under this section unless it amounts to an acknowledgment of the formal validity of the instrument. Where the admission of execution is unqualified, it may well be equivalent to an admission of due execution, or a waiver of proof of due execution within the meaning of this section.<sup>4</sup> When however, the admission of signature by the defendant is coupled with an express denial that the document was signed in the presence of the attesting witness, the plaintiff must at least call one attesting witness. Such an admission is not sufficient proof of the instrument.<sup>5</sup> In a case in the Calcutta High Court, where one defendant, a sole mortgagor, admitted a mortgage but pleaded satisfaction, and the other defendants, who were subsequent purchasers, impeached the mortgage as fraudulent, it was held that the effect of this section (Section 70) is merely to supersede the necessity of evidence so far as the party admitting is concerned and that therefore it does not dispense with the necessity of complying with the provisions of sections 68 to 70 as against other parties.<sup>6</sup> It has been held that the section applies only to a document which is duly attested and where that is not so, the document is invalid in spite of the party's admission.<sup>7</sup>

3. *Asharfi v. Nannhi*, A.I.R. 1922 All., 153 (1); I.L.R. 44 All. 127; 64 I.C. 11; 19 A.L.J. 855; and see *Kabivan v. Krishna*, 20 C.W.N. xxviii, where one attesting witness was examined by the defendant. In *Jaggarnath v. Raoji*, A.I.R. 1923 Bom. 90; I.L.R. 47 Bom. 137; 76 I.C. 73; 24 Bom.L.R. 1296, it was held that the plaintiff was not put to proof of attestation, distinguishing *Dalichand v. Lotu*, A.I.R. 1920 Bom. 294; I.L.R. 44 Bom. 405; 55 I.C. 616; 22 Bom.L.R. 136.
4. Per Richardson, J., in *Arjun Chandra Bhadra v. Kailas Chandra Das*, 1923 Cal. 149 (2); 7. I.C. 532; (1922) 96 C.L.J. 373; 27 C.W.N. 263 and per Suhrawardy, J., "execution is used in the sense of due execution or execution in the way which a particular document is required to be executed." In *Jaggarnath v. Raoji*, 47 B. 137; 76 I.C. 73; A.I.R. 1923 B. 90, Crump, J., held that where a party admits execution he does not necessarily ad-

5. *mit attestation.*
5. *Arjun Chandra Bhadra v. Kailas Chandra Das*, A.I.R. 1923 Cal. 149 (2); 70 I.C. 532; (1922) 36 C.L.J. 373; 27 C.W.N. 263, referring to *Jogendra Nath v. Nitai Charan*, (1903) 7 C.W.N. 384; *Satish v. Jogendra* (1916) 44 Cal. 345; 24 C.L.J. 175; 20 C.W.N. 1044 and *Nibaran Chandra v. Nagendra Chandra*, A.I.R. 1919 Cal. 1024; 44 I.C. 984; 22 C.W.N. 444.
6. *Satish v. Jogendranath*, A.I.R. 1917 Cal. 693; I.L.R. 44 Cal. 345; 34 I.C. 862; 24 C.L.J. 175; 20 C.W.N. 1044; per Woodroffe, J., distinguishing *Jogendra Nath v. Nitai Charan*, *supra*.
7. *Hira Bibi v. Ram Harilal*, A.I.R. 1925 P.C. 203; 52 I.A. 362; I.L.R. 5 Pat. 58; 89 I.C. 659; 28 A.L.J. 815; 27 Bom.L.R. 1144; 42 C.L.J. 148; 30 C.W.N. 364; 49 M.L.J. 240; 1925 M.W.N. 728; 22 L.W. 373; 3 Pat.L.R. 296; 6 P.L.T. 575; 2 O.W.N. 641.

The admission of a document in evidence at the trial without objection cannot take the place of proof of execution and attestation which would establish it as a mortgage.<sup>8</sup> Although proof of the document may be waived, this does not affect the legal character of the document or its validity.<sup>9</sup>

**5. Admission by heir of the party to such document.** The exemption under this section is available only where the admission is made by the party to the document and not where it is made by an heir to such party.<sup>9-1</sup>

**71. Proof when attesting witness denies the execution.** If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

**Scope and applicability.** This section is one of the exceptions to the rule relating to proof of documents, required by law to be attested, which is laid down in Section 68.<sup>10</sup> It provides that if the attesting witness denies, or does not recollect the execution of the document, its execution may be proved by other evidence. This is a sort of a safeguard introduced by the Legislature to the mandatory provisions of Section 68, where it is not possible to prove the execution of the document by calling attesting witnesses, though alive. The section can only be requisitioned when the attesting witnesses, who have been called, fail to prove the execution of the document by reason of either denying their own signatures, or denying the signature of the testator, or having no recollection as to the execution of the document.<sup>11</sup> The fate of a document is not necessarily at the mercy of the attesting witnesses. The mere fact that the attesting witnesses to a document repudiate their signatures or make statements suggesting that they attested at the instance of persons other than the executant does not invalidate the document, if it can be proved by evidence of a reliable character that they have given false testimony. The principle is well settled that when the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the Statute were complied with; in other words, the Court may, on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they are wilfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the document.<sup>12</sup> The section presupposes that the witness is actually produced before the Court, and then, if he denies execution, or his memory fails, or if he refuses to prove or turns hostile, other evidence can be

8. Banwari Prasad Singh v. Mst. Bigni Kuer, A.I.R. 1927 Pat. 131 : 101 I.C. 277 : 8 P.L.T. 7.
9. Baijnath Singh v. Brijraj Kuar, A.I.R. 1922 Pat. 514 : I.L.R. 2 Pat. 52 : 68 I.C. 583 : 4 P.L.T. 239.
- 9-1. Sri Baladeb Mahaprabhu v. Puni Patrani, (1975) 1 Cut.W.R. 2
10. Jai Karan Das v. Protapsing, A.I.R. 1940 Cal. 189; I.L.R. (1939) 2 Cal. 479; 187 I.C. 718.
11. Vishnu Ramkrishna v. Nathu Vithal, A.I.R. 1949 Bom. 266: 51 Bom. L.R. 245.
12. Nubo Kishore Dass v. Joy Doorga Dossee, 22 W.R. 189; Cooper v. Backett, (1846) 4 Moore P.C. 410: 10 Jur. 931; 13 E.R. 365; Young v. Richard, (1839) 2 Curt 371; Burgoyne v. Showler, 1844 Rob. 5; Brahmamat Tewari v. Chandran Bibi, 1916 Cal. 374: 34 I.C. 686; 20 C.W.N. 192; Mahraj Lal Bihari v. Anjuman-un-nisa, 48 I.C. 538: 5 O.L.J. 667; Mohammad Ziaullah Khan v. Rafiq Mohammad Khan, 1939 Oudh 213: 182 I.C. 190.

admitted to prove execution.<sup>13</sup> Before the section can be applied it is necessary to comply with Section 68, Evidence Act, and to call as a witness one at least of the attesting witnesses.<sup>14</sup> Where the party relying on a document took out summons on one of the attesting witnesses and the witness did not appear and nothing further was done to secure his attendance, it was held that it was not enough to let in further evidence under this section.<sup>15</sup>

If the attesting witness denies, or does not recollect the execution of the document, its execution may be proved by other evidence. In such cases, it is the same as if there were no attesting witness, and the execution may be proved by any other evidence obtainable.<sup>16</sup> If one attesting witness is called and he denies or does not recollect the execution of the document and there is another witness alive who is subject to the process of the Court and capable of giving evidence but is not produced, it is not clear whether the attestation can be proved by other evidence.

According to Prof. Wigmore, the rule regarding proof of an attested document by calling an attesting witness prefers an attestor as a witness; the rule's force is, therefore, not spent until it appears that no attestor can be had; in other words, if there is more than one attestor, all must be shown unavailable before resort can be had to other testimony.<sup>17</sup> The same view has been taken by the Bombay High Court in the case of *Vishnu Ram Krishna v. Nathu Vithal*,<sup>18</sup> where it was observed :

"It is important to note that at least one witness should be in a position to prove the execution of the will. If that attesting witness can prove the execution of the will, the law dispenses with the evidence of the other attesting witness. But, if that one attesting witness cannot prove the execution of the will, then his evidence has to be supplemented by the other attesting witness being called to prove the execution..... Section 71, in our opinion has no application when one attesting witness has failed to prove the execution of the will and other attesting witnesses are available who could prove the execution, if they were called."

In *Avenati Shikdar v. Mohammad Esmail*,<sup>19</sup> Mitter, J., also took the same view but Jack, J., held that the party relying on the document was not bound to call the other attesting witnesses, though alive, whom there are grounds for him to believe to be hostile. In another case, another Bench of the Calcutta High Court held that when one of the attesting witnesses is called and he resiles, there is full compliance with the provisions of Sections 68 and 71, and

- 13. *Hare Krishna Panigrahi v. Jogneswar Pande*, 1939 Cal. 688; 69 C. L. J. 454; 43 C. W. N. 1025; *Bandaru Veeramma v. C. Rama Krishna Sarma*, (1975) 2 A. P. L. J. 364; (1976) 1 An. W. R. 281.
- 14. *Banwari Lal v. Gopinath*, 1931 All. 411; 131 I.C. 557; 1931 A. L. J. 342.
- 15. *Hare Krishna Panigrahi v. Jogneswar Pande*, *supra*.
- 16. See *Talbot v. Hadson*, 7 Taunt. 251; *Bowman v. Hodgson*, L. R. 1

- P. 362; *Wight v. Rogers*, id., 678; the same rule applies where the instrument is lost and the names of the witnesses are unknown; *Keeling v. Ball*, (1796) 2 Peake (Add Cas.) 88; *Lakshman v. Krishnaji*, A. I. R. 1927 Bom. 655; 105 I. C. 769; 29 Bom. L. R. 1425.
- 17. Wigmore, s. 1309.
- 18. A. I. R. 1949 B. 266 at 268; 51 Bom. L. R. 295.
- 19. A. I. R. 1929 C. 441; 49 C.L.J. 347.

the party relying on the document is entitled to prove it by other evidence.<sup>20</sup> The Patna High Court also has held that, if one attesting witness is called and he denies, or does not recollect the execution of the document, then the execution may be proved *aliunde*, and it is not necessary to call another attesting witness, even if he is alive.<sup>21</sup>

In proving the execution of a document the attesting witness frequently states that he does not recollect the fact of the deed being executed in his presence, but that, seeing his own signature to it, he has no doubt that he saw it executed; this has always been received as sufficient proof of the execution.<sup>22</sup> A statement of the attesting witness as to a mortgage-deed that they signed the blank paper and not the completed deed is sufficient to attract the operation of Section 71 and entitles the mortgagee to prove execution by evidence other than that of the attesting witnesses.<sup>23</sup>

The section does not require proof of execution in the presence of the attesting witness. Proof of execution of the document is sufficient.<sup>24</sup>

**72. Proof of document not required by law to be attested.** An attested document not required by law to be attested may be proved as if it was unattested.

**Proof of attestation.** For a long time, it was held, that when a document was attested, even though the law did not require attestation, one at least of the attesting witnesses should be produced. But as this worked great hardship on suitors, the Common Law Procedure Act of 1854,<sup>25</sup> in England, and the Indian Evidence Act of 1855<sup>1</sup> whose provisions on this point are produced in Section 72 (*ante*) introduced the present more reasonable practice.

The section lays down that where a document, not required by law to be attested, is attested by witnesses, it may be proved as it was unattested; that is to say, an attesting witness need not be examined to prove its execution. The superfluous act of getting attested by witnesses of a document not required to be attested, does not attract the provisions of Section 68 of this Act.<sup>2</sup>

Even where the witnesses to a deed of sale are alive, their testimony is not the only evidence by which it can be established. It may be established by any other evidence.<sup>3</sup>

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| <p>20. Hasn Ali v. Guru Das Kapali, A. I. R. 1929 Cal. 188; 116 I. C. 726; 49 C. L. J. 16; 33 C. W. N. 248.</p> <p>21. Mst. Maniki Kaur v. Hansraj Singh, A. I. R. 1938 Pat. 301; 173 I. C. 983; 19 P. L. T. 234.</p> <p>22. Roscoe, N. P. Ev., 135; and cases there cited; Phipson, Ev., 11th Ed., p. 721. See also Benoy Bhushan Roy v. Dharendra Nath Dey, 1924 Cal. 415; 74 I.C. 178; 38 C. L. J. 114.</p> <p>23. Dinabandhu v. Sanatan, 48 I. C. 624.</p> <p>24. Lalita Prasad v. Durshan Singh, A. I. R. 1924 All. 149; 74 I.C. 839; Pateshwari Prasad v. Shankar Dyal, A. I. R. 1924 All. 217; 74 I.C.</p> | <p>969; Narain Das v. Dilwar, 1919 All. 448; I. L. R. 41 All. 250; 52 I. C. 830; Lakshman Sahu v. Gokul Maharania, A. I. R. 1922 Pat. 415; I. L. R. 1 Pat. 154; 70 I.C. 298; but see Lakshman v. Krishnaji, A. I. R. 1927 Bom. 655; 105 I.C. 769; 29 Bom. L. R. 1425.</p> <p>25. 17 &amp; 18 Vict., c. 125, s. 26; and see 28 and 29 Vict., c. 18, ss. 1, 7 (criminal cases).</p> <p>1. S. 37.</p> <p>2. Ram Kishore v. Ambika Prasad, A. I. R. 1966 A. 515; 1966 A. W. R. (H.C.) 57.</p> <p>3. Daitary Mohanti v. Jugo Bundho Mohanti, 23 W. R. 293, 295.</p> |
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See note 3 to Section 68 for illustrative cases.

73. *Comparison of signature, writing or seal with others admitted or proved.* In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

<sup>4</sup>[This section applies also, with any necessary modifications, to finger-impressions.]

s. 3 ("Proved".)  
s. 3 ("Court".)

ss. 45, 46, 47 (Proof of handwriting).

Steph. Dig., Art. 52; Taylor, Ev., ss. 1869–1874; Wharton, Ev., 711–719; Roscoe, N. P. Ev., 138–142; Roger's Expert Testimony, ss. 130–144; Lawson's Expert and Opinion Evidence, 323–416; Harris, Law of Identification, 266, 332.

### SYNOPSIS

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| 1. Principle.  | —Comparison by Court.  |
| 2. Scope.  | 8. Comparison, principles of.  |
| 3. "Purport", meaning of.                            | 9. Value of comparison.  |
| 4. Standard writing must be "proved or admitted."    | 10. Finding based on comparison—Interference in second appeal or revision.       |
| 4-a. "Direct any person present in court."           | 11. Accused, if can be directed to sign or give thumb-impression for comparison. |
| 5. Specimen may be taken by Court—Requested writing. | 12. Article 20 (3) of the Constitution—Effect of.<br>—Rationale of Art. 20 (3).  |
| 6. Comparison in the case of ancient documents.      |  |
| 7. Comparison by whom to be made                     |  |

1. **Principle.** Facts which are not otherwise relevant to the issue are admissible when they can be shown to be for the particular purpose in hand identical with some relevant fact.<sup>5</sup> It is on a similar principle that documents not otherwise relevant to the issue are admissible for the purpose of comparison of handwritings when proved to be in the handwriting of the party whose signature is in question.<sup>6</sup> And see note, post.

4. Ins. by the Indian Evidence Act, 1899 (5 of 1899), S. 3.  
5. Wills, Ev., 2nd Ed., 47; thus where the issue was as to the line of boundary of a particular estate, evidence having been given that the estate

was determinate with a certain hamlet, evidence was admitted to prove the boundary of the hamlet; Thomas v. Jenkins, 6 A & E 525.  
6. 703, Ev., 2nd Ed., 65.

**2. Scope.** In addition to the modes of proving handwriting which have already been dealt with by Sections 47 and 45 ante, there remains direct comparison of the disputed document with one proved or admitted to be genuine under this section,<sup>7</sup> which is in general in accordance with the present English law<sup>8</sup> upon the subject, as amended by Acts of the years 1854 and 1865. Although all proof of handwriting, except when the witness either wrote the document himself, or saw it written is in its nature comparison;<sup>9</sup> it being the belief which a witness entertains, upon comparing the writing in question with an exemplar formed in his mind from some previous knowledge—yet the English law, until the first of the abovementioned dates did not allow the witness, or even the jury, except under certain special circumstances, actually to compare two writings with each other, in order to ascertain whether both were written by the same person. But the English rule is now otherwise.<sup>10</sup> By the terms of the section, any writing, the genuineness of which is admitted or proved<sup>11</sup> to the satisfaction of the Court, may be used for the purposes of comparison, although it may not be relevant or admissible in evidence for any other purpose. The section empowers Courts to compare admitted and disputed writings for the purposes of forming their own opinions. The rule of caution is not to base a conclusion entirely upon the Court's own comparison, because the function of the Court is distinct from, and above the role of, an expert witness, giving evidence on handwriting which is tested by cross-examination.<sup>12</sup> The Court has, however, to form its own opinion with the aid of all the permissible methods, and to arrive at a conclusion where a conclusion can safely be arrived at, as, for instance, where the conclusion of the Court, after comparing the admitted and disputed writings, coincides with the opinion of the expert and is further corroborated by other pieces of evidence. The method contemplated, by this section ought to be employed by the Court to test and find corroboration or contradiction of the opinion of the expert. The Court does not, in such a case, function as a handwriting expert itself, but it acts as the authority charged with the duty of arriving at a conclusion, with the aid of all the data upon the record, by all the legally permissible means at its command.<sup>13</sup> Although if there is no evidence, as regards the genuineness of the signature, the Court cannot rely on its own examination of the signature to supply the evidence, because the Judge cannot treat himself as an expert, yet he can use his own eyes and

7. The section differs in its terms from the corresponding Sec. 48 of the repealed Act II of 1855 which was as follows :

"On an inquiry whether a signature, writing or seal is genuine, any undisputed signature, writing or seal of the party whose signature, writing or seal is under dispute may be compared with the disputed one, though such signature, writing or seal be on an instrument which is not evidence in the cause." As to S. 48 of Act II of 1855, see R. v. Amanoollah, (1866) 6 W. R. (Cr.) 5.

8. See 28 and 29 Vict., c. 18, ss. 1, 8; Taylor, Ev., ss. 1869-1874.

9. See S. 47 ante.

10. Taylor, Ev., s. 1869; Lawson, op. cit, 324.

11. See Phoodee v. Gobind, (1874) 22 W. R. 272; R. v. Kartik, (1868) 5 R. C. and C. R. Cr. Rul. 58, 62; R. v. Amanoollah, (1866) 6 W. R. (Cr.) 5; Puran v. Grish, (1868) 9 W. R. Civ. R. 450. In Tara v. Luchee, (1873) 21 W. R. 6, certain ryots swore that they got their paatahs from the hands of the persons who purported to sign them; this was held to be sufficient proof under this section that the signatures were those of the lessor.

12. Bhagwandin v. Gauri Shankar, A. I. R. 1957 A. 119; Fazaladdin v. Panchanan Das, A. I. R. 1957 C. 92; Devi Prasad v. State, A. I. R. 1967 A. 64; 1967 Cr. L. J. 134.

13. Bisseswar v. Nabawip Chandra, A. I. R. 1961 C. 300; 64 C. W. N. 1967; Devi Prasad v. State, supra.

look at the admitted signature, along with the disputed signature, to decide whether the evidence, that has been given as regards the genuineness of the document, should be believed or not.<sup>14</sup>

In *Sarojini Dassi v. Hari Das Ghose*,<sup>15</sup> referring to the exposition of the methods of proving handwriting given by Jenkins, C. J., in the case of *Barindra Kumar v. Emperor*,<sup>16</sup> the law on the subject was laid down as follows :

"The ordinary methods of proving handwriting are : (1) by calling as a witness a person who wrote the document or saw it written, or who is qualified to express an opinion as to the handwriting by virtue of Section 47 of the Evidence Act ; (2) by a comparison of handwriting as provided in Section 73 of the Evidence Act ; and (3) by the admission of the person against whom the document is tendered. A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear. In applying the provisions of Section 73 of the Evidence Act, it is important not to lose sight of its exact terms. It does not sanction the comparison of any two documents, but requires that the writing with which the comparison is to be made, or the standard writing as it may be called, shall be admitted or proved to have been written by the person to whom it is attributed, and next the writing to be compared with the standard, or, in other words, the disputed writing must purport to have been written by the same person, that is to say, the writing itself must state or indicate that it was written by that person."<sup>17</sup>

Under this section the Court is authorised to compare the disputed signature with signatures which are admitted or proved in order to ascertain whether the disputed signature was made by the person, by whom it is alleged to have been made. Where the Court has before it opinions which are declared relevant facts under Section 45 or Section 47 of the Evidence Act, the Court may base its conclusion, in a proper case, solely on such opinions and decide on the basis of these opinions whether the disputed signature was made by the person by whom it purports to have been made. But, where the Court bases its conclusion solely on its own opinion arrived at, as a result of comparison of the disputed signature with the admitted or proved signatures, the decision of the Madras High Court is to the effect that the Court's judgment cannot be called in question on the ground that it is not based on evidence.<sup>18</sup>

It is not that, in the absence of expert evidence on the question of genuineness or otherwise of the disputed documents, or the signatures of the executants the Court cannot use its own eyes and compare for itself the disputed writings or signatures with the admitted ones.<sup>19</sup> Indeed, there is no legal bar to the Judge using his own eyes to compare disputed signatures with

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| <p>14. Fazaladdin v. Panchanan Das, A.I.R. 1957 C. 92; Devi Prasad v. State, A.I.R. 1967 A. 64 : 1967 C.L.J. 134.</p> <p>15. A. I. R. 1922 Cal. 12; I. L. R. 49 Cal. 235; 66 I.C. 774.</p> <p>16. I. L. R. 37 Cal. 467; 7 I.C. 359; 11 Cr. L. J. 453; 14 C. W. N. 1114, which was followed in <i>Pullin Behari v. King-Emperor</i>, 16 I.C. 257; 15 C. L. J. 517; 16 C. W. N. 1105.</p> | <p>17. Cited with approval in <i>Latafut Hussain v. Onkar Mal</i>, A. I. R. 1935 Oudh 41 at 44; I. L. R. 10 Luck. 423; 152 I.C. 1042.</p> <p>18. <i>Vazir Begum Animal v. Seth Tholaram</i>, 73 L. W. 19; 14 I.C. 741, and (1956) 2 M. L. J. 399 referred to; A. I. R. 1957 Cal. 92 considered.</p> <p>19. <i>Bhupendra Narain v. Narain Lal</i>, A. I. R. 1965 Pat. 332.</p> |
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admitted ones even without the aid of any evidence of a handwriting expert.<sup>20</sup> The Supreme Court has held that it is not essential that a handwriting expert must be examined in a case to prove or disprove the disputed writing. A Court is competent to compare the disputed handwriting of a person with others which are admitted or proved to be his writing.<sup>21</sup>

There is nothing to prevent the Court comparing disputed writings or signatures with admitted ones for itself and it may do so in the presence of and with the assistance of lawyers appearing in the case.<sup>22</sup>

A comparison of handwriting as a mode of proof, is hazardous and inconclusive, specially when it is made by any one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts.<sup>23</sup> But, if the finding of the Court as to a document being in the handwriting of a particular person is based, not only upon a comparison of the handwriting but also on the surrounding circumstances, and there is also positive evidence of a witness who has proved the handwriting of the person, the finding is entitled to weight.<sup>24</sup>

It is a rule of caution and prudence that where the Court considers that the opinion of an expert would be of assistance in coming to a decision, it may call for the evidence of an expert. But the Court is not precluded from coming to its own conclusion in cases, where it is fully familiar with the language and script of the document which is the subject-matter of scrutiny before it, and where it has assistance in such scrutiny of the lawyers for the parties. If, on the face of it, the Court can come to a conclusion that the document in question contains alterations and interpolations, or can form its opinion on the matter before it, it is not bound to seek the assistance of an expert.<sup>25</sup>

**3. "Purport", meaning of.** In the exposition of the law in *Barindra Kumar v. Emperor*,<sup>25-1</sup> by the Calcutta High Court, the second requisite of the section has been stated to be that the "disputed writing must purport to have been written by the same person, that is to say, the writing itself must state or indicate that it was written by that person". But there seems to be no object in limiting the scope of the section to documents which are signed or contain some intrinsic statement of the identity of the writer.

In the second portion of the section under construction the word used is "alleged", and as from the context it is clear that no contradiction between

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| 20. Bhupendra Narain v. Narain Lal,<br>1965 Pat. 332; Biseswar v. Nabardip Chandra, A.I.R. 1961 C. 300;<br>64 C.W.N. 1067.<br>dرا, A. I. R. 1961 C. 300: 64 C.<br>W. N. 1067.   | A. I. R. 1961 Pat. 451 (456): 1961<br>B. L. J. R. 411; Kam Sabhag Singh<br>v. Emperor, A. I. R. 1937 Pat.<br>146; Azmat v. Shiambal, A. I. R.<br>1947 All. 411; J. C. Galstaun v.<br>Sonatan Pal, A. I. R. 1925 Cal. 485<br>(in the last two cases the practice of<br>judge declaring whether a disputed<br>signature agrees with other signatures<br>of certain person without the<br>assistance of any evidence but<br>merely on his own inspection has<br>been disapproved by experienced<br>judges in many cases). |
| 21. State of Gujarat v. Vinaya Chandra,<br>(1967) 1 S. C. R. 249: 1967 S.<br>C. D. 414; (1967) 1 S. C. J. 821:<br>(1967) 1 S. C. W. R. 391; 1967<br>A. W. R. (H.C.) 422: 1967 Cr.<br>L. J. 668: 8 Guj. L. R. 140; 1967<br>M. L. J. (Cr.) 442: A. I. R. 1967<br>S.C. 778 (780); State v. Tribikram<br>Bohidar, 37 Cut. L. T. 714 (721).<br>24. Ibid. | Ibid.  |
| 22. Darshan Singh v. Parbhu Singh, 1<br>L. R. 1946 A. 150; A. I. R. 1946<br>A. 67.  | 25. Bhaggu v. Manni Prasad, A. I. R.<br>1965 A. 202: 1965 A. L. J. 952.<br>274 L.L.R. 97 Cal. 357: 7 I.C. 369;<br>11 Cr.L.J. 591: 14 C.W.N. 1114.  |
| 23. State of Bihar v. Kailash Prasad.   |  |

the two words could have been intended, the impression left on the mind is that the two must have been used to express the same idea. So, any document alleged by a party to be in the handwriting of a particular person may, for the purpose of proof, be compared with another writing or signature admitted or proved to the satisfaction of the Court to have been made or written by that person.<sup>1</sup> In a case it has been said that what is meant by the second condition in the above exposition of the law by the Calcutta High Court is this :

"Suppose the disputed signature in a document runs as 'Sacchariah Nehemiah, son of Jesudasan' and it is alleged that the real man who affixed the signature and took on the liability under the promissory note is Ramanathan, son of Vishwanathan, whose admitted signature is tendered for comparison, no Court can by any amount of comparison of the two handwritings hold Ramanathan to be the person liable for the signature running Sacchariah Nehemiah, son of Jesudasan. Even if the signature in the disputed document runs as Swaminathan of Mylapore, but there is no description of that particular Swaminathan, and there is evidence that there are many Swaminathans in Mylapore, and it cannot be proved that the person on whom the liability is sought to be foisted is the person described in the promissory note, the second condition will not be satisfied."<sup>2</sup>

4. Standard writing must be "proved or admitted". It has been held that the evidence of a handwriting expert is only admissible under Section 45 when the writing with which the comparison is to be made has been admitted or proved to be the writing of the person alleged.<sup>3</sup> This section requires that the writing with which the comparison is to be made or the standard writing, as it may be called shall be admitted or proved to have been written by the person to whom it is attributed.<sup>4</sup> Any comparison of a disputed signature will be only useful when it is done with an admitted signature, otherwise, it will be a case of blind leading the blind.<sup>5</sup> It would be an error to take for a standard a signature in a deed sought to be set aside as spurious.<sup>6</sup> Writings which it is sought to use against accused persons for purposes of comparison should be clearly proved before being so used.<sup>7</sup> The same principle applies in case of a thumb-impression.<sup>7-1</sup> No one in a criminal trial can admit anything on behalf of an accused person except the accused him-

1. Veeraraghava v. Souri, A. I. R. 1919 Mad. 951; 48 I.C. 68; 35 M.L.J. 608; 8 L.W. 625; Emperor v. Ganpat Balkrishna, 15 I.C. 649; 13 Cr. L.J. 505; 14 Bom. L.J. 310.
2. Narasimha v. Someswar, A. I. R. 1957 Mad. 210; (1956) 2 M.L.J. 399.
3. Suresh v. R., (1912) 39 C. 606; 14 I.C. 753; 16 C.W.N. 812; see also Debendra v. Abdul, (1909) 10 C.L.J. 150; Doe v. Vickers, 4 Ad. and E 78; Doe v. Stone, 3 C.B. 176.
4. Barindra Kumar v. Emperor, I.L.R. 37 Cal. 467; 7 I.C. 359; 11 Cr. L.J. 453; 14 C.W.N. 1114; Pul-

- lin Behari v. King-Emperor, 16 I.C. 257; 15 C.L.J. 517; 16 C.W.N. 1105; Sarojini Dasi v. Haridas Ghose, A.I.R. 1922 Cal. 12.
5. Vembu Amal v. Esakkia Pillai, A.I.R. 1949 Mad. 419; (1949) 1 M.L.J. 71; 1949 M.W.N. 47; Gaffar Baksh Khan v. Emperor, A.I.R. 1927 Pat. 408; 101 I.C. 187.
6. Puran v. Grish, 9 W.R. 450 (Civ.).
7. R. v. Kartik, (1868) 5 R.C. and C.R. Cr. Rul. 5862; R. v. Amanullah, (1866) 6 W.R. (Cr.) 5.
- 7-1. Krishna Chandra v. Commissioner of Endowments, A.I.R. 1976 Orissa 52.

self or herself. If signatures are to be taken as admitted signatures they must be admitted by the accused himself or such signatures must be proved.<sup>8</sup> It has been doubted whether fictitious specimens may, on cross-examination, be submitted to a witness in order to impeach his testimony; but it has been frequently employed in practice.<sup>9</sup>

4-a. "Direct any person present in Court". The words 'any person' in the expression 'direct any person present in Court' are wide enough to cover an accused person.<sup>10</sup>

The occasion for direction by the Court under the section can arise only when the, Court feels that it is necessary for its own use. This power of the Court can be exercised by the Court itself and not at the instance of one or the other party before the Court to assist that party in getting it compared by expert and produce him as his own witness.<sup>10-1</sup> However, in some other cases it has been held that the power to give direction under this section can be exercised at the instance of a party because comparison got made by any party is ultimately for the purpose of satisfying the Court.<sup>10-2</sup>

Where the accused is not before the Court, the Magistrate has no power to ask the accused person to go to the police and give specimens of his signature and handwriting. The police despite their wide powers of investigation under Sections 156 and 157, Cr. P. C., cannot compel an accused person to give his specimen signature and handwriting for that would be against the express provisions of this section.<sup>11</sup> If a person ordered by the Court to give his thumb-impression or signature and he refuses to comply with the order, the Court can legally draw a presumption under any other provision of the law, like Section 114 post. But the Court cannot order that the thumb-impression of an accused person be taken forcibly in such a case and the same taken forcibly cannot be taken into consideration in deciding the guilt of the accused person.<sup>12</sup> On refusal of the person so directed to give specimen writing the Court is entitled to draw an inference adverse to him.<sup>12-1</sup>

8. Taru Bala v. The State, A. I. R. 1953 Cal. 307: 56 C. W. N. 738.
9. Phipson, Ev., 11th Ed., p. 141.
10. King-Emperor v. Tun Hlaing, I.L.R. (1923) 1 Rang. 759 : A.I.R. 1924 Rang. 115 (F.B.); Emperor v. Ramrao Mangesh, I. L. R. (1932) 56 Bom. 304; A. I. R. 1932 Bom. 406; State v. Parameswaran Pillai, 1952 Ker.L.T. 310 (F.B.); Adoy-sious John v. State of Kerala, 1966 M. L. J. (Cr.) 298; 1965 Ker. L. J. 950; (1965) 2 Ker. L. R. 269; 1965 Ker. L. T. 1129 (1132, 1133); Hiralal Agarwalla v. The State, A. I. R. 1958 Cal. 123; State v. Gupta, A. I. R. 1958 Bom. 207; Trikomal v. State, (1964) 1 Cr. L. J. 94 (Guj.); T. Subbiah v. S. K. B. RamaSwamy Nadar, 1969 M. L. J. (Cr.) 117; 1970 Cr. L. J. 254; A. I. R. 1970 Mad. 85. But see *contra*: Gulzar Khan v. State, A. I. R. 1962 Pat. 255 (F.B.) which is against the preponderance of authority above said.
- 10-1. Pali Ram v. State, 1975 Cr. L. J. 1756 (Delhi); B. M. Kapadia v. I. D. Kabrawala, A. I. R. 1975 Guj. 95; (1975) 16 Gui. L. R. 66.
- 10-2. I. L. R. (1972) 1 Delhi 717; Rami Reddy v. State of A. P., (1971) 2 Andh.-W. R. 94; (1971) 2 A. P. L. J. 174; 1971 M. L. J. (Cr.) 481.
11. Aloysious John v. State of Kerala, 1966 M.L.J. (Cr.) 298; 1965 Ker. L.J. 950; (1965) 2 Ker. L. R. 269; 1965 Ker.L.T. 1129 (1132, 1133); Hiralal Agarwalla v. The State, A. I. R. 1958 Cal. 123; State v. Gupta, A. I. R. 1958 Bom. 207; Trikomal v. State, (1964) 1 Cr. L. J. 94 (Guj.); T. Subbiah v. S. K. B. RamaSwamy Nadar, 1969 M. L. J. (Cr.) 117; 1970 Cr. L. J. 254; A. I. R. 1970 Mad. 85. But see *contra*: Gulzar Khan v. State, A. I. R. 1962 Pat. 255 (F.B.) which is against the preponderance of authority above said.
12. Jalaluddin v. State, 1968 All. Cr. R. 375; 1968 A. W. R. (H.C.) 590.
- 12-1. Bandia Naik v. State, 1974 Cut. L. P. (Cr.) 19; (1972) 2 Cut. W. R. 1557; I. L. R. (1972) Cut. 1232.

The section is not applicable to a case at the stage of revision, for formation of opinion at that stage by the Court on the basis of comparison of the disputed signature with an admitted signature would be bringing in additional material.<sup>13</sup>

The Court can also direct a party to appear before it for giving specimen of writing or impression for comparison.<sup>13-1</sup>

**5. Specimen may be taken by Court.** The party whose writing is in dispute may also be required to write, for purpose of comparison, in the Judge's presence, and such writing will then itself be admissible.<sup>14</sup> Though this provision is useful, yet the comparison will often be less satisfactory, as a person may feign or alter the ordinary character of his handwriting with the very view of defeating a comparison.<sup>15</sup>

*Requested writing.* The securing of requested writing in court is more involved than obtaining exemplars for comparison. In obtaining requested writings, the Court should expect and an attempt will be made to disguise writing characteristics. It is unwise to show the witness or accused the questioned document before requesting samples of his writing. Effort should be made to have pen, ink and paper or pencil and paper, as the case may be, which will approximate those used in making the questioned signature. It is suggested by Leland that the subject may be permitted to write a series of papers, that his writing may be interrupted from time to time and that he be given a fresh sheet of paper each time. He should also be requested to write the same or similar material as contained in the document. This is preferable to having a suspect write a long column of signatures or to keeping the requested writing on one sheet of paper, for supplying him with new paper gives him less opportunity to disguise his writing. If questioned document involves any signature, the suspect should be first asked to write a different signature which includes an identical combination of letters. If the Court has any knowledge as to the position the forger was in at the time he did the writing—standing, sitting or lying down—the suspect should be requested to make exemplars in a similar position. It is often important to have the suspect write at different sittings or better still on different days. Such a procedure will bring out natural variations in his writing.<sup>16</sup> Requested writings should be on the same type of paper, and of the same colour of ink and the same kind of medium, as were used in the disputed handwriting, as far as possible.<sup>17</sup>

13. Hardevi Malkani v. State, 1968 A. L. J. 466; 1969 Cr. L. J. 1089; A. I. R. 1969 All. 423 (431).
- 13-1. M. Narayanaswami v. V. Yangattanna, A. I. R. 1975 A. P. 88 : I. L. R. (1975) A. P. 578; (1974) 2 A. P. L. J. 178; (1974) 2 Andh. W. R. 365.
14. See second clause of section and Cobbett v. Kilmminster, 4 Fost and Fin. 490; Dugd Devine v. Wilson, 10 Moo. P. C. R. 502, 530; Rogers, op. cit., s. 142. In America it has been held that a party cannot be compelled in cross-examina-

- tion to write his name: ib., and the section says "the Court may direct".
15. Norton, Ev., 256; see observations of the Privy Council in Jaswant Singh v. Sheo Narain, (1899) 16 A. 157, 161; 21 I. A. 6.
16. Leland Jones' Scientific Investigation and Physical Evidence, p. 114. See discussion in Biseswar v. Nabawip Chandra, A. I. R. 1961 Cal. 300: 64 C. W. N. 1067.
17. Abdul Gani v. Devi Lal, A. I. R. 1960 Raj. 77; I. L. R. (1960) 10 Raj. 152.

**6. Comparison in the case of ancient documents.** The genuineness of ancient documents, i. e. more than 30 years old, may be proved by comparison with other ancient documents which have been shown to have come from proper custody and to have been uniformly treated as genuine.<sup>18</sup> The witness should generally have before him in Court, the writing compared. It has, however, been held in America that where the loss of the original writing has been clearly proved, the opinion of an expert is receivable as to the genuineness of the signature to the lost instrument, he having examined the signature prior to its loss and compared his recollection of such signature with the admitted genuine signature of the same person on papers already in the case.<sup>19</sup> The original and not the copy is what the Court must act upon. Copies of any kind, whether photographic or otherwise, are merely secondary evidence and cannot be used as equivalent to primary evidence. But when the use of photographic copies is not objectionable, as being an attempt improperly to use secondary evidence as equivalent to primary evidence, magnified photographic copies of the writing in dispute and of admitted genuine writings of the same person have been received in evidence, competent preliminary proof having been given that the copies were accurate in all respects except as to size and colouring.<sup>20</sup>

It has been held under the English Act that all the documents sought to be compared must be in Court.<sup>21</sup>

**7. Comparison by whom to be made.** The section does not specifically state by whom the comparison may be made, though the second paragraph of the section dealing with a related subject expressly provides by way of contrast that in that particular connection the Court may make the comparison.<sup>22</sup> The comparison can be made either by witness acquainted with the handwriting,<sup>23</sup> or by expert witnesses skilled in deciphering handwriting,<sup>24</sup> or without the intervention of any witnesses at all, by the jury themselves,<sup>25</sup> or in the event of there being no jury, by the Court.<sup>1</sup> But it has been held by

18. Taylor, Ev., ss. 1873-1874.

19. Roger's Expert Testimony, s. 139.

20. ib., S. 140. In Haynes v. McDermott, 82 N. Y. 41, the New York Court said: "We may recognise that the photographic process is ruled by general laws that are uniform in their operation and that almost without exception a likeness is brought forth of the object set before the camera. Still somewhat for exact likeness will depend upon the adjustment of the machinery, upon the atmospheric conditions and the skill of the manipulator, etc." Other circumstances were mentioned in a preceding case (Taylor Will Case, 10 Abr. Pr. N. S. 300) such as the correctness of the lens, the state of the weather, skill of the operator, the colour of the impression, the purity of the chemicals, accuracy of forming the angle at which the original was inclined to the sensitive plate, the possible fraud of the operator, etc.

21. Arbon v. Fussell, (1862) 3 F. & Fr. 152.

22. Sarojini Dassi v. Hari Das Ghose, A.I.R. 1922 Cal. 12.

23. S. 47 ante, the witness need not be a professional expert or a person whose skill in the comparison of handwritings has been gained in the way of his profession or business; such a question is one of weight only; R. v. Silverlock, (1894) 2 Q.B. 766. As to the opinions of native Judges on native writings, see Rajendra v. Jogendra, (1871) 7 B. L. R. 216, 233.

24. S. 45 ante.

25. Khijruddin v. Emperor, A.I.R. 1926 Cal. 139: I.L.R. 53 Cal. 372: 92 I.C. 442. See Cobbett v. Kilminster, 4 Fost. & Fin. 490, and observations as to comparison by a jury in R. v. Harvey, '11 Cox. 546, 548.

1. Taylor, Ev., s. 1870; Sarojini Dassi v. Hari Das, A.I.R. 1922 Cal. 12; Khijruddin v. Emperor, supra; Lila Sinha v. Bijoy Protap, A.I.R. 1925

the Bombay High Court that the second clause limits the power of the Court to directing a person present in Court to write any words only if it is of the view that it is necessary for its own purposes to take such writing in order to compare what is written with what is alleged to have been written by such person. Such a power does not extend to permitting one or the other party before the Court to ask the Court to take such writing for the purpose of its evidence.<sup>2</sup>

It is open to the Court to give a direction to any party (before the Court) to give his writing in Court for the purpose of comparison by the handwriting expert.<sup>3</sup>

*Comparison by Court.* It is not essential that a handwriting expert must be examined to prove or disprove a writing. The Court is competent to compare the disputed writing with writing admitted or proved to be that of the person concerned. Of course the court may get the writing compared by expert and examine him if it thinks fit to do so but it is not bound to do so.<sup>3-1</sup> It is not necessary that the comparison by the Court should be made in open court so as to make it an open debate in which counsel or parties are to join. It is a subjective process and the Court can make comparison while preparing the case for judgment.<sup>3-2</sup> Though it is open to Court to make the comparison itself, it is not safe to base conclusion merely on such personal comparison; it is always advisable to take assistance of an expert<sup>3-3</sup> and use his comparison as an aid for appreciation of evidence.<sup>3-4</sup>

There is no rule that in every case where a signature is denied expert opinion must be called for.<sup>3-5</sup> Opinion of expert is not binding on court, it is justiciable.<sup>3-6</sup>

Cal. 768 : 87 I.C. 534; 41 C.L.J. 300; Latafat Hussain v. Onkar Mal, A.I.R. 1935 Oudh 41 : I.L.R. 10 Luck. 423 : 152 I.C. 1042. See also S. C. Gupta v. Emperor, A.I.R. 1924 Rang. 17 : I.L.R. 1 Rang. 290 ; 73 I.C. 425 : 25 Cr.L.J. 185; Ganpatrao v. Vasantrao, A.I.R. 1932 Bom. 588 : 34 Bom.L.R. 1371; Rudragouda v. Basangouda, A.I.R. 1938 Bom. 257 : 175 I.C. 361 : 40 Bom.L.R. 202; Gondu v. Tulsiram, A.I.R. 1930 Nag. 27 : 120 I.C. 335.

2. State v. Poonamchand Gupta, I.L.R. 1958 Bom. 299 ; A.I.R. 1958 Bom. 207.

3. M. Rama Rao v. Smt. Laxmi Amma, (1969) 2 Mys.L.J. 158 (159); State v. Gopala Rao, 34 Mys.L.J. 35 : A.I.R. 1954 Mys. 117.

3-1. State of Gujarat v. Vinaya Chandra, (1967) 1 S.C.R. 249 : 1967 S.C.D. 414 : (1967) 1 S.C.J. 821 . (1967) 1 S.C.W.R. 391 : 1967 A.W.R. (H.C.) 422; 1967 Cr.L.J. 668 : A.I.R. 1967 S.C. 778; State v. Tribikram, 37 Cut.L.T. 714; Bhupendra Narain v. Narain Lal, A.I.

R. 1965 Pat. 332; Bissesarw v. Nabdwip, A. I. R. 1961 Cal. 300: 46 C. W. N. 1067; Iswar Chandra Mohanty v. Ram Nath Lal, A.I.R. 1978 Orissa 156 : (1978) 45 Cut.L.T. 447; Iqbal Ahmad v. Ketaki Devi, 1976 Cr.L.J. 244 (Alld); Saligram v. State, 1973 Cr.L.J. 1030 : I.L.R. (1972) H.P. 231 : (1972) 2 Sim.L.J. 335; R. G. Futane v. Mohd. Kasam, 1973 Mah.L.J. 511; Kamlesh Kumari v. B. S. Bedi, A. I. R. 1973 P. & H. 152 : 1972 Cur.L.J. 881; K. Jagannmohan Rao v. K. Swarup, (1972) 2 M.L.J. 77 : 85 M.L.W. 484.

3-2. Seetha Mahalakshmi v. Gelam Veeraraju, (1970) 1 Andh.L.T. 64.

3-3. R. G. Futane v. Mohd. Kasam, 1973 Mah.L.J. 511.

3-4. K. C. Swain v. Dhoby Barik, (1974) 1 C.W.R. 58; Kamlesh Kumari v. B. S. Bedi, A.I.R. 1973 Punj. 152 : 1972 Cut.L.J. 881.

3-5 Panchalal v. Ganeshi Lal, A.I.R. 1973 Raj. 12.

3-6. Ibid.

Comparison of writing is one of these tests which, ordinarily, Appellate Courts are quite as competent to apply as Courts of first instance.<sup>4</sup>

**8. Comparison, principles of.** "In all cases of comparison of handwriting, the witnesses, the jury and the Court may respectively exercise their judgment on the resemblance or difference of the writings produced. In doing so, they will sometimes derive much aid from the evidence of experts with respect to the general character of the handwriting,—the forms of the letters, and the relative number of diversified forms of each letter,—the use of capitals, abbreviations, stops and paragraphs—the mode of effecting erasures or of inserting interlineations or corrections, the adoption of peculiar expressions, the orthography of the words, the grammatical construction of the sentences and the style of the composition, and also on the act of one or more of the documents being written in a feigned hand."<sup>5</sup> It must be borne in mind that although from the dissimilarity of signatures a Court may legitimately draw the inference that a particular signature is not genuine because it varies from an admittedly genuine signature yet resemblance of two signatures affords no safe foundation that one of them is genuine. Now it may be conceded that if two signatures are exactly identical, there is room for suspicion that the one in question may be a copy or careful imitation of the genuine signature. It is a fact well known and may be readily verified, that no two signatures actually written in the ordinary course of writing them are precisely alike.

The character of a person's signatures is generally of uniform appearance, and the resemblance between one and another signature of the same person is thus apparent, but the coincidence is seldom known where a genuine signature of a person superposed over another genuine signature of the same person is such a facsimile that one is a perfect match to the other in every respect. There is generally diversity in the makes of the pen, the size of the letter, the level of the signature and space it occupies that stands as a guard over the genuine signature and characterises it as the true signature.<sup>6</sup>

It is difficult to say that a signature is a forgery because certain letters in the disputed signature appeared to have been written in a halting hand.<sup>7</sup> It is not fair to compare the free handwriting spread over a folio page, with plenty of space, and a post-card in which the writer has to condense all he wishes to say, in the exiguous space provided by the post office. The writing must necessarily be far more cramped, and naturally various letters in the post card writing would differ from the writing which is not compared.<sup>8</sup>

As was observed by Coleridge, J., in *Doe v. Suckermore*,<sup>9</sup> "the test of genuineness ought to be the resemblance not to the formation of letters in some other specimen or specimens but to the general character of the writing which is impressed on it as the involuntary and unconscious result of constitution, habit or other permanent cause and is, therefore, itself permanent".

4. R. v. Amanoollah, 6 W.R.Cr. 5 at 6; and see Phoode v. Gobind, (1874) 22 W.R. 272.

5. Taylor, Ev., s. 1871. See also the observation in *Vadrevu Annapurnamma v. Vadrevu Bhima*, A.I.R. 1960 Andh. Pra. 359.

6. Sarojini Dassi v. Hari Das, A.I.R.

1922 Cal. 12.

7. J. C. Galstaun v. Sonatan Pal, A.I.R. 1925 Cal. 485 : 78 I.C. 668.

8. Irabasappa v. Bhadrawa, A.I.R. 1922 Bom. 296: 80 I.C. 189.

9. (1886) 5 A. & E. 703 : 7 L.J. (N. S.) K.B. 38 : 2 N. & P. 16.

Again as Sir J. Nicholl said in *Robson v. Rocke*,<sup>10</sup> "the best, usually perhaps, the only proper evidence of handwriting is that of persons who have acquired a previous knowledge of the party's handwriting from seeing him write and who form their opinion from the general character and manner of these, and not from criticising the particular letters."

**9. Value of comparison.** It is to be observed with regard to documents not written in Court that many men are capable of writing in several different hands; and consequently, where the object they have in view is to relieve themselves from liability nothing can be easier than to produce to the Court genuine documents which have been written for the express purpose of proving that no similitude exists between them and the writing in dispute.<sup>11</sup> A comparison of writings, therefore, for this and other reasons is made for ascertaining the truth which ought to be used with very great caution,<sup>12</sup> especially if no skilled witness has been called to make the comparison.<sup>13</sup> So, with regard to seals it has been judicially observed that "at the best, the test of comparison between the impression of one native seal and another is but a fallible one and must always be received with extreme caution".<sup>14</sup> It is no doubt open to a Court to express its own opinion about the identity or otherwise of a disputed handwriting or thumb-impression, but it would not be safe to base a conclusion entirely on such a comparison.<sup>15</sup> Conclusions based on mere comparison of handwriting must, at best, be indecisive, and yield to the

10. (1824) 2 Add. 53 : 162 E.R. 215.
11. Taylor, Ev., s. 1872 : the method of proof dealt with by this section commonly called "by comparison of hands", has met with strong opposition both in England and America from its doubtful value and supposed dangers; Best, Ev., p. 239.
12. Phaedee v. Gobind, (1874) 22 W.R. 272, per Markby and Romesh Chauder Mitter, JJ.; see Nobin v. Rassick, (1884) 10 C. 1047, 1051 (evidence by comparison held not to be sufficient); Kurali v. Anantaram, (1871) 8 B.L.R. 490, 502 : 16 W.R. 16 (P.C.) (finding of forgery on comparison of handwriting only disapproved); Sarojini Dassi v. Haridas Ghose, A.I.R. 1922 Cal. 12; Ambika Charan Barua v. Nareshwari Dasi, A.I.R. 1925 Cal. 145 : 85 I.C. 525 : 29 C.W.N. 75; Emperor v. Ramrao Mangesh, A.I.R. 1932 Bom. 406 : I.J.R. 56 Bom. 304 : 138 I.C. 708 ; 33 Cr. L.J. 666 : 34 Bom.L.R. 598; Bissesswar v. Nababwip Chandra, A.I.R. 1961 Cal. 300 : 64 C.W.N. 1067.
13. R. v. Silverlock, (1892) 2 Q.B. 766; R. v. Harvey, 101 Cox. 546; Romesh Chunder v. Rajani Kant, I.L.R. 21 Cal. 1; Sarojini Dassi v. Hari Das Ghose, *supra*; J. C. Galstaun v. Sonatan Pal, A.I.R. 1925 Cal. 485 : 78 I.C. 668; Darshan Singh v. Parbhu Singh, A.I.R. 1946 All. 67 : I.L.R. 1946 All. 130 : 1945 A.L.J. 426; Azmat Ullah Khan v. Shiam Lal, A.I.R. 1947 All. 411 : 1947 A.L.J. 110; Laafat Hussain v. Onkar Mal, A.I.R. 1935 Oudh 41 : I.L.R. 10 Luck. 423 : 152 I.C. 1042 : 11 O.W.N. 1589; Mst. Bibi Kaniz Zainab v. Syed Mobarak Hossain, A.I.R. 1924 Pat. 284 : 72 I.C. 748; Bhagwan Din v. Gouri Shankar, A.I.R. 1957 All. 119; Rudra Gouda v. Basangouda, A.I.R. 1938 Bom. 257 : 175 I.C. 361 : 40 Bom.L.R. 202; Major Stanley Hugh Barker v. Mrs. Patricia May Barker, A.I.R. 1955 M.B. 103 (F.B.). See also Bhagwan Din v. Gouri Shankar, A.I.R. 1957 All. 119; Surendra Mohan v. Saroj Ranjan Sarkar, 1961 Cal. 461 (F.B.); Nagappa v. Nannibu, A.I.R. 1960 Mys. 220; Vadrevu Annapurnamma v. Vadrevu Bhima, A.I.R. 1960 Andh. Pra. 359.
14. R. v. Amanoollah, (1866) 6 W.R. Cr. 5, per Kemp and Seton-Karr, JJ.
15. Bhagwan Din v. Gouri Shankar, A.I.R. 1957 All. 119.

positive evidence in the case.<sup>16</sup> Even the opinion of a handwriting expert, standing by itself, is rarely conclusive, and the opinion of layman, like a Judge, should not be held to be conclusive.<sup>17</sup> Where there is a direct conflict of testimony between the parties, it is unsatisfactory and dangerous to stake a decision on the correct determination of the genuineness of the signature by mere comparison with the admitted signatures, especially without the aid in evidence of microscopic enlargements or any expert advice.<sup>18</sup> But in a case where there is no conflict of evidence, the Court is entitled to form its own opinion after a comparison of the disputed writing with the admitted writing.<sup>19</sup>

It is true, if there was no evidence before the Court as regards the genuineness of the signature, the Court could not, in law, rely on its own examination of the signature to supply the evidence because the learned Judge could not treat himself as an expert. But there is nothing in principle or authority which bars the Judge of facts from using his own eyes and looking at the admitted signature along with the disputed signature in deciding whether the evidence that has been given as regards the genuineness of the document should be believed or not.<sup>20</sup> The principle however is that where there is no evidence on the genuineness of the disputed signature or of an expert under Section 45 or 47, the Court's own opinion on comparison is inadequate.<sup>21</sup>

**10. Finding based on comparison: Interference in second appeal or revision.** Comparison of signature is one of the modes of proving handwriting and although, where there is no other evidence, such proof would be regarded as hazardous and inconclusive, it cannot be regarded as an error in law to base the conclusion on such proof alone and a Court of second appeal would have no power to set aside a finding based on such comparison.<sup>22</sup> Nor can such a finding be interfered with in revision.<sup>23</sup>

**11. Accused, if can be directed to sign or give thumb-impression for comparison.** Under the second paragraph of the section the Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person. The question whether under this provision the Court can legally take specimen signatures or thumb-impressions of an accused person in Court is not free from difficulty.

- 16. Kishore Chandra v. Ganesh Prasad, A.I.R. 1954 S.C. 316 at 318 : I.L.R. 1954 Pat. 313 ; 1954 S.C.R. 919 : 1954 S.C.J. 395 : 1954 S.C.A. 979 : (1954) 1 M.L.J. 622; Tilakdhari v. Jagat Rai, A.I.R. 1961 Pat. 76.
- 17. Narasimha Rao v. Someswar Joshi, A.I.R. 1957 Mad. 210: (1956) 2 M.L.J. 399.
- 18. Kessarbai v. Jethabhai Jivan, A.I.R. 1928 P.C. 277 : 111 I.C. 169 : 28 L.W. 737.
- 19. Narayana Noamy v. Emperor, I.L.R. 17 Pat. 15 : 19 P.L.T. 432 :
- 20. 1938 P.W.N. 338.
- 20. Fazaladdin Mandal v. Panchanan Das, A.I.R. 1957 Cal. 92.
- 21. Vazir Begum v. Seth Tholdram, (1960) 1 M.L.J. 142.
- 22. Balak Ram v. Muhammad Said, A.I.R. 1923 Lah. 695 : 77 I.C. 872 : 5 L.L.J. 530; Gondu v. Tulsiiram, A.I.R. 1930 Nag. 27 : 120 I.C. 935; but see Ambika Charan Barua v. Nareswari Dasi, A.I.R. 1925 Cal. 145 : 85 I.C. 525 : 29 C.W.N. 75.
- 23. Narasimha Rao v. Someswar Joshi, A.I.R. 1957 Mad. 210.

In *Maung Po Nyun v. Mutukurpen Chetty*,<sup>24</sup> it was held that a person against whom proceedings under Section 476, Cr. P. C., 1898 (now Section 340 of Cr. P. C., 1973) are directed being in the position of an accused person, he cannot properly be asked questions merely to elicit a statement as a foundation for ordering his prosecution, nor can he be compelled to make any thumb-impressions under Section 73 of the Evidence Act. Then in *Bazari Hajam v. King-Emperor*,<sup>25</sup> the Patna High Court held that there was no law by which an accused person can be, either by words or by gestures or by exposing himself to certain physical treatment, made to implicate himself in the crime with which he is charged, and that the very fact of the taking of a thumb-impression from an accused person for the purpose of possible manufacture of the evidence by which he could be incriminated, is, in itself, sufficient to warrant one in setting aside the conviction upon the understanding and upon the assumption that such was not really a fair trial. But this decision was dissented from by two different Benches of the same High Court in the cases of *Basgit Singh v. Emperor*,<sup>1</sup> and *Zahuri Sahu v. Emperor*<sup>2</sup> in which relying on Section 5 of the Identification of Prisoners Act, 1920<sup>3</sup> it was held that the Court could direct an accused person to give his thumb-impression in Court. The same view was taken by the Madras<sup>4</sup> and Bombay<sup>5</sup> High Courts. In *King-Emperor v. Kiran Bala Dasi*,<sup>6</sup> a Bench of the Calcutta High Court also took the same view and held that the procedure of directing the specimen of the thumb-impression of the accused to be taken was permissible under Section 5 of Act XXXIII of 1920 as also under illustration (c), Section 45, Evidence Act, but no reference was made to the provisions of Section 73, Evidence Act. In *Kishori v. Emperor*,<sup>7</sup> there was a difference of opinion between Lord Williams and Jack, JJ. on the question of the applicability of Section 73, Evidence Act to such a case. The question of the applicability of Section 73 to the accused in a criminal trial was decided in the affirmative by a Full Bench of the Rangoon High Court in *King-Emperor v. Nga Tun Hlaing*,<sup>8</sup> where Young, J., pointed out that in Section 73 there is no exception made in favour of an accused person and *prima facie* the section would permit him to be directed to make finger-impression and that Section 342, Cr. P. C., 1898 (now Section 313 of Cr. P. C., 1973) does not prevent it. His Lordship observed<sup>9</sup>: "Section 342, Cr. P. C., 1898 (now Section 313 of Cr. P. C., 1973) relates only to oral questioning of the accused and does not prohibit a direction to him to make a finger-impression any more than it prohibits a direction to him to face a witness in order that he may be identified."

- 24. 35 I.C. 492; 17 Cr.L.J. 316: A.I.R. 1917 L.B. 137.
- 25. A.I.R. 1922 Pat. 73: I.L.R. 1 Pat. 242; 68 I.C. 958; 23 Cr.L.J. 638; 3 P.L.T. 526.
- 1. A.I.R. 1928 Pat. 129: I.L.R. 6 Pat. 305; 104 I.C. 626; 28 Cr.L.J. 850.
- 2. A.I.R. 1928 Pat. 103: I.L.R. 6 Pat. 623; 106 I.C. 212; 28 Cr.L.J. 1028; 8 P.L.T. 847.
- 3. Act 35 of 1920; S. 5 of this Act authorises a Magistrate for the purpose of an investigation under the Civil Procedure Code to direct finger impressions to be taken.
- 4. Public Prosecutor v. Kandasami, A.I.R. 1927 Mad. 696: I.L.R. 50

- Mad. 462; 98 I.C. 99; 27 Cr.L.J. 1251; 53 M.L.J. 597; 27 L.W. 184.
- 5. Emperor v. Ramrao Mangesh Burde, A.I.R. 1932 Bom. 406; I.L.R. 56 Bom. 304; 138 I.C. 708; 33 Cr.L.J. 666; 34 Bom.L.R. 598.
- 6. A.I.R. 1926 Cal. 531; 93 I.C. 73; 27 Cr.L.J. 409; 43 C.L.J. 79; 30 C.W.N. 373.
- 7. A.I.R. 1935 Cal. 308; 156 I.C. 396; 36 Cr.L.J. 921; 39 C.W.N. 986.
- 8. 1924 Rang. 115: I.L.R. 1 R. 759; 83 I.C. 668; 26 Cr.L.J. 109; 2 Bur.L.J. 270.
- 9. A.I.R. 1924 Rang. 117.

Agreeing with this and reviewing earlier decisions the Calcutta,<sup>10</sup> Mysore<sup>11</sup> and the Travancore-Cochin<sup>12</sup> High Courts have held that the procedure followed in taking specimen thumb-impressions under the direction of the Court is in strict compliance with Section 73 and Section 45, illustration (c), Evidence Act and also Section 5 of Act XXXIII of 1920. It has, however, been held that the powers under this section could not be used by the Court for buttressing the case either of the prosecution or of the accused. It is, therefore, not open to a Magistrate who directs the accused to write out certain words for purposes of comparison, to hand over the writing to the prosecution to make use of it as a piece of their own evidence; nor can he send it to the expert who is a prosecution witness.<sup>12-1</sup> The Court can, however, summon the aid of an expert to help in arriving at a proper conclusion.<sup>13</sup> There are no words limiting the second paragraph of Section 73, to persons other than a person accused of an offence and in the absence of any such limiting words it is hardly open to the Court to read them into the section. The words "any person" in the section therefore include a person accused of an offence.<sup>14</sup> This section does not apply where the direction for taking the thumb-impression and specimen handwriting is sought to be made by the Magistrate at the investigation stage before any challan was presented against the accused in the Court.<sup>15</sup> But in the undernoted case it was held that the accused could be directed to give specimen to enable the police to investigate as the purpose is to enable the Court to make comparison when the accused is ultimately put up for trial before it.<sup>15-1</sup> It is open to the Court to give a direction to any party (before the Court) to give his writing in Court for the purpose of comparison by the handwriting expert.<sup>16</sup>

**12. Article 20(3) of the Constitution, effect of.** There remains the question whether the direction to write or give thumb-impression under this section offends against Art. 20 (3) of the Constitution of India which provides that no person accused of any offence shall be compelled to be a witness against himself. It has been held by a learned Judge of the Madras High Court relying on the decision of their Lordships of the Supreme Court in *M. P. Sharma v. Satish Chandra*,<sup>17</sup> that the direction asking the accused to give his thumb-impression would amount to asking him to furnish evidence which is prohibited, under Art. 20 (3).<sup>18</sup> But the Supreme Court case, *M. P. Sharma v. Satish Chandra*,<sup>19</sup> relied upon by the learned Judge related to the le-

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- 10. Golam Rahman v. The King. A.I.R. 1950 Cal. 66 : 51 Cr.L.J. 376; 83 C.L.J. 397.
- 11. State of Mysore v. C. V. Gopala Rao. A.I.R. 1954 Mys. 117.
- 12. State v. Parameshwaran Pillai, A.I.R. 1952 T.C. 482 : 54 Cr.L.J. 1 : 1952 K.L.T. 310 (F.B.).
- 12-1. R. B. Khajolia v. A. S. T. Zaidy, 1973 Cr.L.J. 1499 : 75 Bom.L.R. 116 : 1973 Mah.L.J. 326.
- 13. Hiralal Agarwala v. The State, 61 C.W.N. 691.
- 14. Sailendra Nath Sinha v. The State, A.I.R. 1955 Cal. 247 : 56 Cr.L.J. 790; State v. Parameshwaran Pillai, *supra*.
- 15. Brij Bhushan v. State, A.I.R. 1957 M.P. 106; P. R. Ghosh v. State, I.L.R. (1973) 2 Cal. 354 : (1973) 77 C.W.N. 865; Dharamvir Singh v. State, 1975 Cr.L.J. 884 (P & H) 1974 P.L.J. (Cr.) 439 : 1975 Cur. L.T. 132.
- 15-1. Rami Reddi v. State of A.P., (1971) 2 Andh.W.R. 94; (1971) 2 A.P.L.J. 174 : 1971 Mad.L.J. (Cr.) 481.
- 16. State of Mysore v. Gopala Rao, 34 Mys.L.J. 35: A.I.R. 1954 Mys. 117; M. Rama Rao v. Laxmi Amma, (1969) 2 Mys.L.J. 158 (159).
- 17. A.I.R. 1954 S.C. 300 : 1954 S.C.R. 1077 : 55 Cr.L.J. 865 : 1954 S.C.J. 428 : (1954) 1 M.L.J. 680 : 1954 M.W.N. 566 : 56 P.L.R. 366.
- 18. Rajamuthukoil Pillai v. Periyasami Nadar, A.I.R. 1956 Mad. 632; State v. Ramkumar, A.I.R. 1957 M.P. 73; Rama Sarup v. State, A.I.R. 1958 All. 119 : 1958 Cr.L.J. 134.
- 19. A.I.R. 1954 S.C. 300.

gality of a search and seizure of documents under Secs. 94 and 96 of the Criminal Procedure Code. In that case, their Lordships of the Supreme Court interpreted Art. 20 (3) as meaning (1) that it is a right pertaining to a person accused of an offence, (2) that it is a protection against compulsion to be a witness, and (3) that it is a protection against such compulsion resulting in his giving evidence against himself, and while they also said that broadly stated the guarantee in Art. 20 (3) is against testimonial compulsion, they could not go to the length of holding that the issue of a search warrant for production of documents amounted to such testimonial compulsion. The decision, therefore, is not any authority for the proposition that the direction to take specimen writings of a person who is accused of an offence amounts to a direction compelling him to give evidence against himself. A mere direction to a person accused of an offence to give his specimen writings does not amount to compelling him to give evidence against himself.<sup>20</sup>

It would here be instructive to quote a passage from a judgment of Justice Oliver Wendell Holmes.<sup>21</sup> In *Holt v. United States*,<sup>21</sup> that very distinguished Judge said :

"Another objection is based upon an extravagant extension of the Fifth Amendment of the American Constitution. A question arose as to whether the blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It was objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal Court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a Court would go in compelling a man to exhibit himself. For when he is exhibited whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent."

It must, however, be remembered that the Court has no power to compel an accused person to write out the contents of a document alleged to have been forged by him. All that Section 73 states is that the Court may direct any person present in Court, etc.<sup>22</sup>

It was subsequently made explicit by a decision of the Madras High Court in *In re Sheik Muhammad Hussain*,<sup>23</sup> wherein it has been held that a thumb-impression of the accused taken by the Police in the course of investigation, which was later on produced at the trial, did not amount to "testimonial compulsion" under Art. 20 (3), and was not on that account inadmissible. It was observed that the Supreme Court in *M. P. Sharma v. Satish Chandra*,<sup>24</sup> had not interdicted any statement taken by the Police in the course of investi-

20. *Sailendranath Sinha v. The State*, A.I.R. 1955 Cal. 247; 56 Cr.L.J. 790; see also *State v. Parameswaran Pillai*, A.I.R. 1952 T.C. 482; 54 Cr.L.J. 1; 1952 K.L.T. 310 (F.B.).

21. (1910) 218 U.S. 245 : 54 Law Ed.

1021 at p. 1030.  
22. *State v. Parameswaran Pillai*, A. I. R. 1952 T.C. 482; 54 Cr.L.J. 1; 1952 K.L.T. 310 (F.B.).  
23. (1956) 2 M.L.J. 427

24. A.I.R. 1954 S.C. 300.

gation, which was subsequently sought to be proved at the trial. The Allahabad High Court has conformed to this view in *Ranjit Ram v. State*,<sup>25</sup> by ruling that when, in pursuance of an order directing him to furnish his finger-prints or specimen of handwriting, the accused furnishes a specimen of his writing voluntarily, without protest, the provisions of Art. 20 (3) would not be violated.<sup>1</sup> The contrary opinion had been sponsored by the Madhya Pradesh, Kerala and Calcutta High Courts. In *State v. Ram Kumar*<sup>2</sup> and *Brij Bhushan v. State*,<sup>3</sup> the Court upheld a direction to the accused to copy out an application, which he had filed in a previous case with a view to establish the identity of two writings, and to give his thumb-impression. A rider was, however, added in *Nazir Singh v. State*,<sup>4</sup> namely, that though the taking of finger-prints of an accused whilst he remains passive would be innocuous, their extraction under duress, would violate Art. 20 (3). To a similar effect were the pronouncements in *Farid Ahmed v. State*<sup>5</sup> and in *Tarini Kumar Pandey v. State*.<sup>6</sup> The Kerala High Court had banned the use of finger-prints obtained during the course of investigation.<sup>7</sup> In view of the marked difference in approach amongst the High Courts in regard to the applicability of the dictum in *M. P. Sharma v. Satish Chandra*,<sup>8</sup> the Supreme Court has considered afresh the whole question in *State of Bombay v. Kathi Kalu*<sup>9</sup> both in the light of the provisions of Art. 20 (3), and the earlier pronouncement of theirs in *M. P. Sharma's* case.<sup>10</sup> The decision has been given by a Bench of ten learned Judges. The conclusion arrived at has been unanimous, although S. K. Das, A. K. Sarkar and K. C. Das Gupta, JJ., have given reasons of their own. In effect, the opinion ratifies the view of the Madras High Court in *Sheik Muhammad Hussain's* case.<sup>11</sup> Their Lordships have specifically overruled the decisions in *Farid Ahmad's* case,<sup>12</sup> and *Sankaran Nair's* case.<sup>13</sup> The three cases which have been dealt with by the Supreme Court were these. In the one from Punjab, the accused were charged with burglary. There were certain glass panes and phials in the burgled premises, on which had fallen the palm and finger-impressions of the accused. The investigating agency got the accused to give his palm and finger-impressions in the presence of a Magistrate. These were found identical with those on the glass panes and phials. The accused were convicted on the basis of this evidence. In the second from Bombay, the prosecution obtained a chit in the writing of the accused, and whilst the investigation was in progress, three specimen handwritings on three different sheets of paper were taken from the accused. They were later on compared with the writing on the chit by the handwriting expert and their identity was established. In the third from Calcutta, the charge was for possession of contraband opium. It was discovered during the investigation that the accused had made an endorsement on the back of the railway receipts,

25. A.I.R. 1961 All. 456.

1. See also *Bal Raj Balla v. Sri Ramesh Chandra*, A.I.R. 1960 All. 157.

2. A.I.R. 1957 M.P. 73.

3. A.I.R. 1957 M.P. 106.

4. A.I.R. 1959 M.P. 411.

5. A.I.R. 1960 Cal. 32 : 63 C.W.N. 901.

6. A.I.R. 1960 Cal. 318 : 1960 Cr.L.J. 579.

7. *Damodaran v. State*, A.I.R. 1960 Ker. 29: I.L.R. 1959 Ker. 749; *State of Kerala v. K. K. Sankaran*, A.I.R. 1960 Ker. 392: I.L.R. 1960 Ker. 760.

8. A.I.R. 1954 S.C. 300: 1954 S.C.

R. 1077.

9. A.I.R. 1961 S.C. 1808 : (1961) 2 Cr.L.J. 856; *Government of Manipur v. Thokchom Tomba Singh*, 1969 Cr.L.J. 396 : A.I.R. 1969 Manipur 22 (23); *Jalaluddin v. State*, 1968 All.Cr.R. 375 : 1968 A.W.R. (H.C.) 590.

10. A.I.R. 1954 S.C. 300 : 1954 S.C. R. 1077.

11. (1956) 2 M.L.J. 427.

12. *Farid Ahmad v. State*, 1960 Cal. Nair, 1960 Ker. 392: I.L.R. 1960 Ker. 760.

13. *State of Kerala v. K. K. Sankaran Nair*, 1960 Ker. 392: I.L.R. 1960 Ker. 760.

in his own hand. The prosecution applied to the Magistrate to take his specimen writing and signature for the purpose of being compared and verified with the writing on the railway receipts.

Their Lordships came to the following conclusion :

(1) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made, would not by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact in conjunction with the other circumstances disclosed in evidence in a particular case, wou'd be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.

(2) The mere questioning of an accused by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not 'compulsion'.

(3) 'To be a witness' is not equivalent to 'furnishing evidence' in its widest significance, that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.

(4) Giving thumb-impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'.

(5) 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing made or given in Court or otherwise.

(6) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. Case-law has gone beyond this strict interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence orally or in writing.

(7) To bring the statement in question within the prohibition of Art. 20 (3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made.

It may be taken that while the accused cannot be compelled to give his specimen writing and signatures, because such specimen writing and signatures may be used as evidence against him, there is nothing to prevent the accused being merely asked to give his specimen writing and signatures, because, even under the provisions of the Criminal Procedure Code as amended, the accused may give evidence if he chooses to do so, though he cannot be compelled to give evidence. Where the accused on being asked to do so by the Court voluntarily gives his specimen writing and signature without raising any objection, the protection under Article 20 (3) is not contravened and such writ-

ing can be taken into consideration.<sup>14</sup> A direction to an accused person to give signatures, specimen writing, thumb-impressions, finger-prints or foot-prints, to be used for comparison with some other signatures, handwritings, thumb-impressions, finger-prints or foot-prints, which the police may require in the course of investigation, will not amount to compelling the accused person to be a witness against himself, and is not hit by Article 20 (3). Such a direction can be given under this section.<sup>15</sup>

*Rationale of Art. 20 (8).* The circumstances under which protection of an accused against self-incrimination came into existence may be borne in mind. There are two contrasted systems of criminal jurisprudence, viz., the Anglo-Saxon and Continental. The Anglo-Saxon Criminal Jurisprudence is described as accusatorial system and the Continental Criminal Jurisprudence is described as the inquisitorial system.

In the accusatorial system the principle is that no accused shall be compelled to incriminate himself. The history of this rule in the Anglo-Saxon system, that a man shall not be compelled to furnish evidence against himself or against self-incrimination is a long one, and is elaborately dealt with in the monumental work on Evidence by Wigmore, Third Edition, Vol. VIII, Chapter LXXX, pages 276–303 and by Professor Glanville Williams in his "The Proof of Guilt" (the Hamlyn Lectures), page 36 and following.

The rule did not exist under the Tudors and early Stuarts. In fact, it was the whole process of compulsion practised by the Star Chamber and High Commission which led to such revolution that the doctrine that an accused should not be compelled to self-incriminate himself came to be established in England, and has subsequently been one of the cherished rights of the English citizens and became part of the English Common Law.

So far as the United States of America was concerned, the early colonial settlers brought over the practice of compulsory questioning at least to Massachusetts. In the 18th century this practice disappeared and the contemporary English Common Law protecting the silence of the accused came to be adopted. Thirteen of the original States insisted on prohibition of self-incrimination in the Federal Bill of Rights of 1791 and in their own revolutionary Constitutions, excepting in Iowa and New Jersey. The Fifth Amendment of the Constitution of the United States of America lays down that no person shall be compelled in any criminal case to be a witness against himself.

That this has been subsequently developed by American Courts far beyond the confines of Art. 20 (3) of our Constitution will be evident from the American decisions cited at the bar and in the standard treatises on American Constitutional Law.<sup>16</sup>

14. Sekender v. State, A.I.R. 1962 C. 30.
15. Gulzar Khan v. State, A.I.R. 1962 Pat. 255 : 1962 B.L.J.R. 604 (F. B.); B. Rami Reddy v. State of A.P., (1972) 1 Andh. L. T. 32; Iqbal Ahmad v. Ketaki Devi, 1976 Cr.L.J. 244 (All.).
16. See Boyd v. U. S., 116 U. S. 616; Wilson v. U. S., 149 U.S. 60; U.S. v. Rabinowich, 238 U.S. 78;

Batty v. Brady, 316 U.S. 455; U.S. v. White, 322 U.S. 694; Holt v. U.S., 218 U.S. 245; Burdick v. U.S., 236 U.S. 79; Fitzpatrick v. U.S., 178 U.S. 304. Rottschaefer's Hand-book on American Constitutional Law (Hornbook series); pp. 800-801; Willoughby, Principles of the Constitutional Law of the United States, second edition, pp. 475-477; Cooley on Constitutional Law of

The invaluable privilege against self-incrimination conferred by Act. 20 (3) will be recognised at its true worth when we consider the inquisitorial system emanating from France and spread over the continent. Sir James Fitzjames Stephen's History of the Criminal Law of England, page 535 and following gives a graphic description of the searching preliminary enquiries of an accused person by an examining Magistrate and the subsequent records of examination and confrontations with the contents of the dossier practised by the Presidents of the trial Courts and concludes :

"This appears to me to be the weakest and most objectionable part of the whole system of French criminal procedure except parts of the law as to the functions of the jury."

Therefore, it is not surprising that there have been endeavours in France as well as in other Continental countries to which French inquisitorial procedure has extended to divest the system of its more objectionable features, the latest being the U.S.S.R. Though the provisions of the Soviet Union Codes never stated that the confession is the queen of evidence, nevertheless the student of official public records of Soviet trials is struck by the fact that self-incrimination was the only evidence on which the defendant's guilt has been founded. That this was true at many trials was frankly recognised by N. Khrushchev in his famous speech to the 20th Party Congress of the Communist Party of Soviet Union (February 25, 1956). Therefore the subsequently enacted Criminal Procedure Code recognised that the looking upon self-incrimination as the queen of evidence has oriented the investigative and judicial agencies in obviously wrong ways and created the possibility of rendering unfounded sentences.<sup>17</sup>

Therefore to sum up, while we must vigilantly guard against the inquisitorial procedure invading our criminal jurisprudence we must equally be on our guard against the abuses of the accusatorial system. This golden mean is set out by Prof. Wigmore on Evidence, Third Edition, Vol. VIII, page 318. The policy of the privilege against self-incrimination is plain. It exists mainly in order to stimulate the prosecution to full and fair search for evidence procurable by their own exertions, and to deter them from a lazy and pernicious reliance upon the accused's testimony extracted by force of law. But at the same time the privilege cannot be extended beyond protecting the accused in his testimonial status from the time he is accused of an offence and must be confined to the limits laid down in *Sharma's case*.<sup>18</sup> To loosely extend the privilege would not be in the public interest, because as Bentham wittily pointed out "if all the criminals of every class have assembled, and framed a system

the United States, fourth edition s. 19, pp. 367-368; Wills, Constitutional Law, 1935 at page 520 and following; Emerson and Haber, Political and Civil Rights in the United States, page 111 and following.

17. See the two-volume work of Government, Law and Courts in the Soviet Union and Eastern Europe by

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Dr. Vladimir Gsovski and Kazimiers Grzybrowski (1959), published by Stevens and Sons Ltd. (London): Bulletin No. 9 of the International Commission of Jurists and Journal of the International Commission of Jurists (Sept., 1959, page 285 and foll.).

18. 1954 M. W. N. 566; 1954 S. C. R. 1077.

after their own wishes, is not this exclusion the very first which they would have established for their security?" In fact, modern text-book writers on American Constitutional Law and Criminal Evidence<sup>19</sup> condemn such loose extensions and say that it will one day be incredible that Judges would have descended as far as they sometimes have here gone on the road to logical absurdity.<sup>20</sup>

Article 20 (3) of the Constitution enacts that no person accused of any offence shall be compelled to be a witness<sup>21</sup> against himself. This Article does not enact any new principle which we had not already inherited from the English system of criminal justice. It is a fundamental principle of the English system of criminal justice (which differs from the inquisitorial procedure obtaining in France and some other Continental countries) that it is for the prosecution to prove the guilt and the accused need not make any statement against his will. The principle of immunity from self-incriminating evidence is based on the maxim, *nemo tenetur seipsum accusare* (no man is bound to accuse himself) and thus founded on the presumption of innocence which characterises the English system of criminal trial. The principle is now embodied in Statute—the Indian Evidence Act, 1898, which says that though the accused is competent to be a witness on his own behalf, he cannot be compelled to give evidence against himself. The Fifth Amendment of the Constitution of U.S.A. adopts the above principle by laying down "No person shall be compelled in any criminal case to be a witness against himself."<sup>22</sup> So, an accused can give evidence on his own behalf if he so elects. But if he elects not to give evidence that fact cannot be used to his prejudice. Nor can a man be convicted on testimony obtained by compulsory discovery.<sup>23</sup>

While the accused cannot be compelled to produce any evidence against himself, such evidence can be taken or seized, provided of course such taking or seizure is legally permissible. This aspect of Article 20 (3) has been fully discussed in a Bench decision of the Madras High Court (Somasundaram and Ramaswami Goundar, J.) in Criminal Revision Case No. 772 of 1955, disposed of on 5th April, 1956, wherein Ramaswami Goundar, J., who delivered the judgment of the Bench, has referred to *M. P. Sharma v. Satish Chandra, Registrar, Delhi*,<sup>24</sup> *In re Palani Moopan*,<sup>25</sup> *Sunder Singh v. The*

19. (U.S.A.) Mayer American Legal System, pp. 110-111; Wigmore on Ev., Third Edition, Vol 8, p. 386, etc.; Underhill Criminal Evidence, 5th Ed., Vol. 2, p. 905.
20. Bhagawan Das Goenka v. Union of India, 1960 M. W. N. (Cr.) 92 (D. B.). The decisions of M. H. C. recognising these limitations are: *In re Palani Moopan*, 1955 M. W. N. (Cr.) 301; *Swarnalingam Chettiar*, In re, 1955 M. W. N. 660; 1955 M. W. N. 173 (Cr.); *Palani Goundar v. The State*, 1956 M. W. N. (Cr.) 145; *Kaliappa Nadar v. State*, Cr. App. Nos. 789 of 1956 and 3 and 19 to 25 of 1957; *Public Prosecutor v. Ganesh Iyer*, Cr. App. No. 164 of 1956; *In re Krishna Konar*, R. T. No. 80 of 1957; *In re Vellaya Goundar*, Cr. R. C. No. 506 of 1958, dated 17-3-57 and

*In re Perumal*, R. T. No. 107 of 1959, dated 2-12-59; *Public Prosecutor v. Muhammad Dastagiri*, Cr. A. p. 110 of 1956.

21. To be compelled ordinary English law means to furnish evidence. Shakespeare's Horatio speaking to Hamlet says: "Season your admiration for a while With an attent ear, till I may deliver Upon the witness of these gentlemen. This marvel to you" (Hamlet, Act I, Scene II) (cited in *State of Bombay v. Kathi Kalu*, A.I.R. 1961 S. C. 1808 at page 1818).
22. *Hale v. Henkel*, 50 L. Ed., 652.
23. *Boyd v. U.S.*, 29 L. Ed. 746; *Batty v. Brady*, 316 U.S. 455.
24. 1954 M. W. N. 566; 1955 Cr. L. J. 865; A. I. R. 1954 S. C. 300.
25. 1955 M. W. N. 301; 1955 M. W. N. Cr. 73.

*State.*<sup>1</sup> *Swarnalingam Chettiar v. Labour Inspector,*<sup>2</sup> *K.E. v. Nga Tun,*<sup>3</sup> *Sailendra v. The State.*<sup>4</sup> In *Elias v. Pasmor*,<sup>5</sup> it has been held that upon arrest of an accused person the police can search the premises where the prisoner is arrested and seize any material which is relevant for the prosecution of any crime committed by any person even other than the prisoner himself.

A Corporation being an artificial person is not entitled to this immunity but it cannot be directed to produce its books causing suspension of its business, unless there is good reason for the order.<sup>6</sup> The present clause (3) of Article 20 follows the language of the Fifth Amendment of the American Constitution but the rule laid down in our Constitution is narrower than the American rule as expanded by interpretation. Thus, it will be seen that three things are necessary to constitute the requirements of this clause, viz. (i) an accused person; (ii) his being compelled to be a witness; and (iii) such compulsion being against himself. In other words, the prohibition operates only when an accused is sought to be forced to depose against his innocence.

To sum up, in the language of Wigmore on Evidence, Third Edition, Vol. VIII (Section 2263) at page 362 :

"Looking back at the history of the privilege.....and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to extract from the person's own lips an admission of his guilt, which will thus take the place of other evidence.

"The general principle, therefore, in regard to the form of the protected disclosure, may be said to be this: The privilege protects a person from any disclosure sought by legal process against him as a witness."

Again at pages 374-375 :

"If an accused person were to refuse to be removed from the jail to the court-room for trial, claiming that he was privileged not to expose his features to the witnesses for identification, it is not difficult to conceive the judicial reception which would be given to such a claim. And yet no less a claim is the logical consequence of the argument that has been frequently offered and occasionally sanctioned in applying the privilege to proof of the bodily features of the accused.

"The limit of the privilege is a plain one. From the general principle .....it results that an inspection of the bodily features by the tribunal or by witnesses violates the privilege, because it does not call upon the accused as a witness, i. e., upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action—as when he is required to take off his shoes or roll up his sleeves—is immaterial,—unless all bodily actions were synonymous with testimonial utterance, for, as already observed

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1. A. I. R. 1955 All. 867.
2. 1955 M. W. N. 660: 1955 M. W. N. Cr. 173 (1): A. I. R. 1956 M. 165.
3. A. I. R. 1924 Rang. 115: I. L.

4. A. I. R. 1955 Cal. 247.
5. (1984) 2 K.B. 164.
6. Hale v. Henkel, 50 L. Ed. 652.

R. I. R. 759: 83 I.C. 668.

.....not compulsion alone is the component idea of the privilege, but testimonial compulsion. What is obtained from the accused by such action is not testimony about his body, but his body itself..... Unless some attempt is made to secure communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operation of his mind in expressing it, the demand made upon him is not a testimonial one. Moreover, the main object of the privilege—is to force prosecuting officers to go out and search and obtain all the extrinsic available evidence of an offence, without relying upon the accused's admissions. Now in the case of the person's body, its marks and traits, itself is the main evidence; there is ordinarily no other or better evidence available for the prosecutor. Hence the main reason for the privilege loses its force.

Both principle and practical good sense forbid any larger interpretation of the privilege in application."<sup>7</sup>

To conclude: Article 20 (3) of the Constitution of India follows the language of the Fifth Amendment of the American Constitution, but their scopes differ. Hence a Bench of the Bombay High Court in *Narayanlal v. Maneck Phiroz*,<sup>8</sup> has pointed out, whereas under the American Constitution the Fourth Amendment safeguarded the privacy of the home and made it unconstitutional for the issue of searches and seizures unless they were on reasonable grounds, and the Fifth Amendment dealt with what is known as testimonial compulsion—our Constitution-makers in Art. 20 (3) did not deal with the Fourth Amendment but only dealt with testimonial compulsions leaving searches and seizures to be dealt with under the general law, unless searches and seizures constitute a contravention of Art. 20 (3) as being testimonial compulsion for the production of documentary evidence. The difference between the language used in Art. 20 (3) and the Fifth Amendment, is patent. The American Constitution limits the right of immunity from compulsory testimonial to a criminal case. In Art. 20 (3) of our Constitution that limitation does not appear. The protection against this compulsion under our Constitution is general. It is not confined to any particular criminal case as would appear if Art. 20 (3) were to be read by itself. But in construing Art. 20 (3) we must adopt some canons of construction. The first and the obvious one is to read the Article as a whole and not to divorce clause (3) of that Article from the rest of it. The second is that we must not overlook the fact that the Constitution-makers in India had knowledge not only of the American Constitution but also the principles of English Common Law and also the exceptions engrafted upon those principles. Finally, we must give to this Article an Interpretation which is for the greatest good of the people. We are not dealing with an ordinary statute or with an ordinary piece of legislation; we are dealing with the Constitution of India and in interpreting the provisions of the Constitution, we must not overlook the fact that the Constitution was enacted for the purposes set out in the preamble to the Constitution. Therefore, any interpretation which advanced the good of the people must be preferred to an interpretation which would retard the interests of the people of our country.

Therefore, Art. 20 (3) of the Constitution should be read in the context of the second clause which precedes it and this Article should not be read in

7. Subbayya Gounder v. Bhoopala Subramaniam, 1957 M. W. N. (Cr.) 146.

8. A. I. R. 1959 Bom. 320; I. L. R. 1959 B. 952; 61 Bom. L. R. 220.

the light of the American Constitution or American decisions but more in the light of our own legislative provisions, our own legislative history, the background of English law, and the Constitution looked upon as an organic whole.

Analysing the terms in which this fundamental right has been declared in the Constitution, it may be said to consist of the following components : (1) It is a right pertaining to a person accused of an offence ; (2) it is a protection against compulsion to be 'witness', and (3) it is protection against such compulsion resulting in his giving evidence 'against himself'.

The words "accused of any offence" seem to indicate according to the common usage of the words, as well as by an examination of the relevant sections of the Code of Criminal Procedure which has been made by Balakrishna Iyer, J., an accusation made in a criminal prosecution before the court of law or judicial tribunal where a person is charged with having committed an act which is punishable under the Indian Penal Code or any special or local law. The protection afforded to a person under Article 20 (3) is available to a person against whom a formal accusation relating to the commission of an offence has been levelled, which in the normal course may result in prosecution. In short, before the label of an "accused" can be stuck on a person, there must be a charge against him that he had committed an offence and there must be some proceedings against him under the Criminal Procedure Code. If the proceedings are dropped or abandoned, he will cease to be an accused.<sup>9</sup>

### Public Documents

[Introduction to Section 74–78]

#### SYNOPSIS

|  |   |
|--|---|
| 1. Scope of Secs. 74 to 78:                    | -Nature of public writings.                     |
| —Right to obtain inspection or copy.           | —Definition of "public documents".              |
| —Proof of public documents.                    | —Proof of public documents by certified copies. |
| —Admissibility and effect of public documents. | —Exception to Best Evidence Rule.               |
|  | —Grounds of exception.                          |

1. Scope of Secs. 74 to 78. Documents are of two kinds, public and private. Section 74 accordingly supplies a definition of the term "public document", and Section 75 declares all documents other than those particularly specified to be private documents. The following Sections (74–78) deal with (a) the nature of the former class of documents, and (b) the proof which is to be given of them. Section 74 defines their nature, and Sections (76–78) deal with the exceptional mode of proof applicable in their case; the proof of private documents, as defined by Section 75, being subject to the general provisions of the Act relating to the proof of documentary evidence contained in Sections 61–73.

Any inquiry as to public documents may be directed (a) to the means of obtaining an inspection or copy of them, (b) to the method of proving them, and (c) to their admissibility and effect.<sup>10</sup>

9. Bhagwandas Goenka v. Union of India, 1960 M.W.N. (Cr.) 100 at

p. 100 (D.B.) (per Ramaswami, J.).  
10. Taylor, Ev., s. 1479.

*Right to obtain inspection or copy.* With respect to the means of obtaining an inspection or copy of a public document, the matter is one which is not dealt with by this Act. Section 76 provides for the giving of certified copies of public documents which the public have a right to inspect; but there is no general provision as to the right of inspection in the case of public documents in any enactment in force in India.

Every person, however, has a right to inspect public documents, subject to certain exceptions, provided he shows that he is individually interested in them. When the right to inspect and to take a copy is expressly conferred by Statute, the limit of the right depends on the true construction of the Statute. When the right to inspect and take a copy is not express conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy and in what is reasonably necessary for the protection of such interest. The Common Law right is limited by this principle.<sup>11</sup> It may be inferred that the Legislature intended to recognise the right generally, that is the right to inspect public documents, for all persons who can show that they have an interest for the protection of which it is necessary that liberty to inspect such documents should be given. In such cases in the absence of a statutory right, there is a Common Law right.<sup>12</sup> There are some special provisions applicable to particular cases. Though these special provisions do not generally contain any particular remedy to which resort may be had if inspection of copies be refused, yet an order in the nature of a mandamus directing the public officer concerned to do his duty in the matter may be obtained from the High Court under the provisions of Chap. VIII of the Specific Relief Act.<sup>13</sup>

*Proof of public documents.* The method of proving public documents is, as already observed, the subject sections 76-78 post.<sup>14</sup>

*Admissibility and effect of public documents.* The admissibility and effect of non-judicial public documents is dealt with by Sections 35-38, and of judicial public documents by Sections 40-44, ante.<sup>15</sup>

The question of the admissibility and proof of a public document involves three points for consideration: (a) The contents must relate to a fact in issue or a fact relevant under the earlier sections of the Act. (b) If the contents are a statement of such facts and are not acts forming such facts, the statement must be relevant under Sections 35-38, chiefly Section 35 (c). The con-

11. R. v. Arumugam, (1897) 20 M. 189, 191, 192, per Subramania Ayar and Davies, JJ. Collins, C. J., held that the accused was a person interested in the documents in question, and that if they were public documents he would be entitled to inspect and have copies of them. (p. 194). Shephard, J., was of the same opinion as the referring Judges as to the right of inspection, but held that two of the documents in question were not public documents (p. 196).

12. Chandi v. Boistab, (1903) 31 C.

284, 293; R. v. Arumugam, (1897) 20 M. 189, 196.

13. Act 1 of 1877 but this Chapter has been omitted from the new Act 47 of 1963 as to the means of obtaining an inspection or copy in England; see Taylor, Ev., s. 1479-1522, and see Greenleaf, Ev., p. 471.

14. See post, and as to the English law Taylor, Ev., ss. 1523-1659, 1747-A, et seq.

15. As to the English law, Taylor, Ev., ss. 1660, 1747-A, et seq.; and see Greenleaf, Ev., s. 522, et seq.

tents of the original document must be proved subject to and with the benefit of Section 65, clause (e) and Sections 76-78 (4).

The accuracy of the preparation of the original may be proved or presumed as provided by Sections 80-87, and the correctness of certified copies may be presumed under Section 79. In this connection, Section 57 relating to judicial notice should also be considered.

*Nature of public writings.* Public writings have been defined to consist of "the act of public functionaries, in the Executive, Legislative and Judicial Departments of Government, including under this general head the transactions which official persons are required to enter in books or registers in the course of their public duties and which occur within the circle of their own personal knowledge and observation. To the same head may be referred the consideration of documentary evidence of the acts of State the laws, and judgments of Courts of Foreign Governments. Public documents are susceptible of another division, they being either (a) judicial, or (b) non-judicial."<sup>16-17</sup> Under the latter head come Acts of State, such as proclamations and other Acts and orders of the Executive of the like character, Legislative Acts, Journals of the Legislature, official registers or books kept by persons in public office, in which they are required to write down particular transactions, occurring in the course of their public duties, such as parish registers, the books which contain the official proceedings of corporations and matters respecting their property, if the entries are of a public nature, the books of the post-office and custom house and registers of other public offices, prison-registers, registers of births, deaths and marriages, registers of patents, designs, trademarks, copyrights and other like documents, an enumeration of the whole of which would be practically impossible.<sup>18</sup> Under the former head come all judicial writings, whether domestic or foreign.<sup>19</sup> Section 74 is in substantial accordance with the abovementioned definition, but also includes therein public records kept in India of private documents.

*Definition of "public documents".* In the case of *Sturla v. Freccia*,<sup>20</sup> it was said that "a 'public document' means a document that is made for the purpose of the public making use of it, especially where there is a judicial or quasi-judicial duty to enquire. Its very object must be that the public, all persons concerned in it, may have access to it." That case dealt with the admissibility of statements in public documents. It will, however, be observed that, under Section 74 of the Act, the question whether a document is or is not a public document, within the meaning of that section, is distinct from the question whether or not the public have a right to inspect it. It is only of public documents, which the public have a right to inspect, that certified copies may be given in evidence, but it may well be that a document may be "public" within the meaning of this Act, and also one which is not open to the inspection of the public of which, therefore, no proof by certified copy may be given. Again, in the absence of anything to show that a document was prepared by a public servant in the discharge of his official duty, the mere

16-17. Greenleaf, Ev., s. 470. See Abdul Halim v. Raja Sadat Ali, A. I. R. 1928 Oudh 155; 108 I.C. 817.

18. ib., ss. 479-484; Taylor, Ev., s. 1600-n; Powell, Ev., 9th Ed., 260-

261; Roscoe, N. P., Ev., 125. 19. See Powell, Ev., 9th Ed., 253-260. 20. L. R. 5 App. Cas. 639, 642, 643, per Lord Blackburn.

fact that it is kept in a public office does not make it a public document.<sup>21</sup> Thus, notes made by an Inspector of Assessment appointed for the purpose of assisting the Executive in fixing the annual value of the lands and buildings under Section 131 of the Calcutta Municipal Act, cannot be said to be the records of facts of official bodies or tribunals, because the Executive Officer acting under Section 136 of the Calcutta Municipal Act is neither a legislative nor a judicial officer. The inspection book prepared by him is hence not a public document.<sup>22</sup> Foodgrains Procurement Stock Register, maintained under the Orissa Foodgrains Control Order, 1951, is a 'public document' under this section.<sup>23</sup> A permit under the Motor Vehicles Act is a public document and hence an office copy is as good as the original.<sup>24</sup>

*Proof of public documents by certified copies.* As has been already observed,<sup>25</sup> the contents of documents must be proved either by the production of the document, which is called primary evidence, or by copies or oral accounts of the contents, which are called secondary evidence.

*Exception to Best Evidence Rule.* Primary Evidence is required as a rule, but this is subject to seven exceptions,<sup>1</sup> in which secondary evidence may be given. The most important of these are : (a) cases in which the document is in the possession of the adverse party,<sup>2</sup> and (b) cases in which certified copies of public documents,<sup>3</sup> are admissible in place of the documents themselves.<sup>4</sup>

*Grounds of exception.* The grounds upon which the last-mentioned exception rests are grounds of public convenience. Public documents are, "comparatively speaking", little liable to corruption, alteration, or misrepresentation—the whole community being interested in their preservation and in most instances entitled to inspect them ; while private writings, on the contrary, are the objects of interest but to few, whose property they are, and the inspection of them can only be obtained, if at all, by application to a Court of Justice or some Department. The number of persons interested in public documents also renders them much more frequently required for evidentiary purposes ; and if the production of the originals were insisted on, not only would great inconvenience result from the same documents being wanted in different places at the same time but the continual change of place would expose them to be lost, and the handling from frequent use would soon result in their destruction. For these and other reasons, the law deems it better to allow their contents to be proved by derivative evidence, and to run the chance, whatever that may be, of error arising from inaccurate transcription, either intentional or casual. But true to its great principle of exacting the best evidence that the

21. Nityanand Roy v. Abdur Raheem, 7 Cal. 76; Mahtab Din v. Kesar Singh, A. I. R. 1928 Lah. 640; 107 I.C. 618; Secretary of State v. Chiman Lal, A. I. R. 1942 Bom. 161; I. L. R. 1942 Bom. 357; 201 I.C. 420; 44 Bom. L. R. 295.
22. Jitendra Nath v. Makhanlal, (1957) 61 C. W. N. 175.
23. Madan Lal v. State, I. L. R. 1957 Cut. 564; A. I. R. 1958 Orissa 1.
24. Sabin Ahmed, In re, A. I. R. 1960 M. P. 318; 1960 M. P. L. J. 904; Prithi Singh v. Union of India, A.

- I. R. 1959 Manipur 43.
25. See Introd., Chap. V.
1. S. 65 ante.
2. ib., clause (a).
3. ib., clause (e).
4. Steph. Introd., 170. It will be noticed, therefore, that the so-called "Best Evidence Rule" has in strictness no application to the case of public writings, a properly authenticated copy being a recognised equivalent for the original itself. Best, Ev., Amer. notes, 432; Greenleaf, Ev., 482.

nature of the matter affords, the law requires this derivative evidence to be of a very trustworthy kind, and has defined, with much precision, the forms of it which may be resorted to in proof of the different sorts of public writings.<sup>5</sup> Thus, it must, at least in general, be in a written form, i. e., in the shape of a copy,<sup>6</sup> and as already mentioned, must not be a copy of a copy. In very few, if, in any, instances is oral evidence,<sup>7</sup> receivable to prove the contents of a record or public book which is in existence.<sup>8</sup> With regard to the proof of documents of a public character in England, and the legislation relating thereto, see the notes to Section 82 post. Proof of public documents under this Act may be given either by means of certified copies under the provisions of Sections 76 and 77, or in the case of certain public documents particularly mentioned in Section 78, in the particular modes referred to and allowed by that section. When such proof has been offered, certain presumptions arise in respect of the documents which form the subject of the third division of this Chapter of the Act.<sup>9</sup>

**74. Public documents.** The following documents are public documents :

(1) documents forming the acts or records of the acts—

- (i) of the sovereign authority,
- (ii) of official bodies and tribunals, and
- (iii) of public officers, legislative, judicial and executive,  
<sup>10</sup>[of any part of India or of the Commonwealth], or of a foreign country,

(2) public records kept <sup>11</sup>[in any State] of private documents.

s. 3 ("Document.") ss. 76-78 (Presumptions as to documents).  
ss. 79-90 (Proof of public documents).

#### SYNOPSIS

|  |   |
|--|---|
| 1. Definition of "public document".  | 4. "Of official bodies and tribunals".  |
| 2. "Acts".   | 5. "Of public officer, etc."  |
| 3. "Of the sovereign authority".   | 6. Foreign public documents.  |
| <hr/>  |   |
| 5. By several modern Acts of Parliament special modes of proof are provided for many kinds of records and public documents; see 31 and 32 Vict., c. 37; 14 & 15 Vict., c. 99; 8 and 9 Vict., c. 113; 42 Vict., c. 11; 45 Vict., c. 50; a large number of similar enactments are to be found in the recent statute books; see Taylor, Ev., ss. 1073-1290. | see S. 82 post. (5) Copies signed and certified as true by the officer to whose custody the original is entrusted. This Act refers to certified copies (S. 76) and certain other copies particularly specified (S. 78).   |
| 6. In England the principal sorts of copies used for the proof of documents are : (1) Exemplifications under the great seal. (2) Exemplifications under the seal of the Court where the record is. (3) Office copies, i.e. copies made by an officer appointed by law for the purpose. (4) Examined copies as to which,                                  | 7. See Best, Ev., Amer. notes, p. 433.<br>8. Best, Ev., s. 485, and see Ss. 218, 219 fb., Starkie, Ev., 315.<br>9. See Introduction to Ss. 79-90.<br>10. The original words "whether of British India or of any other part of Her Majesty's dominions" have successively been amended by the A.O. 1948 and 1950 to read as above.<br>11. Subs. by A.O. 1948 for "in British India". |

7. 'Acts or records of acts of public officer :  
 —Visas.  
 —Judicial.  
 —Judgments.  
 —Orders.  
 —Decrees.  
 —Plaints, written statements, affidavits and petitions.  
 —Depositions.  
 —Translated copies of original documents.  
 —Statements recorded under section 164, Cr.P.C.  
 —Warrant and other papers of criminal Courts.  
 —Sanction for prosecution.  
 —Death registers.  
 —Notification.  
 —Confessions.  
 —Report of process-server.  
 —Dakhalnama.  
 —Other documents.  
 —Ballot-papers and other election papers.  
 —Outdoor tickets and discharge certificates.  
 —Pariwarik register.  
 —Complainant's statements under section 200, Cr.P.C.
8. Revenue :  
 —Jamabandi.  
 —Wajibularz.  
 —Mutations, quinquennial and settle-
- ment registers.  
 —Crop cutting report.  
 —Dag Chitha.  
 —Measurement Chithas.  
 —Record of rights.  
 —Certificate of Board of Trade.  
 —Ayakut accounts.  
 —Khasra girdwaries.  
 —Patwari papers.  
 —Register of Watadars.  
 —Anumatipatra, Kobalas, Teiskhana Registers.  
 —Official communications.  
 —Pedigree tables in settlement records.  
 —Survey and settlement reports.  
 —Maintenance application filed before Salar Jung Estates Committee.
9. Income-tax returns.
10. Public records :  
 —Loan registers.  
 —Jail registers.  
 —Papers of police.  
 —Patta registers.  
 —Census registers.  
 —Assessment orders.  
 —Registers for admission and withdrawal in schools.
11. Public records of private documents:  
 —Registered documents  
 —Wills.  
 —Memorandum of association of a company.

### 1. Definition of "public document". See Introduction.

To constitute a document a public document, it must fall within any of the category (1) or (2) mentioned in the section. Therefore, documents which do not fall within either of those categories cannot be said to be public documents. Thus Pandas' Bahis and horoscopes are not public documents.<sup>12</sup>

Where a document, or a part thereof, is a public document within the meaning of this section, it does not require any further proof. In case, there be a doubt as to its genuineness, the officer whose signature the document purports to bear may be called to prove its genuineness.<sup>13</sup>

**2. "Acts".** It has been held that in construing Sec. 74 it may fairly be supposed that the word "acts" in the phrase "documents forming the acts or records of the acts" is used in one and the same sense; that the act of which the record made is a public document must be similar in kind to the act which takes shape and form in a public document; that the kind of act which Section 74 has in view is indicated by Section 78 in which section the acts are all final completed acts, as distinguished from acts of a preparatory or tentative character. Thus, the enquiries which a public officer may make, whether under the Criminal Procedure Code or otherwise, may or may not

12. Paras Ram v. Dayal Das, A.I.R. 1965 H.P. 32.

13. Prithi Singh v. Union of India, A.I.R. 1959 Manipur 43.

result in action. There may be no publicity about them. There is a substantial distinction between such measures and the specific acts in which they result and it is to the latter only that Section 74 was intended to refer.<sup>14</sup> Thus, when a Civil Surgeon reports to a Magistrate about the age of a person, he is merely giving his expert opinion and is not making a record of his "act" in official capacity for the use of the public. His report cannot be considered to be an act or a record of his act as a public servant, and is not, therefore, a public document.<sup>15</sup>

3. "**Of the sovereign authority**". To this head may be referred Public Statutes, Proclamations, Ordinances, State Papers and Gazettes.<sup>16</sup>

4. "**Of official bodies and tribunals**". The fifth clause of Sec. 78 brings the record of the proceedings of a Municipal body in India within the second clause of the first sub-section of Section 74, as the record of the acts of an official body. The record of the proceedings of a Municipal Board is a public document, and the officer who is authorised by the ordinary course of his official duties to give copies of public documents is for these purposes a public officer.<sup>17</sup> Resolutions of allotment committee of the Improvement Trust recommending allotments is a public document but the application for such allotments are private documents.<sup>17-1</sup>

5. "**Of public officer, etc.**". For the definition of a "Public Officer", see Section 2 (17) of the Code of Civil Procedure. That definition very nearly corresponds to that of "Public Servant" given in Section 21 of the Indian Penal Code, but a person may be a public servant but not a public officer. Thus, a Municipal Commissioner is a public servant,<sup>18</sup> but he is not a public officer.<sup>19</sup> The following have been held to be public officers :

A Collector acting as Manager of Court of Wards,<sup>20</sup> Official Trustee,<sup>21</sup> Official Assignee,<sup>22</sup> Receiver in insolvency,<sup>23</sup> Military Officers acting as members of a Court-Martial,<sup>24</sup> Receiver appointed in a suit<sup>25</sup> are public officers

- 14. R. v. Arumugam, (1897) 20 M. 189, 197, per Shephard, J. So also Benson, J., at p. 204, said : "It may, I think, well be doubted whether the word 'acts' in S. 74 is used in its ordinary and popular sense and not rather in the restricted and technical sense in which it is used in S. 78"; but see also remarks of S. Aiyar, J. at p. 208 and note on this case, post.
- 15. Abdul Halim v. Raja Saadat Ali, 1928 Oudh 155 : 108 I.C. 817.
- 16. See Phipson Ev., 11th Ed., p. 758.
- 17. Reference to Full Bench under S. 46 of Act 1 of 1879, (1897) 19 A. 293 at p. 295.
- 17-1. M. N. Krishna Rao v. Board of Trustees, (1972) 1 Mys.L.J. 101.
- 18. See Illustration to Sec. 21, Indian Penal Code.
- 19. Narendra Prasad v. Janki Kuer, A.I.R. 1947 Pat. 385 : I.L.R. 25 Pat. 739: 228 I.C. 176.
- 20. Gokul Chandra v. Manager, Banianchang Mozumdar Ward Estate, A.I. R. 1939 Cal. 720 : I.L.R. (1940) 1 Cal. 73 : 43 C.W.N. 1212; Charu Chandra v. Snigdhendu Prasad, A.I.R. 1948 Cal. 150 : 52 C.W.N. 212; Narsinghrao v. Lakshman Rao, (1876) 1 Bom. 318; Collector of Bijnor v. Munuwar, (1880) 3 All. 20; but see Bhan v. Nana, (1888) 13 Bom. 343.
- 21. Sahebzadee v. Ferguson, (1881) 7 Cal. 499; Abdul v. Doutre, (1889) 12 Mad. 250.
- 22. Joosule Haji Ali v. N. W. Kemp, (1902) 26 Bom. 809.
- 23. De Silva v. Govind, (1920) 44 Bom. 895 : 58 I.C. 411 : 22 Bom.L.R. 987 : A.I.R. 1920 B. 50.
- 24. Subedar Shingara v. Callaghan, A.I.R. 1946 Lah. 247 : I.L.R. 1947 Lah. 22 : 225 I.C. 414 (S.B.).
- 25. Radharani v. Purna Chandra, A.I.R. 1930 Cal. 737 : 128 I.C. 108 : 34 C.W.N. 671; Prasaddas Sen v. K. S. Bonnerjee, A.I.R. 1931 Cal. 61 : I.L.R. 57 Cal. 1127 : 130 I.C. 903.

but a Liquidator appointed by the Registrar of a Co-operative Society is not a public officer.<sup>1</sup>

The police, charged with the duty of investigating an offence, is a public officer and his act or records of the act can be inspected.<sup>2</sup>

**6. Foreign public documents.** The Act covers public documents of Native States or foreign countries.<sup>3</sup> The records of proceedings in a Court of justice in a foreign country are public documents.<sup>4</sup> A copy of a Probate granted in Australia was held to be admissible in India.<sup>5</sup> But, in another case, in support of a claim instituted in a Court in British India for a share in her deceased father's estate, the plaintiff tendered in evidence a document which purported to be a certified copy of the will executed by her late father at Colombo, where he was said to have been at the date of the execution of the alleged will. The document was filed as an exhibit in the suit, but the Subordinate Judge held that it was not admissible in evidence. It bore an endorsement purporting to be signed by the Assistant Registrar-General for Ceylon to the effect that it was a true copy of a last will and testament made from the Protocol of record filed in his office. No evidence was tendered before the Subordinate Judge that the copy had been made from and compared with the original. On the question of the admissibility in evidence of the said document, it was held that it was inadmissible, that it was not a public document within the meaning of clause (1) (iii) or (2) of this section and that, in the absence of evidence that it had been made from and compared with the original, the provisions of that Act relating to secondary evidence of public documents were inapplicable.<sup>6</sup> It has been held that the record of a confession of an accused person recorded by the Magistrate of Bhind in Gwalior is probably a public document.<sup>7</sup> Similarly, the visa, obtained on the basis of the Pakistani Passport being a public document, is admissible in evidence and furnishes *prima facie* proof that the holder has acquired Pakistani citizenship.<sup>8</sup>

**7. Acts or records of acts of public officer : Visas.** The Visa Officer of the Government of India who issues Visas in a foreign country is an officer of the Government of India, and the Visas issued by him are public documents within the meaning of the section, under which, even the records of the acts of the officers of a foreign country would be public documents. Further, every one of the entries in the passport is a public document, as constituting an act or the record of the acts of public officer.<sup>9</sup> A residential permit issued in favour of a foreigner is a public document being an act or the record of the acts of the registration officer.<sup>10</sup>

1. Abdul Ghani v. Imdad, A.I.R. 1942 Lah. 287 : 203 I.C. 363.
2. V. J. Thomas v. State of Kerala, 1970 M.L.J. (Cr.) 320 : 1970 Cr. L.J. 1499 : A.I.R. 1970 Ker. 273 (276).
3. Maharaj Bhanudas v. Krishnabai, A.I.R. 1927 Bom. 11 : I.L.R. 50 Bom. 716 : 99 I.C. 307 : 28 Bom. L.R. 1225.
4. Haranund Chettangia v. Ramgopal Chettangia, I.L.R. (1899) 27 Cal. 639 : 27 I.A. 1 : 2 Bom.L.R. 562 : 4 C.W.N. 429.
5. In the matter of Adija, 11 I.C. 261.
6. Ponnammal v. Sundaram, (1900) 23 M. 499.
7. R. v. Sundar, (1890) 12 A. 595.
8. State v. Abdul Rashid, A.I.R. 1961 Pat. 112 : (1961) 1 Cr.L.J. 412(2)
9. State v. Abdul Sattar, A.I.R. 1963 Guj. 226 : 1963 Guj.L.R. 1073.
10. Ibid.

*Judicial.* The records of courts of justice and other judicial writings, constitute another class of public documents.<sup>11</sup> Statements recorded under Section 164, Cr. P. C., are public documents.<sup>12</sup> A permit under Motor Vehicles Act is a public document.<sup>13</sup>

*Judgments.* A judgment of a court is a public document,<sup>14</sup> and so also an order sheet in a case.<sup>15</sup>

*Orders.* A certified copy of an order of a Probate Court, granting letters of administration with the will annexed, is a public document under this section and admissible under Section 66.<sup>16</sup>

*Decrees.* A decree of a court is a public document of which a certified copy is admissible in evidence.<sup>17</sup>

*Plaints, written statements, affidavits and petitions.* But that class of documents which consists of plaints, written statements, affidavits and petitions filed in Court, cannot be said to form such acts or records of acts as are mentioned in the section, and are, therefore, not public documents.<sup>18</sup> In the case cited below,<sup>19</sup> which was a suit arising out of an alleged trespass, certified copies of the judgment of the Munsiff in a previous suit between the parties as well as the decree, were admitted in evidence as public documents ; certified copies of the plaint and written statements were also tendered in evidence, on the ground of their being public documents, and objected to. The plaint was admitted, but the written statement was rejected. The correctness, however, of this decision, so far as it held the plaint to be admissible has been for a long time doubted,<sup>20</sup> and has not been followed on the Original Side of the Calcutta High Court. The decision is, it is submitted, erroneous ; there being

11. Taylor, Ev., s. 1534.

12. State of Madras v. Krishnan, I.L.R. 1961 M. 1; A.I.R. 1961 M. 92; 73 L.W. 713 (F.B.).

13. In re Sabir Ahmad, A.I.R. 1960 M.P. 318; 1960 M.P.L.J. 904.

14. Ladli Prasad Zutshi v. Emperor, A.I.R. 1931 All. 364; I.L.R. 53 All. 724; 132 I.C. 327; 32 Cr.L.J. 864; 1931 A.L.J. 405.

15. Nand Kumar Sinha v. Emperor, A.I.R. 1937 Pat. 534; 172 I.C. 237; 1937 P.W.N. 119.

16. Habiram v. Hem Nath, A.I.R. 1916 Cal. 676; 30 I.C. 690; 19 C.W.N. 1068.

17. See Collector of Gorakhpur v. Ram Sundermal, A.I.R. 1934 P.C. 157; 61 I.A. 286; I.L.R. 56 All. 468; 150 I.C. 545; 1934 A.L.J. 779; 4 A.W.R. 46; 36 Bom.L.R. 867; 60 C.L.J. 67; 38 C.W.N. 1101; 67 M.L.J. 274; 1934 M.W.N. 751; 40 L.W. 217; 11 O.W.N. 689; 15 P.L.T. 531; Kishen Lal v. Firm Ramchandermal Jagannath, A.I.R. 1953 Raj. 216; 4 Raj.L.W. 202; Md. Ayub Khan v. Abdus Samad Khan, 1969 B.L.J.R. 932 (936).

18. Manbodh v. Hirasai, A.I.R. 1926

Nag. 339; 93 I.C. 650; Tarkeshwar Prasad Tewari v. Devendra Prasad Tewari, A.I.R. 1926 Pat. 180; 92 I.C. 184; 7 P.L.T. 267; Akshoy Kumar Bose v. Sukumar Dutta, A.I.R. 1951 Cal. 320; Mata Prasad v. Brij Kishore Singh, 1942 Oudh 303; 200 I.C. 265; 1942 O.W.N. 191; 1942 A.W.R. (C.C.) 139 (caselaw discussed); Usuf Hasan v. Major Raunaq Ali, A.I.R. 1943 Oudh 54; 203 I.C. 391; 1942 O.W.N. 522; 1942 A.W.R. (C.C.) 324; Vtnkatalingam v. Parthasarthy, A.I.R. 1942 M. 558; 202 I.C. 697; (1942) 2 M.L.J. 47 (petition and affidavit); but see the order of reference in Katikineni Venkata Gopala Narasimha Rama Rao v. Chitturi Venkataramayya, A.I.R. 1940 M. 768; I.L.R. 1940 M. 969; (1940) 2 M.L.J. 257; 1940 M.W.N. 787; 52 L.W. 159 (F.B.); Gulab Chand v. Sheo Karan, A.I.R. 1964 Pat. 45.

19. Sahzada v. Wedgeberry, (1873) 10 B.L.R. App. 31.

20. See as to the admissibility of quasi-records, Taylor, Ev., s. 1534.

no principle upon which the case of a plaint can be distinguished from that of a written statement. Both are the acts or record of the acts of private parties and not of a public tribunal or its officers. It has, therefore, been held that an award which is annexed to a petition cannot be admitted in evidence as a 'public document'. All that can be proved is that that particular award had been before the Court and that the Court had pronounced judgment on it. The principle is, that a petition, as such, is not the record or act of a judicial authority; neither is an affidavit, except an affidavit of service.<sup>21</sup> A private document does not become a public document simply because it is filed in court. The compromise of private parties filed in a criminal court is not a public document and cannot be proved except by a certified copy.<sup>22</sup> But objections to the admissibility of a certified copy of a written statement, if not taken in the trial court when it is tendered in evidence, cannot be permitted to be taken in appeal.<sup>23</sup>

*Depositions.* Depositions of witnesses taken by an officer of the court are public documents.<sup>24</sup> There can be no distinction between notes of evidence and full deposition of witnesses as recorded by Judges, hence notes of evidence recorded by the Court of Small Causes is public document.<sup>25</sup>

*Translated copies of original documents.* Where there is no statutory duty on a Government servant to make or retain translations of original documents (wills), the translated copy, though kept in the office of Court of Wards, is not a 'public document' within the meaning of this section.<sup>1</sup>

*Statements recorded under Section 164, Cr. P. C.* In regard to statements recorded under Section 164, Cr. P. C., a Full Bench of the Madras High Court in *State of Madras v. Krishnan*<sup>2</sup> has elaborately considered the definition of "public documents", and the question as to whether the statements recorded under Section 164, Cr. P. C., are public documents and finally the right to obtain certified copies thereof. It has been held that a Magistrate recording a statement under Section 164, Cr. P. C., is performing a judicial act and the record is a 'public document' within the meaning of this section.

*Warrant and other papers of criminal courts.* A warrant is a public document and it can be proved only by a certified copy.<sup>3</sup> Statements recorded in commitment proceedings 33 years back would be public document and Sections 74, 76, 77 and 80 would apply.<sup>3-1</sup> A remand report on the considera-

21. East India Trading Co. v. Badat & Co., I.L.R. 1959 Bom. 1004 : A.I.R. 1959 Bom. 414.

22. State of Gujarat v. Ambalal, (1966) 7 Guj.L.R. 23 : 1966 Cr.L.J. 967 (1).

23. Firm Durga Dat Jagannath v. Firm Ram Pratab Sukh Dayal, A.I.R. 1923 L. 138 : 79 I.C. 221.

24. Chandreshwar Prasad Narain Singh v. Biseshwar Pratab Narain Singh, A.I.R. 1927 Pat. 61; I.L.R. 5 Pat. 777: 101 I.C. 289 : 8 P.L.T. 510 : Karapaya Servai v. Mayandi, A.I.R. 1933 Rang. 212 : 147 I.C. 414; Haranund v. Ram Gopal, I.L.R. 27 Cal. 639 : 27 I.A. 1 : 2 Bom.L.R. 562 : 4 C.W.N. 429 (P.C.) (Foreign

Judicial Records). A witness's deposition is part of the records of the acts of an official tribunal within the meaning of S. 74, Reg. App. No. 110 of 1900, 10th June 1902 (Cal.H.C.).

25. Annaimalai Trading Co. v. Hariharan Transports, 1965 M.L.J. (Cr.) 702.

1. Sri Thakur Krishna v. Kanhaiyalal, A. I. R. 1961 All. 206.  
2. 1960 M. W. N. (Cr.) 238; I. L. R. 1961 M. I; A. I. R. 1961 M. 92; 73 L. W. 713 (F.B.).

3. Kantilal Ambalal v. State, 1968 Cr. L. J. 758; A. I. R. 1968 Guj. 100. Saudagar Singh v. State of Punjab, (1974) 76 P. L. R. 57.

tion of which an order of remand is made<sup>3-2</sup> is a public document.<sup>3-2</sup> Statement of defendant recorded in a criminal case against him is a public document and its certified copy is admissible.<sup>3-3</sup>

*Sanction for prosecution.* Sanction for prosecution accorded by the officer competent to do so is a public document. The original or its certified copy is admissible without formal proof.<sup>3-4</sup>

*Death registers.* A death register is a public document. The presumption is that the entry in such register is correct. Heavy onus rests on those who want to displace the presumption.<sup>4</sup>

*Notification.* A notification under section 19 of the Kerala Forest Act, 1962, is a public document which may be proved by production of the relevant Gazette or by a certified copy of the notification.<sup>5</sup>

*Confessions.* The record of a confession recorded by a Magistrate is a public document, being the record of an act of a public officer done in the discharge of his duty,<sup>6</sup> but such record by a second class Magistrate not empowered to record confession is not a public document.<sup>6-1</sup>

*Report of process-server.* The report of a process-server is a public document.<sup>7</sup>

*Dakhalnama.* A dakhalnama has been held to be a public document,<sup>8</sup> and so also a robkari.<sup>9</sup>

*Other documents.* A recorded order, for the issue of a search warrant by a Magistrate, comes directly within the scope of the definition of public document.<sup>10</sup> A certificate of sale granted under the Civil Procedure Code (Act VIII of 1859), and before Section 107 of Act XII of 1879 was enacted, is a document of title but is not a public document.<sup>11</sup>

- 3-2. Raman Velu, *In re*, 1973 M. L. J. (Cr.) 25: 1972 Ker. L. T. 922: I. L. R. (1973) 1 Ker. 50.
- 3-3. Firm Ramchand Bhagirath v. Ganpatram, 1972 W. L. N. 1116 (Raj.).
- 3-4. Prem Prakash v. State of Rajasthan, 1971 W. L. N. 408 (Raj.).
- 4. Gopichand v. Bedam, A. I. R. 1966 Pat. 231: 1965 B. L. J. R. 738.
- 5. Chackopyli v. State of Kerala, I. L. R. (1966) 1 Ker. 320: 1966 Ker. L. J. 76: 1966 Ker. L. R. 125: 1966 M. L. J. (Cr.) 413: 1966 Ker. L. T. 102 (104).
- 6. Mohammad Ali v. Emperor, A. I. R. 1934 All. 81: I. L. R. 56 All. 302: 147 I. C. 390: 35 Cr. L. J. 385: 1933 A. L. J. 1551 (F.B.).
- 6-1. Nikuram v. State of H. P., A. I. R. 1972 S.C. 2077: 1972 Cr. L. J. 1317.
- 7. Balku v. Emperor, A. I. R. 1925 Oudh 183: 81 I. C. 533: 25 Cr. L. J. 917; Abdul Khadir v. Ahammed Shaiwa Ravuthar, I. L. R. 35 Mad. 670: 12 I.C. 679; Heramba Nath v. Surendra Nath, A. I. R. 1919 P. 454: 53 I.C. 20; but see as to mode of proof, Fateh Mohammad v. Hakim Khan, A.I.R. 1926 Lah. 629: 96 I. C. 825.
- 8. Sat Narain Dube v. Narain Bargah, 30 I. C. 830: 13 A. L. J. 935: A.I. R. 1915 A. 341; Sita Ram v. King Emperor, 1927 All. 52: 98 I. C. 471: 27 Cr. L. J. 1851; Muhammad Nasir v. Ram Karan Singh, 25 I. C. 529: A. I. R. 1914 A. 435.
- 9. Radhanath Kaibarta v. Emperor, 46 I.C. 689 (2): 19 Cr. L. J. 769: 22 C. W. N. 742: A. I. R. 1918 C. 217.
- 10. Kalinga Tubes, Ltd. v. D. Suri, A. I. R. 1953 Orissa 49: 54 Cr. L. J. 514.
- 11. Vasanji v. Haribhai, (1900) 2 Bom. L. R. 535, per Candy, J.

Where a suit was compromised and a petition presented in the usual way, and the Court made an order confirming the agreement which, with the order as well as the power-of-attorney, were all entered upon record, it was held that these papers became as much a part of the record in the suit, as if the case has been tried and judgment given between the parties in the ordinary way, and that record was a public document and might be proved by an office copy.<sup>12</sup> In a suit for ejectment the defendant pleaded a compromise. As evidence of it, he tendered a certified copy of a petition which bore an order of the Court on it. This document was rejected by the lower Court as not proved, but it was held by the High Court that the document did not require to be proved and was admissible in evidence under Section 77 of this Act.<sup>13</sup> Statements recorded by a Magistrate in a departmental enquiry are not public documents as the enquiry is not a judicial one.<sup>14</sup>

*Ballot papers and other election papers.* Ballot papers put by voters bearing their seals or marks and ballot papers put by the voters in the ballot box are records of the Election Commission indicating the manner in which the voters have cast their votes. They have to be kept, under the relevant election rules, under proper seals, even after the counting of votes. They are to be preserved as public records and have to be made available to an Election Tribunal. They are public records, and as such they are public documents within the meaning of this section.<sup>15</sup>

The check memo required to be maintained by the officer in charge of the counting table is a document forming record of the acts of a public officer and is a public document.<sup>16-1</sup> Electoral rolls are public documents.<sup>16-2</sup>

*Outdoor tickets and discharge certificates.* Outdoor tickets and discharge certificates granted in public hospitals are also public documents.<sup>16</sup>

*Pariwarik register.* The Pariwarik register prepared by the Election Officer under the provisions of the Bihar Panchayat Election Rules, 1959, is a public document, the contents of which can be used as evidence in the case without calling the Gram Sewak.<sup>17</sup>

*Complainant's statements under section 200, Cr. P. C.* The record of the statement of a complainant under Section 200, Cr. P. C., is a record of a judicial act under that section and it is a public document.<sup>18</sup>

**8. Revenue : Jamabandi.** A jamabandi prepared by a Deputy Collector while engaged in the settlement of land under Regulation VII of 1822

- 12. Bhagain v. Gooroo, (1876) 25 W. R. 68.
- 13. Mangal v. Hira, (1904) 1 All. L. J. 369 (certified copy of application for compromise with an order of the Court on it is admissible in evidence under S. 77 and need not be proved).
- 14. Government of Bengal v. Santi Ram Mondal, A. I. R. 1930 Cal. 370; I. L. R. 58 Cal. 966; 127 I.C. 657; 32 Cr. L. J. 10.
- 15. Ram v. Gouri Shankar, A. I. R. 1965 Pat. 449.
- 15-1. Banamali Das v. Rajendra, A. I. R. 1975 S.C. 1863 : (1976) 1 S. C. C. 54.
- 15-2. Kirtan v. Thakur, A. I. R. 1972 Orissa 158 (F.B.).
- 16. Ramani v. Kamal Lal Malakar, A. I. R. 1965 Tripura 17.
- 17. Toral Mahton v. Chandreshwar Mähton, 1971 B. L. J. R. 418 (422); A. I. R. 1972 Pat. 13 (15).
- 18. Laxmanna v. Hanamappa, (1967) Mys. L. J. 553 (554).

has been held to be a public document within the meaning of this section on the ground that the act of the Collector in making a settlement or even an inquiry under the provisions of that Regulation is that of a public officer, whether it be judicial or executive (it probably partaking of both characters), and that the record of such acts is a public document.<sup>19</sup> But this decision has been since said to be open to some degree of doubt.<sup>20</sup> In any case, however, it is evident that the question whether a document is admissible in evidence as a public document and the question whether that which is in it is binding upon tenants without reference to the question of consent or notice, are entirely separate matters.<sup>21</sup>

*Wajibularz.* A wajibularz is a public document.<sup>22</sup>

*Mutations, quinquennial and settlement registers.* Mutation, quinquennial and settlement registers are public documents.<sup>23</sup> Mutation entries are relevant only so far as they indicate the nature and contents of reports of revenue authorities made at the time of mutation but they do not prove relationship between the person mutated and the person in whose place he is so mutated.<sup>23-1</sup>

*Crop cutting report.* The crop cutting report prepared by the Collector in the ordinary course of his duties in proceeding under Section 40 of the Bengal Tenancy Act falls within the provisions of Section 74 of the Evidence Act.<sup>24</sup>

*Dag Chitha.* A dag chitha containing entries, made according to Rr. 55 (ii) and 66 of the Manipur Land Revenue and Land Reforms Rules, 1961, is a public document. The fact that the survey was still going on and the record of rights had not been finally published under Section 43 of the Manipur Land Revenue and Land Reforms Act, 1960, would affect only the weight to be attached to the entries.<sup>25</sup>

*Measurement Chithas.* An abstract or copy of a Government measurement chithas which has been produced from the Collectorate, but as to which there is nothing to show that it is the record of measurements made by a public officer, is not admissible as a public document,<sup>1</sup> nor, it would seem, is a chitha prepared by a public officer, with a view to resumption proceedings

19. Taru v. Abinash, (1878) 4 C. 79; Mahaboop v. K. Vittal, A.I.R. 1959 Mys. 180; Anantam v. Valluri, A. I. R. 1960 Andh. Pra. 222.
20. Akshaya v. Shama, (1889) 16 C. 586, 590; Ram Chunder v. Banseerdhur, (1888) 9 C. 741, 743.
21. Akhaya v. Shama, supra at p. 590.
22. Fajju v. Sirya, 170 I.C. 392.
23. Oody v. Bishonath, (1867) 7 W. R. 14. See Kashee v. Noor, S. D. A. (1849), pp. 113, 116; Ramanandhan v. Jaigovind, A. I. R. 1924 Pat. 213; I. L. R. 2 Pat. 839; 75 I.C. 955; Secretary of State v. Chimanlal, A. I. R. 1941 Bom. 151; I. L. R. 1942 Bom. 857; 201 I.C. 420; 44 Bom. L. R. 295; Gobardhan

- Gountia v. Labanyanidhi Bhoi, 33 Cut. L. T. 960 (965, 966) (Tabdilat papers); G. C. Khan v. State of W. B., I. L. R. (1971) 2 Cal. 119.
- 23-1. Parkash Chand v. Durgi Devi, (1971) 1 Sim.L.J. (H.P.) 423.
24. Kishun Dayal v. Ishwar Nath, A. I. R. 1927 Pat. 167; 102 I.C. 391; 8 P. L. T. 74; Har Govind v. Kishun Dayal, A. I. R. 1926 Pat. 436; 95 I.C. 966.
25. Ningombam v. Chief Commissioner, Government of Manipur, A. I. R. 1969 Manipur 79 (82).
1. Nityanand v. Abdur Raheem, (1881) 7 C. 76.

being taken, a public document, for it is made by Government as an ordinary landlord for a private purpose.<sup>2</sup> If the chithas were prepared for a public purpose, such as the distribution of revenue on the shares, or assessment and settlement of revenue on the share belonging to the Government, they would be public documents, but if they were prepared with the object of ascertaining the lands belonging to the Government without prejudice to the rights of the owners of the bahali shares, they cannot be called public documents, even though they might have been availed of subsequently for assessment of Government revenue.<sup>3</sup>

*Record of rights.* Entries in the Record of Rights under Chapter V of the Manipur Land Revenue and Land Reforms Act 33 of 1960 are admissible in evidence though the Record has not been finally published. The weight to the entry therein is a different matter.<sup>4</sup>

*Certificate of Board of Trade.* A master's certificate granted by the Board of Trade is not a public document.<sup>5</sup>

*Ayakut accounts.* As to Ayakut accounts prepared for administrative purposes by village officers, see case below.<sup>6</sup> Entries in a register made under Bengal Act VII of 1876 by the Collector are entries made in an official register kept by a public servant under the provisions of a Statute, and certified entries are admissible in evidence for what they are worth.<sup>7</sup>

*Khasra girdwaries.* Khasra girdwaries are public documents,<sup>8</sup> but not so a parcha slip granted in the course of survey proceedings.<sup>9</sup> If the certified copy of the khasra girdwari has been made part of the record by the defendants, it is unnecessary to produce the Patwari.<sup>10</sup>

*Patwari papers.* An abstract statement prepared by a Patwari, even though based on papers in his possession and filed in a suit, is only a private document and a certified copy of it does not by itself prove the original.<sup>11</sup> Fard Bachh prepared under the Punjab Land Revenue Act by Patwari are public documents which can be proved by certified copies.<sup>12</sup>

*Register of Watandars.* The register of information regarding the Pargana Watandars prepared by the Assistant Collector under direction given by the Collector under the orders of the Inam Committee, is a public document

2. Ram v. Bunsheedhur, (1883) 9 C. 741, 743. See Dwarka v. Tarita, (1886) 14 C. 120.
3. Nobendra Kishore Roy v. Rahim Banu, 31 I.C. 695; 19 C. W. N. 1015; Nobendra Kishore Roy v. Durga Charan Chowdhry, 10 I. C. 287; 15 C. W. N. 515; Fazlur Rahim v. Nobendra Kishore Roy, 15 I. C. 341; 17 C. W. N. 151.
4. Tronglaobi Pisciculture Co-operative Society, Ltd. v. Chief Commissioner of Manipur, A. I. R. 1969 Manipur 84 (87, 88).
5. In the matter of a collision between the "Ava" and The "Brenhilda"
6. (1879) 5 C. 568.
7. Sivasubramanya v. Secretary of State, (1884) 9 M. 285, 294.
8. Shoshi v. Girish, (1893) 20 C. 940.
9. Mohammad Din v. Fateh Din, A. I. R. 1934 L. 698; 151 I.C. 786; 35 P.L.R. 405.
10. Ram Bhagwan v. Emperor, 47 I.C. 82; 19 Cr. L. J. 886.
11. Khiali Ram v. Sant Lal, 1972 Cur. L. J. 403 (407).
12. Sheo Das v. Sheo Dayal Singh, A. I. R. 1930 All. 712; 128 I. C. 770.
12. Malik Mahmud v. Khusal Ram, A. I. R. 1931 Lah. 605; 131 I.C. 688; 32 P. L. R. 508.

within the definition of public document in this section, being a record of the acts of a public officer.<sup>13</sup>

*Anumatipatra, Kobalas, Teiskhana register.* An anumatipatra, or instrument giving permission to adopt, is clearly not a public document,<sup>14</sup> nor of course are kobalas conveyances and the like<sup>15</sup> nor is a teiskhana register (so called from the number of columns in the statement or register), prepared by a patwari under rules framed by the Board of Revenue under the 16th section of Reg. XII of 1817, nor is the Patwari preparing the same a public servant.<sup>16</sup>

*Official communications.* Letters which have passed between district authorities are public documents forming a record of the acts of public officers.<sup>17</sup> But the question, whether a letter or report from one official to another is an entry in a public record within the meaning of Section 35, will depend on the circumstances of each case.<sup>18</sup>

*Pedigree tables in settlement records.* Pedigree tables taken from settlement records have been held to be public documents.<sup>19</sup>

*Survey and settlement reports.* A Survey and Settlement Reports is a public document.<sup>20</sup> Records in the assessment file constitute public documents, as forming the acts or records of the acts of a public officer or of an official body.<sup>21</sup>

*Maintenance application filed before Salar Jung Estates Committee.* A petition filed before the Salar Jung Estates Committee, an authority appointed under statutes enacted by the Hyderabad State Legislature and by the Union Parliament is a public document. A certified copy of an application for maintenance filed before the committee is admissible to prove an admission contained therein.<sup>22</sup>

**9. Income-tax returns.** It would be putting an unwarranted restriction on the words "documents forming the acts or records of the acts" to say that they should be confined to those parts of an income-tax record which the

- 13. Mallappa Basavantrao v. Tukko Narasinha, A. I. R. 1937 Bom. 307; I. L. R. 1937 Bom. 464: 170 I.C. 801.
- 14. Krishna v. Kishori, (1887) 14 C. 486, 491.
- 15. Hureehur v. Churn, (1874) 22 W. R. 355; Hurish v. Prosuno, (1874) 22 W. R. 303.
- 16. Baij v. Sukhu, (1891) 18 C. 534; Samar v. Juggul Kishore, (1895) 23 C. 366, in the judgment S. 35, ante, is fully considered.
- 17. Pirthee v. Court of Wards, 23 W. R. 272; Mst. Rupa v. Bhairon Prasad, A. I. R. 1928 Nag. 93; 105 I. C. 353; Edu v. Hirralal, A. I. R. 1928 Oudh 488; 5 O. W. N. 886.
- 18. Malikarjuna v. Secretary of State, (1912) 35 M. 21; see Abdul Halim v. Raja Sadat Ali, A.I.R. 1928 Oudh 155: 108 I. C. 817, where the report of a Civil Surgeon was held to be not a public document.
- 19. Sheo Shankar v. Mst. Ramdei, A. I. R. 1935 Oudh 231: 154 I. C. 135: 1935 O. W. N. 162; Sarju Dei v. Ram Harukh, 18 I.C. 250; Gurdit Singh v. Kartar Singh, A. I. R. 1928 Lah. 214: 103 I.C. 182.
- 20. Braj Sundar Deb v. Rajendra Narayan, A. I. R. 1941 Pat. 260: 195 I.C. 313: 22 P. L. T. 699; Manu v. State of Orissa, A. I. R. 1965 Orissa 49.
- 21. A. K. Kader Kutty v. Agricultural Income-tax Officer, Tellicherry, A. I. R. 1961 Ker. 1292.
- 22. Chand Sultana v. Khurshid Begum, A. I. R. 1963 A. P. 365: (1963) 1 Andh. L. T. 171.

Income-tax Officer has himself prepared and to exclude documents which he has himself called for or which have been admitted to record for the purposes of the assessment. The record of an income-tax case must be regarded as the record of the acts of the Income-tax Officer in making his assessment and therefore any document properly on the record is just as much a public document as the final order of assessment.<sup>23</sup> Hence, a profit and loss statement and a statement showing the details of net income, filed by an assessee in support of his return of income furnished under Section 22, Income Tax Act, are public documents with reference to Section 74, Evidence Act, of which certified copies would be admissible under Section 65 (e), Evidence Act.<sup>24</sup> Not only orders of assessment,<sup>25</sup> but also statements recorded by the Income-tax Officer,<sup>1</sup> and income-tax returns<sup>2</sup> are public documents.

**10. Public records.** First information reports are public documents<sup>3</sup> only if they are covered by Sections 154 and 155, Cr. P. C., or Section 44, Police Act, V of 1861.<sup>4</sup>

It has been held by the Madras High Court, that reports made by a police officer in compliance with Sections 157 and 168 of the Criminal Procedure Code are not public documents, and that consequently an accused person is not entitled before trial to have copies of such reports.<sup>5</sup> There is, how-

- 23. Kartikineni Venkata Gopala Narasimha Rama Rao v. Chitluri Venkataramayya, A. I. R. 1940 Mad. 768; I. L. R. 1940 Mad. 969: (1940) 2 M. L. J. 257: 52 L. W. 159 (F.B.).
- 24. ib., overruling Mythili v. Janaki, A. I. R. 1940 Mad. 161; I. L. R. 1940 Mad. 329: 189 I.C. 722: 1939 M. W. N. 1237: 50 L. W. 185 and dissenting from Anwar Ali v. Tofazal Ahmad, A. I. R. 1925 Rang. 84: I. L. R. 2 R. 391: 84 I.C. 487, and Devi Datt v. Shri Ram Narayan Das, A. I. R. 1932 Bom. 291: I. L. R. 56 Bom. 324: 137 I.C. 381: 34 Bom. L. R. 236; Santi Ranjan Das v. Dasuram Mirzamal Firm, A. I. R. 1957 Assam 49.
- 25. ib., Shrimati Buchibai v. Nagpur University, A. I. R. 1946 Nag. 877: I. L. R. 1946 Nag. 433: 1946 N. L. J. 406; Suraj Narain v. Seth Jhabulal, A. I. R. 1944 All. 114: I. L. R. 1944 All. 221: 214 I.C. 232; Promotha Nath v. Nirode Chandra, A. I. R. 1940 Cal. 187: I. L. R. (1939) 2 Cal. 394: 188 I.C. 37: 43 C. W. N. 1169; Devi Datt v. Shri Ram Narayan Das, supra; Venkataramana v. Varahalu, A. I. R. 1940 Mad. 308: 1939 M. W. N. 1028: 50 L. W. 681: Tulsiram v. Anni, A. I. R. 1963 Orissa 11.
- 1. Shrimati Buchibai v. Nagpur University, supra; Venkataramana v. Varahalu, supra.
- 2. Kartikineni Venkata Gopala Narasimha Rama Rao v. Chitluri Ven-
- kataramayya, supra; Naim Singh v. Tikam Singh, 1955 All. 388; Shrimati Buchibai v. Nagpur University, supra; Santi Ranjan Dass v. Dasuram Mirzamal Firm, A. I. R. 1957 Assam 49; Emperor v. Osman Chotani, A. I. R. 1942 Bom. 289: I. L. R. 1942 Bom. 767: 203 I.C. 365; but see Anwar Ali v. Tofazal Ahmad, supra; Devi Datt v. Shri Ram Narayan Dass, supra; Promotha Nath v. Nirode Chandra, supra.
- 3. Mohan Singh v. King-Emperor, A. I. R. 1925 All. 413: 85 I.C. 647; Chittal Singh v. Emperor, 1925 All. 303: I. L. R. 47 All. 280: 85 I.C. 650; Gansa Oraon v. King-Emperor, A. I. R. 1923 Pat. 550: I. L. R. 2 Pat. 517: 73 I.C. 561.
- 4. Nawab Bibi v. Sher Zaman, A. I. R. 1930 L. 1067: 123 I.C. 285: 31 P. L. R. 214.
- 5. R. v. Arumugam, (1897) 20 M. 189 (F.B.); Subramania Aiyar, J., dissenting. Whatever may be said upon the matter from the point of view of convenience and public policy, which do not strictly touch the pure question of construction, there is, it is submitted, great force in the reasoning of Subramania Aiyar, J. (at p. 203), that even if such a document be not a record of at least some of the investigating officer's acts it is itself a document forming an act of his, he being enjoined to act in a particular way, that is to submit such a report.

ever, a difference of opinion in that Court whether the same rule applies to reports made in compliance with Section 173 of the Criminal Procedure Code,<sup>6</sup> or whether reports under that section are public documents of which an accused person is entitled under Section 76 to have copies before trial.<sup>7</sup> Where an order for search had been made on the basis of an application of a Police Inspector, which is not in itself a police report, not only the order but also the application is a public document of which a certified copy may be granted.<sup>8</sup> The record of a statement of a witness made by a police officer in the course of investigation is not a public document,<sup>9</sup> nor is one made by an Excise Officer.<sup>10</sup>

*Loan registers.* The Loan Register of the Public Debt Office in the Bank of Bengal is a public document, and under Section 76 any person having an interest therein is entitled to inspect the same and obtain certified copies thereof.<sup>11</sup>

*Jail registers.* Jail registers are public documents being official records kept by public servants in the discharge of their official duties.<sup>12</sup>

*Papers of police.* A warrant issued under the provisions of Section 46 of the Calcutta Police Act is not a public record.<sup>13</sup>

A letter to the Collector forwarding the proceedings of a public meeting is not a public document.<sup>14</sup>

*Patta registers.* Patta registers recording copies of leases kept for the private use of Government Officers are not public documents but a printed book containing the general index of the lands leased is a public document.<sup>15</sup>

*Census registers.* Census registers are not public documents.<sup>16</sup>

*Assessment orders.* Assessment orders under Section 54, Bihar Agricultural Income Tax Act 32 of 1948, are public documents within the meaning of Section 65 and Section 74.<sup>17</sup>

*Registers for admission and withdrawal in schools.* Registers for admission and withdrawal in a municipal school and applications for admission made to such school duly endorsed by the Headmaster are public documents and proof thereof by secondary evidence is admissible.<sup>18</sup>

6. R. v. Arumugam, (1897) 20 M. 189 (F.B.); Subramania Aiyar, J. dissenting, per Collins, C. J., and Benson, J.
7. Queen-Empress v. Arumugam, (1897) 20 M. 189, per Shephard, J., and Subramania Aiyar, J.
8. Kalinga Tubes, Ltd. v. D. Suri, A. I. R. 1958 Orissa 49; 54 Cr. L. J. 514.
9. Isab Mandal v. Queen-Empress, I. L. R. 28 Cal. 348: 5 C. W. N. 65; Sunil Kumar v. State, A. I. R. 1963 C. 431.
10. Sunil Kumar v. State, A. I. R. 1963 C. 431.
11. Chandi v. Boistab, (1903) 31 C. 284.
12. K. Ramarao v. Emperor, A. I. R. 1943 Oudh 1; 203 I. C. 143.
13. Walvekar v. King-Emperor, A. I. R. 1926 Cal. 966; I. L. R. 53 Cal. 718: 96 I.C. 264.
14. Collector of Dhacca v. Ashraf Ali A. I. R. 1933 Cal. 312: 143 I. C. 367.
15. Secretary of State v. Chimman Lal, A. I. R. 1942 Bom. 161; I. L. R. 1942 Bom. 357: 201 I. C. 420: 44 Bom. L. R. 295.
16. R. v. Bhavanrao, (1904) 6 Bom. L. R. 535.
17. Hiralal v. Ramanand, A. I. R. 1959 Pat. 515.
18. Subbarao v. Venkata Rama Rao, A. I. R. 1964 A. P. 53: (1963) 2 Andh. W. R. 307.

**11. Public records of private documents.** Public records kept in India of private documents are also under the second clause public documents within the meaning of the section. Accounts of election expenses lodged with the Election Officer in accordance with the statutory requirement is a public record of private document within the meaning of section 74 (2).<sup>18-1</sup>

*Registered documents.* Certain register-books are directed to be kept in all registration offices.<sup>19</sup> Under this clause entries of the copies of private documents in Book Nos. 1, 3 and 4 of the Registration Office being public records kept of private documents, are public documents, and as such may be proved by certified copies, that is, certified copies may be offered in proof of those entries, but neither these entries, nor certified copies of these entries, are admissible in proof of the contents of the original documents so recorded, unless secondary evidence is allowable under the provisions of this Act.<sup>20</sup>

A mortgage-deed is, under Section 74, Evidence Act, 1872, a public document, because public records of mortgages are kept in India.<sup>21</sup> A certified copy of a mortgage-deed may be admissible in evidence as secondary evidence but that does not dispense with the proof of actual execution.<sup>22</sup>

Secondary evidence of the returns filed with and in the custody of the Registrar of Joint Stock Companies is admissible, as such returns constitute public records of private documents within the meaning of Section 74 (2).<sup>23</sup>

Register of powers-of-attorney is maintained by the registering officer under certain rules made by the Inspector-General of Registration under Section 69, Registration Act, 1908. Every entry in that register is, therefore, "a public document" within the meaning of Section 74 (1) (iii), Evidence Act, being "a document forming the acts or records of the acts" of an executive public officer in the discharge of a statutory duty imposed upon him.<sup>24</sup> But when what is sought to be proved by a party by production of the registers of the Sub-Registrar's office is not any original entry or one prepared by the Sub-Registrar himself, but copies of documents, the originals of which are in the custody of persons in whose favour they are executed, the documents cannot be admitted in evidence by simply producing the registers of the Registration Office without calling for the original documents.<sup>25</sup> The original receipt<sup>1</sup> or a trust deed<sup>1-1</sup> executed by an individual and registered under the Registration Act is not "a public record of a private document" within Section 74 (2). Section 74 (2) cannot apply to a document executed and authenticated

18-1. K. Majhi v. B. Majhi, I. L. R. (1972) 2 Cal. 618.

19. See Act XVI of 1908, Ss. 51, 57.

20. v. ante, S. 65, clause (f); see Hemanta Kumar Das v. Allantz and Stuttgarter Life Assurance Co., Ltd., A. I. R. 1938 Cal. 120; 177 I.C. 517.

21. Vithoba Savlaram v. Shrihari Narayan, A. I. R. 1945 Bom. 519; 219 I. C. 427; 47 Bom. L. R. 116.

22. Subudhi Padhan v. Raghu, I. L. R. 1961 Cut. 249; A. I. R. 1962 Orissa 40.

23. Zarit Kanti Biswas, In the matter of A. I. R. 1918 Cal. 988; I. L. R. 45 Cal. 169; 45 I.C. 338; 19 Cr. L.

J. 530; 26 C. L. J. 459; 21 C. W. N. 1161.

24. Pattu Kumari v. Nirmal Kumar Singh, A. I. R. 1939 Cal. 569; 185 I.C. 691; 70 C. L. J. 5; 48 C. W. N. 907.

25. Nareah Chandra Bose v. State of West Bengal, A. I. R. 1955 Cal. 398; 59 C. W. N. 757.

1. Gopal Das v. Sri Thakurji, A. I. R. 1943 P.C. 83; 207 I.C. 553; 1943 A. L. J. 292; 47 C. W. N. 607; (1943) 2 M. L. J. 51; 56 L. W. 593; 1943 O. W. N. 334; 10 B. R. 7.

1-1. R. N. Das v. S. Kumar, A. I. R. 1975 Cal. 381.

before the Sub-Registrar under Section 33 (1) (a), Registration Act, but not registered, and when the original is not forthcoming, it is open to a party to prove a private copy of it in the way allowed by law.<sup>2</sup>

According to Section 74 (2) public records kept in India of private documents are considered to be public documents for purposes of proof. There has been difference of opinion as to whether plaints and written statements are such records, and doubt as to whether petitions and affidavits filed in the course of the progress of a suit are public documents. Inconvenience is felt in sending for the originals of these documents, and when the originals are sent for, they in most cases serve no better purpose than the certified copies. The mere fact that a document comes from a Government department and bears its seal does not make it a public document so as to dispense with the need of formal proof.<sup>2-1</sup>

*Wills.* Section 91, second exception, provides that wills admitted to probate in India may be proved by the probate. A certified copy of the copy of a will statutorily maintained by the Sub-Registrar is admissible for the copy so maintained is a public document.<sup>3</sup>

*Memorandum of association of a company.* The memorandum of association of a company, though a private document, forms part of public records in the State kept by the Registrar of Joint Stock Companies. It is therefore a public document within the meaning of sub-section (2) of the present section and secondary evidence of the document can be received under Section 65 (e) ante, under which no foundation even is required for the admission of such secondary evidence.<sup>4</sup>

Public documents are provable in the exceptional modes provided for in Sections 76-78.

### 75. *Private documents.* All other documents are private.

s. 3 ("Document".) ss. 76-78 (Presumptions as to documents.)  
ss. 79-90 (Proof of public documents). documents.)

*Private documents.* All documents other than those specially mentioned in Section 74 are private documents<sup>5</sup> and are provable under the general provisions of the Act relating to the proof of documents.

76. *Certified copies of public documents.* Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to

2. Bishen Sarup v. Abdul Samad, A. I. R. 1931 All. 649 : 1931 A. L. J. 666.  
2-1. Kunti Devi v. Radhey Shyam, A. I. R. 1978 All. 185.  
3. Kamal Lochan Pujhari v. Mitra-

bhanu Biswal, 32 Cut. L. T. 343 (351).  
4. Finani Properties Private, Ltd. v. M. Gulamali Abdul Hossain & Co., A. I. R. 1967 Cal. 391 (400).  
5. S. 75 supra.

make use of a seal ; and such copies so certified shall be called certified copies.<sup>6</sup>

*Explanation.* Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

### SYNOPSIS

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|---|--|
| 1. Principle :                                  | —Right to inspect.                                   |
| —Certified copies of public documents.          | —Extent of right.                                    |
| 2. Scope :                                      | —On payment of legal fees.                           |
| —Document registered but entered in wrong book. | 3. Right to inspection and copies in civil cases.    |
| —Income-tax returns, certified copies of.       | 4. Right to inspection and copies in criminal cases. |
| —Right to copy depends upon right to inspect.   | 5. Form of certificate.                              |
|   | 6. Sealing.  |

1. **Principle.** As one of the exceptions to the rule requiring primary evidence to be given rests on grounds of physical impossibility or inconvenience,<sup>7</sup> so the objection to the production of public documents rests on the ground of moral inconvenience. They are, comparatively speaking, little liable to corruption, alteration or misrepresentation—the whole community being interested in their preservation, and, in most instances, entitled to inspect them. The number of persons interested in public documents also renders them much more frequently required for evidentiary purposes ; and if the production of the originals were insisted on, not only would great inconvenience result from the same documents being wanted in different places at the same time, but the continual change of place would expose them to be lost, and the handling from frequent use would soon ensure their destruction.<sup>8</sup> For these and other reasons their contents are allowed to be proved by derivative evidence at the risk, whatever that may be, of errors arising from transcription either intentional or casual.<sup>9</sup>.

*Certified copies of public documents.* The term "certified copies" has obtained a special meaning in view of the provisions of this section. That term, when used in connection with an appeal and with reference to the order against which the appeal is filed, means the copy which the party preferring the appeal obtains under this section on payments of the necessary fee.<sup>10</sup>

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|---|---|
| 6. A village officer in the Punjab has been declared for the purposes of this Act to be a public officer having the custody of a public document; see the Punjab Land Revenue Act, 1887 (17 of 1887), S. 151 (2). | from the convenience of the thing, that the originals may not be required to be removed from place to place," per Bayley, J., and see Doe v. Ross, 7 M. W. 106, per Lord Abinger. |
| 7. As where the characters are traced on a rock or engraved on a tombstone or the like, see S. 65, clause (d).  | 9. Best, Ev., s. 485 and as to proof of general result of examination of public documents, see Sunder v. Chandreshwar, (1907) 54 C. 293.  |
| 8. See Lady Dartmouth v. Roberts, 16 East 341 "a proceeding in a Court of Justice is provable by an examined copy. This rule has arisen   | 10. Malayalam Plantations, Ltd. v. Commissioner of Income-tax, I. L. R. 1959 Ker. 30; A. I. R. 1959 Ker. 34.  |

A copy not certified as required by this section will not be admissible in evidence.<sup>11</sup>

**2. Scope.** Section 76 applies only to public documents. If a document is not a public document, Section 76 has no application to it.<sup>12</sup> The section provides for the issue of certified copies of only public documents and Section 77 allows the production in evidence of such certified copies. It has been held that this clearly means only such copies as are lawfully issued under Section 76. It does not make admissible copies which have been unlawfully issued and certified.<sup>13</sup> But it has been held by a Bench of the Madras High Court, that Section 76 is only an enabling section and cannot be read as a provision declaring the grant of copies illegal in any particular case.<sup>14</sup>

Where the copy of a *Dhatu Neet* confirming an adoption by the ruler of a covenanting State is issued by a person who, at the time of its issue, was on the personal staff of the Rajapramukh of the covenanting State the person who issued the copy was a 'public officer'. In this case, as the right to get the copy was conceded, the right to inspect was also taken to be conceded.<sup>15</sup>

*Document registered but entered in wrong book.* Where a document must be registered to be an effective document in law and such a document is duly registered but an entry is made in the wrong book, which mistake is obvious, the registration is not invalid, and upon the loss of the original deed, a certified copy thereof from the entry in the wrong book is admissible in evidence, when the certified copy is otherwise *ex facie* regular bearing the certificate of the registering authority, as being a true copy.<sup>16</sup> In *Satinira Nath v. Jatindra Nath*,<sup>17</sup> it was said that where the document should have been entered in book 1, and the mistake is made in good faith by the registering officer, which has not injured any innocent person, the error does not make the registration invalid.

*Income-tax returns, certified copies of.* "Section 54 of the Income-tax Act (corresponding to Section 137 of the 1961 Act) does not make the issue of a certified copy of an income-tax return to an assessee unlawful. The return is a confidential document and cannot be disclosed to a third party, but there can be no objection to the maker of a return having a copy for his own

- 11. Pritam Singh v. Ranjit Singh, (1971) 22 Raj. L. W. 330 (332) (copies of entries in public record).
- 12. Smt. Krishna Subala Bose v. Dhanpati Dutta, A. I. R. 1957 Cal. 59.
- 13. Anwar Ali v. Tofazal Ahmed, A. I. R. 1925 R. 84; 2 Rang. 391; 84 I. C. 487; see also Devi Datt v. Shriram, A. I. R. 1932 Bom. 291; I. L. R. 56 Bom. 324; 137 I.C. 381; 34 Bom. L. R. 236; Promotha Nath v. Nirode Chandra; A. I. R. 1940 Cal. 187; I. L. R. (1949)
- 14. Pentapati Venkataramana v. Pentapati Varahalu, A. I. R. 1940 Mad. 308; 1939 M. W. N. 1028; 50 L.W. 681.
- 15. S. Kesawan v. Narayana Pillai, 1969 Ker. I. R. 326 (328); 1969 Ker. L. T. 110.
- 16. Viswanath v. Dhapu, A. I. R. 1960 C. 494.
- 17. I. R. 62 I. A. 265; 157 I. C. 419; A.I.R., 1935 P.C. 165.

purposes, if he so desires. So far as the assessee is concerned, he is not bound to treat the document as confidential."<sup>18</sup>

If a return made by the assessee, which forms part of the record of the Income-tax Officer, does not fall within the scope of Section 54, when the assessee himself requires a copy of that return, the *fortiori* a copy of the order passed by the Appellate Assistant Commissioner could not fall within the scope of Section 54 of the Income-tax Act so far as the assessee himself is concerned.<sup>19</sup> The words "right to inspect" should not be interpreted in a narrow sense, though, at the same time, one should be careful to notice that the right should not be illusory. Secondly, the right to inspect is not to be upheld or rejected on a consideration of the purpose for which inspection is sought. That purpose would be relevant to determine whether the right set up is illusory or not.<sup>20</sup>

*Right to copy depends upon right to inspect.* The Explanation to Section 76 declares who is to be considered the legal custodian under this section, which limits the right to obtain a copy of a public document from such custodian to such documents as the applicant has a right to inspect. This limitation saves, and excludes, all such documents as the Government has a right to refuse to show on the ground of State policy, privileged communication, and the like.<sup>21</sup> It has been held, that the words "right to inspect" in Section 76, Evidence Act, exclude all such documents as a Government officer has a right to refuse to show on the ground of State policy, or privilege, etc.<sup>22</sup>

Decisions on this question, however, reveal a sharp cleavage of opinion. The strict view sponsored by the Bombay and Calcutta High Courts in *Devi Datt v. Shriram*<sup>23</sup> and *Promotha Nath Pramanick v. Nirode Chandra*<sup>24</sup> that Section 76 would apply only to copies lawfully issued or obtained, has not been adopted by the Allahabad, Madras, Nagpur and East Punjab High Courts. The reasoning behind the latter view is that the right to inspect is not to be understood as the right to inspect the original record, but connotes only a right to look into the record. Secondly, income-tax assessment is a public document. But the right to inspect need not be exercised by the public generally; it is enough if there is any single person who has the right. An assessee is one such, and hence a copy granted to him would be admissible.<sup>25</sup> The Patna High Court has, however,

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18. Narasimha Rama Rao v. Venkataramayya, A. I. R., 1940 Mad. 768; I. L. R. 1940 M. 969; (1940) 2 M. L. J. 257; 52 L. W. 159 (F.B.). See also Naim Singh v. Tikam Singh, A. I. R. 1955 All. 388; but see *Promotha Nath Pramanick v. Nirode Chandra Ghose*, A. I. R. 1940 Cal. 187; *Devi Datt v. Shriram*, A. I. R. 1952 Bom. 291; I. L. R. 56 Bom. 324; 137 I.C. 381; 34 Bom. L. R. 236.
19. Rasipuram Union Motor Service, Ltd. v. Commissioner of Income-tax, Madras, A. I. R. 1957 Mad. 151. See also *Suraj Narain v. Jhabbulal*, A. I. R. 1944 All. 114; Smt. Buchi Bal v. Nagpur University, I. L. R. 1946 Nag. 433; A. I. R. 1946 Nag. 377; Kaka Ram v. Firm Thakur Das, A. I. R. 1962 Punj. 27.
20. A. K. Kader Kutty v. Agricultural Income-tax Officer, A. I. R. 1961 Ker. 32, 35.
21. Norton, Ev., 257.
22. *Devi Datt v. Shriram*, A. I. R. 1932 Bom. 291; I. L. R. 56 Bom. 324; 137 I.C. 381; 34 Bom. L. R. 236.
23. Ibid.
24. I. L. R. (1939) 2 Cal. 394; A. I. R. 1940 Cal. 187.
25. *Suraj Narain v. Jhabbulal*, A. I. R. 1944 All. 114; Smt. Buchi Bal v. Nagpur University, I. L. R. 1946 Nag. 433; A. I. R. 1946 Nag. 377; Kaka Ram v. Firm Thakur Das, A. I. R. 1962 Punj. 27.

chosen to adopt the former view. It proceeds on the ratio that inasmuch as a person seeking to obtain a copy could not get it, if he has no right to inspect it, any copy which he might obtain would be one got in violation of the statutory provision. In the case of assessment of income-tax the Indian Income-tax Act renders the proceedings confidential between the department and the assessee.<sup>1</sup> In a case decided by the Madhya Pradesh High Court, it was held that a person obtaining clandestinely a certified copy of a document which he could not inspect under Section 54 (1) of the Indian Income-tax Act, could nevertheless tender it in evidence. The Court should not import questions of public policy, but decide the admissibility of the document in accordance with the provisions of this Act.<sup>2</sup>

Where an assessee dies leaving certain legal representatives and disputes arise among them with which the income-tax department has nothing to do, one of the legal representatives is not entitled to obtain certified copies of the statements made by the deceased assessee to the income-tax authorities, for the purpose of establishing title to the properties in those disputes. Where a person dies leaving more than one legal representative, one co-heir is not the agent of the others, and, therefore, all of them should concur in applying for inspection of the statements and obtaining the copy thereof. One of them alone cannot represent the deceased and he alone cannot have inspection or obtain copies. One legal representative, in such a case, cannot rely upon this section.<sup>3</sup>

*Right to inspect.* Whether or not, therefore, a person will be entitled to a copy of a public document will depend upon the question whether or not he has a right to inspect it.<sup>4-5</sup> The right to inspect does not necessarily mean that the person should have a right to inspect the original record. It only means that he has a right to look into the order of which a certified copy is sought.<sup>6</sup> In England, the right to inspect public documents varies with respect to their nature. There is a common law right to inspect some. As to others, the right rests upon particular Acts.<sup>7</sup> This Act is silent as to the right of inspection<sup>8</sup> and there is no general provision on the subject in any other enactment in force in India, though there are certain special provisions applicable to particular circumstances only. Thus, registers prepared under the provisions of Chapter IV of the Oudh Land Revenue Act, are declared to be public documents and the property of Government, and are declared to

1. Smt. Banarsi Devi v. Smt. Janki Devi, A. I. R. 1959 Pat. 172.
2. Narbada Shankar v. Jamnabai, A. I. R. 1961 Madh. Pra. 21. See Tulsiram v. Anni, A. I. R. 1963 Orissa 11.
3. Muniayammal v. Third Additional Income-tax Officer, I. L. R. 1960 M. 612; A. I. R. 1960 M. 366: 73 L. W. 291.
- 4-5. Rasipuram Union Motor Service, Ltd. v. Commissioner of Income-tax, Madras, A. I. R. 1957 Mad. 151; Promotha Nath Pramanick v. Nirode Chandra Ghose, A. I. R. 1940 Cal. 187; I. L. R. (1939) 2 Cal. 394; 188 I.C. 37: 43 C. W. N. 1169; Anwar Ali v. Tofazal Ahmed, A. I. R. 1925 Rang. 84; I. L. R. 2 Rang. 391: 84 I. C. 487.
6. Suraj Narain v. Seth Jhabbulal, A. I. R. 1944 All. 114; I. L. R. 1944 All. 221: 214 I.C. 232.
7. See Taylor, Ev., *ss.* 1480-1522; *v. ante*, introduction to *Ss. 74-78*, as to the right of inspection.
8. Emperor v. Muthia Swamiyar, 30 Mad. 466.

be open to public inspection.<sup>9</sup> If a person is personally interested in a public document, it would seem that, in the absence of a right conferred by Statute, he has common law right to inspect it. It may be inferred that the Legislature intended to recognise the right to inspect public documents generally for all persons who can show that they have an interest for the protection of which it is necessary that liberty to inspect such documents should be given.<sup>10</sup> The resolution of Improvement Trust for allotment of sites is a public document. Any applicant who has not been allotted a site by such resolution has a right to see that his interest was not prejudicially affected by non-observance of any rules and as such he has a right to inspect the records so far as they are necessary for protection of his interest.<sup>10-1</sup> A money-lenders' register maintained by the Sub-Registrar is a public document : any one who is interested in showing that a particular person was a professional money-lender may inspect it and obtain copy for that purpose.<sup>10-2</sup>

Under this section the interest of the person applying for a certified copy should be a direct and tangible interest and if a person has made out sufficient interest showing that such inspection is reasonable and necessary for the protection of his interests, he would be entitled to obtain a certified copy.<sup>11</sup>

*Extent of right.* When the right to inspect and take a copy is expressly conferred by Statute, the limit of the right depends on the true construction of the Statute. When the right to inspect and take a copy is not expressly conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy and on what is reasonably necessary for the protection of such interest. If, therefore, a person has a right to inspect, it becomes necessary to see what is the extent of his right to inspection. Every

9. S. 67 (Act XVII of 1897); so also : Administrator General's Act (III of 1913) S. 44—as to books of account open to public inspection; Registration Act (XVI of 1908) S. 57— as to inspection of certain books and indexes and to give certified copies of entries; Indian Evidence Act (I of 1872), S. 35 (notes) ante; The Designs Act (II of 1911) Ss. 20, 71 as to patents and certificate of Controller to be the evidence; Press and Registration of Books Act (XXV of 1867) S. 18 as to registration of memoranda of books; Indian Christian Marriage Act (XV of 1872) S. 79 as to searches and copies of entries; Parsi Marriage and Divorce Act (III of 1936) S. 14 as to making of false certificate; Births, Deaths and Marriages, Registration Act (VI of 1886) Ss. 7, 9 and 35 as to indexes kept at general registry office and searches of lists prepared by Commissioners and grant of certified copies of entries; Societies Registration Act, (XXI of 1860) S. 19 as to inspection of documents and certified copies thereof; Companies Act, (I of 1956) S. 164 as to registers etc. to be evidence; (Indian) Merchant

shipping Act (XLIV of 1958) Ss. 34–41 as to certificate of registry; Powers-of-Attorney Act (VII of 1882) S. 4 deposit of original instruments creating powers-of-Attorney; Calcutta High Court Rules, 1914 Chap. XXXI rule 10 as to winding-up of Company; See s. 35 ante as to records of Courts; Income-tax Returns—See notes to Ss. 74-75; (English) Merchant Shipping Act, 1894 57 & 58 Vict. c. 60) Ss. 64, 239 and 695 (2) as to evidence of register book, certificate of registry, official logs and other documents. 10. Queen-Empress v. Arumugam, I. L. R. 20 Mad. 189 : 7 M.L.J. 167 (F.B.); A.-K. Kader Kutty v. Agricultural Income-tax Officer, A.I.R. 1961 Ker. 32. 10-1. M. N. Krishna Rao v. Board of Trustees, (1972) 1 Mys.L.J. 101. 10-2. D. P. Agarwal v. Lalchand, A.I.R. 1974 Pat. 103. 11. State of Madras v. Krishnan, I.L.R. 1961 Mad. 1 : (1961) 1 M.L.J. 65 (73); 1961 M.L.J. (Cr.) 75; A. Annamalai Trading Co. v. Hari-baran Transports, 1965 M.L.J. (Cr.) 702.

officer appointed by law to keep records ought to deem himself, for the production of documents, a trustee.<sup>12</sup>

A power to regulate a right cannot be used to abrogate it. If members of an association have, under the Articles of Association, a contractual right of inspection, that cannot be reduced by the power given to make rules, into a mere right to claim inspection subject to the approval of a committee. A contractual right of inspection does not of itself imply a right to take copies, any more than a statutory right would do. In the case of a statutory right of inspection, the Court will not imply a right to take copies unless the statutory right would otherwise be of no avail, or practically useless, and common law rights are not affected by a contract or by a Statute.<sup>13</sup>

An act may both give a right of inspection and provide a penalty and remedy in case of its refusal. Where such Acts give a right of inspection but do not enact any particular remedy to which resort may be had, if inspection of copies be refused, an application may be made, in Presidency Towns to the High Court under the provisions of Chapter VIII of the Specific Relief Act,<sup>14</sup> but this Chapter has been omitted from the new Act of 1963.

If there exists no such special provision, and the disclosure of the contents of any of the general records of the realm, or of any other documents of a public nature, would, in the opinion of the Court or of the Chief Executive Magistrate or of the head of the department under whose control they may be kept be injurious to the public interests, an inspection would certainly not be granted.<sup>15</sup>

*On payment of legal fees.* Court-fees on certified copy of judgment is payable only at the stage of application for such copy.<sup>15-1</sup>

**3. Right to inspection and copies in civil cases.** The Civil Procedure Code provides certified copies of judgments,<sup>16</sup> and decrees of all Original and Appellate Courts shall be furnished to the parties at their expense on application to the Court.<sup>17</sup>

A defeated litigant who has initiated a proceeding in a superior court has a tangible interest to inspect the proceedings of the lower court within the meaning of the present section. The Notes of Evidence recorded in a suit by the Court of Small Causes is a public document and the defeated litigant is entitled to certified copies of the Notes of Evidence.<sup>18</sup>

**4. Right to inspection and copies in criminal cases.** In criminal cases an accused person, committed under the Code of Criminal Procedure to the

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- 12. Chandli v. Boistab, (1903) 31 C. 284, 293; Bank of Bombay v. Suleman, (1908) 32 Bom. 466 (P.C.).
- 13. Rameswar Lal v. Calcutta Wheat and Seed Association Ltd., A.I.R. 1938 Cal. 89 : 178 I.C. 861 : 42 C.W.N. 161.
- 14. See Empress v. Dinonath Roy, 8 Cal. 166 : 10 C.L.R. 190.
- 15. Taylor, Ev., s. 1483. In the case first mentioned in the preceding note an application was made to Court in the suit calling upon the Bank of Bengal to comply with an order of Court.
- 15-1. Prasanna v. State of Assam, A.I.
- 16. R. 1971 Assam 55 : 1971 Cr.L.J. 591 : I.L.R. 1970 Assam 293 (F.B.).
- 17. In matters before the Calcutta Small Causes Court, for "judgment," read "proceedings", vide Notification of the 18th Feb., 1889.
- 18. Order XX, rule 20; Order XLI, rule 36, as to certified copies of decrees and orders in execution of Supreme Court decrees and orders, v. ib., Order XLV, rule 15.
- 18. A. Annamalai, Trading Co. v. Hari-baran Transports, 1965 M.L.J. (Cr.) 702.

High Court or the Court of Session, is entitled to a copy of the charge, free of all expense ; and, if he applies within a reasonable time for copies of the depositions, these latter copies are to be made at his expense unless the Magistrate sees fit to give them free of cost.<sup>19</sup> He is entitled free of cost to a copy of the evidence of any witness examined by a Magistrate (other than a Presidency Magistrate) after commitment.<sup>20</sup> A previous conviction or acquittal may be proved in addition to any other mode provided by any law for the time being in force (a) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was had, to be a copy of the sentence or order ; or (b) in case of a conviction either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.<sup>21</sup>

Section 173 (4) of the Criminal Procedure Code, 1898 as amended by Act XXVI of 1955 made it incumbent upon the prosecution to provide the accused with copies of the police charge-sheet, the first information report and the statements of witnesses recorded by the police during investigation. Even before the amendment, it had been held that the right of the accused to the copies of the statements was a valuable right and that refusal to give the copies was liable to vitiate the entire trial.<sup>22</sup> Under Section 173 (5) of the new Cr. P. C., 1973, it is optional for the police to furnish such copies and the statutory duty of furnishing copies has been laid on the Magistrate, under Section 207, Cr. P. C., 1973.

An accused is entitled to inspect the report made by the police for remand or extension of remand, though no charge-sheet may have been filed yet, because any person who has an interest, for protection of which inspection is necessary, should be given the right to inspect. An accused is entitled to know the reason for his being sent to prison, so he is also entitled to a copy of the same.<sup>22-1</sup>

An accused is entitled to certified copy of F.I.R. on payment of necessary fee at any stage of the case.<sup>22-2</sup>

There is no provision in the Code of Criminal Procedure, 1898 as regards the right of inspection by an accused of the records in the custody of the Court. Merely because the documents are in the custody of the Court that will not give him a right which he would not have, if the documents were in private custody. The accused can have a necessity to look into the documents filed by the prosecution only as and when they are tendered to the Court by the prosecution at the trial.<sup>23</sup> In the new Cr. P. C., 1973, the second proviso to Section 207 provides for inspection of a document by the accused if the document is voluminous, but such inspection is allowed in lieu of certified copy.

19. Criminal Procedure Code, S. 210.

20. ib., S. 219.

21. Criminal Procedure Code, S. 511 (now S. 298; Reg. III of 1872 regarding certified copies of convictions); as to offences committed by European British subjects in Indian Allied States v. ib., S. 189.

22. Purshottam Jethanand v. State of Kutch, A.I.R. 1954 S.C. 700; 55 Cr.L.J. 1751; Shankar Lal v. State,

1954 All. 779 : 55 Cr.L.J. 1705.

See also cases cited in these two cases.

22-1. Raman Velu, In re, 1972 Ker. L.T. 922 : 1973 M.L.J. (Cr.) 25 : I.L.R. (1973) 1 Ker. 50

22-2. P. Mondal v. State, 1971 Cr.L.J. 875.

23. In re T. S. Swaminathan, A.I.R. 1944 Mad. 419 : (1944) 1 M.L.J. 397 : 57 L.W. 338.

This section entitles a person interested in a public document to inspect or obtain a certified copy thereof. A statement or confession recorded under Section 164, Cr. P. C., is a public document. A person interested, as a person suspected of an offence, is entitled to obtain a certified copy thereof in the absence of any statutory prohibition. This section confers a right to obtain copies.<sup>24</sup>

By Section 371, Cr. P. C., 1898 (now Section 363 of Cr. P. C., 1973), a certified copy of a judgment has to be furnished to the accused free of cost. "Free of cost" means free of all costs including payment of court-fee. Necessary court-fee has ordinarily to be paid when applying for certified copy of a judgment under the present section read with the relevant provisions of the Court-fees Act, 1870. As a result of the provision in Section 371, Cr. P. C., 1898 (now Section 363 of Cr. P. C., 1973), it is intended that no court-fees are chargeable at the time of furnishing certified copy of the judgment under that section. The document being at the time of its inception duty-free remains so throughout its use for the purpose of appeal under Section 419, Cr. P. C., 1898 (now Section 382 of Cr. P. C., 1973).<sup>25</sup>

The Advocate-General is a public officer as defined in Section 2 (17) (h), C. P. C. If he decides to file an appeal against acquittal there is no legal bar to his issuing a certified copy of the judgment of the Sessions Judge to himself for being presented with the memorandum of appeal in a particular case.<sup>1</sup> It is submitted that the Advocate-General may have rightly been held to be a public officer but it is curious how the definition given in Cr. P. C. was referred to for a criminal matter.

**5. Form of certificate.** In Sec. 76 a particular form of certificate is prescribed, but that form is not necessary in every case. All that is required by Section 65 is that it must be a true copy of the original and there must be something to denote that it was so. Copies bearing the seal of the Income-tax Department and an endorsement that they were duly copied and compared were held to be sufficient although it was not known as to who actually signed the endorsement.<sup>2</sup> As to presumption of genuineness and accuracy in the case of certified copies of foreign judicial records, see Section 86 post. A copy not bearing any certificate and not supported by the evidence of the person who prepared it, is not admissible in evidence.<sup>3</sup>

**6. Sealing.** Sealing is necessary only when the officer having the custody of the public document is authorised by law to make use of a seal.<sup>4</sup> Where there is a seal in which there appears the signature of an officer, there is a presumption under Section 79 that the officer held the official character which he claims in the document.<sup>5</sup> The clause in the Explanation "by the

- 24. State of Madras v. Krishnan, I.L.R. 1961 M. 1 : A.I.R. 1961 M. 92; 73 L.W. 713 (F.B.).
- 25. Prasanna v. State, 1970 Assam L.R. 188 : A.I.R. 1971 Assam and Nagaland 55 (F.B.).
- 1. State of Bihar v. S. K. Mehta, 1966 Cr.L.J. 343 (352).
- 2. Suraj Narain v. Seth Jhabbulal, A.I.R. 1944 All. 114 : I.L.R. 1944 All. 221 : 214 I.C. 232.
- 3. Khadim Ali v. Jagannath, A.I.R., 1941 Oudh 77 : I.L.R. 16 Luck, 230;

- 191 I. C. 166 : 1940 O.W.N. 999; Ram Prasad v. Emperor, A.I.R. 1945 Pat. 210 : I.L.R. 24 Pat. 143 : 219 I.C. 148. See also Karapaya Servai v. Mayandi, A.I.R. 1953 R. 212 147 I.C. 414.
- 4. Sri Ram v. Mohammad Abdul Rahim Khan, A.I.R. 1938 Oudh 69 : I.L.R. 13 Luck. 723 : 172 I.C. 882.
- 5. Gurditt Singh v. Surjan Singh, A.I.R. 1950 Pepsu 56 : 2 Pepsu L.R. 431.

ordinary course of official duty is authorised" means nothing more than that it is in the discharge of his official duties. Hence, when a subordinate officer is authorised by a superior officer to issue a copy on an application made in that behalf, a copy issued by him would be one 'made' in the course of official duty.<sup>6</sup>

*77. Proof of documents by production of certified copies.* Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

#### SYNOPSIS

Proof of documents.

2. "May be produced in Court."

**1. Proof of documents.** Private documents must generally be proved by the 'production of the originals' occupied with evidence of their handwriting, signature, or execution as the case may be.<sup>7</sup> An exception to this rule exists under the Act in the case of wills admitted to probate in India which may be proved by the probate.<sup>8</sup> The contents of public documents may be proved either by the production of certified copies<sup>9</sup> under Section 77, or if they be documents of the kind mentioned in Section 78, by the various modes described in that section. The contents of private documents such as kobalas, conveyances, leases and the like, though filed in a Court or public office for purposes of evidence in a suit, are not provable in another suit by means of certified copies.<sup>10</sup> A plaint, not being a public document cannot be proved by means of certified copy.<sup>11</sup> Where the document in question is a certified copy of a public document, it need not be proved by calling a witness.<sup>12</sup>

**2. "May be produced in proof".** The word 'may' in Sec. 77 is used only as denoting another mode of proof (optional to the party) than the ordinary one, namely, the production of the original. For when the original is a public document within the meaning of Section 74, a certified copy of the document, but no other kind of secondary evidence, is admissible.<sup>13</sup> So, accordingly, the Privy Council rejected a document upon the record of a previous judicial proceeding which purported to be an authenticated copy of the original document, but was not certified to be true copy as required by Section 76, and was not shown to have been examined by any witness with the origi-

6. Mohan Reddy v. Nellagiri, A.I.R. 1958 Andh. Pra. 485 : (1958) 1 Andh.W.R. 495.

7. See Ss. 59, 61-73 ante.

8. S. 91, Exception 2, post.

9. Ram Lal v. Ghansham Das, A.I.R. 1923 Lah. 150(1): 71 I.C. 825; Baijnath v. Corporation of Calcutta, A.I.R. 1933 Cal. 178: 141 I.C. 248 : 36 C.W.N. 1147. It is doubtful whether Ss. 76 and 79 apply to copies given before the passing of the Act; Jakir Ali v. Raj Chunder, 10 C.L.R. 476.

10. Hureehar v. Churn, (1874) 22 W.R. 355, as to the decision in Shazada v. Daniel Wedgebarry, 10 B.L.R.

App. 31, ante. See notes to Ss. 74, 75. As to proof of order of Government sanctioning prosecution, see State v. Sagar Mal, A.I.R. 1951 All. 515 : I.L.R. (1952) 2 All. 543; Muhammad Oziullah v. Beni Madhav, A.I.R. 1922 Cal. 298 : I.L.R. 50 Cal. 135 : 71 I.C. 239 : dist. Apurba Krishna v. R., 35 C. 141 : 7 C.L.J. 49.

11. Tarkeshwar v. Devendra, A.I.R. 1926 Pat. 180 : 92 I.C. 184.

12. Ramappa v. Bojjappa, A.I.R. 1963 S.C. 1633.

13. S. 65, ante, the provisions of which appear to have been overlooked in Norton, Ev., 258.

nal.<sup>14</sup> This last provision, however, must be read subject to the provisions of Sections 78 and 82 post, and the last paragraph of the second section ante. Thus, by virtue of the provisions contained in Section 82 post, a foreign and colonial document may be proved by an authenticated copy within the meaning of 14 and 15 Vict., c. 99, S. 7; such authenticated copy being declared by the Statute to be admissible in evidence without proof of seal, signature or judicial character of the person making such signature. Secondary evidence, therefore, other than a certified copy, is admissible both in the cases expressly mentioned by this Act and in those where an unrepealed or other Act has especially enacted that such other evidence shall be admissible.<sup>15</sup> Section 79 raises a presumption of genuineness in the case of certified copies. Proof of a special character may be offered as to the official documents which are the subject of individual mention in Section 78.

On mere production of a certified copy of a document more than thirty years old, no presumption can be made regarding the genuineness of execution under Section 90 of the Act.<sup>16</sup>

The certified copy of a birth certificate over the signature of the Executive Officer, Municipal Corporation, is automatic evidence under the conjoint effect of Sections 35 and 77. It is conclusive unless it is disproved.<sup>17</sup>

Certified copies of statements of witnesses made in judicial proceedings are admissible under Section 80 post read with this section.<sup>18</sup>

*78. Proof of other official documents.* The following public documents may be proved as follows :—

(1) Acts, orders or notifications of <sup>19</sup>[the Central Government] in any of its departments, <sup>20</sup>[or of the Crown Representative] or of any <sup>21</sup>[State Government] or any department of any <sup>22</sup>[State Government],

14. Krishna v. Kishori, (1887) 14 C. 486, 490.
15. So in cases governed by the Merchant Shipping Act, 1894 (57 and 58 Vict., c. 90, s. 695) examined copies are admissible equally with certified copies. The difference between a certified and an examined copy, is that the former is made by an official whose duty it is to furnish such copies to parties who have an interest in the subject-matter, and a right to apply for them, on payment or otherwise; the latter is one which any private individual makes from the original with which, having himself compared it by examination, he is enabled to swear that it is a true copy. Norton, Ev., 258.
16. Basant Singh v. Brij Raj Saran Singh, L.R. 62 I.A. 180; A.I.R. 1935 P.C. 192; Harihar Prasad v. Deonarain, 1956 S.C.R. 1; A.I.R. 1956 S.C. 305; Rajeshwari v. Varalakshamma, A.I.R. 1964 A.P. 284.
17. Dalim Kumar v. Nandarani Dassi, 73 C.W.N. 877; A.I.R. 1970 Cal. 292; Nanhak Lall v. Baijnath Agarwalla, A.I.R. 1935 Pat. 474; Anil Krishna Basak v. Sailendra Nath Paul, (1965) 69 C.W.N. 593 at p. 602.
18. Chandreshwar Prasad v. Bisheshwar Pratap, 101 I.C. 289; A.I.R. 1927 Pat. 61; Bhaiyashbir Chand v. Bachan Kaur, (1966-68) P.L.R. Supp. 101 (106).
19. Subs. by the A.O. 1937 for "the Executive Government of British India".
20. ib.
21. Subs. by the A.O. 1950, for "Provincial Government" which had been substituted by the A.O. 1937, for "L. G".
22. ib.

by the records of the departments, certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government<sup>23</sup>[or, as the case may be, of the Crown Representative];

(2) the proceedings of the Legislatures,

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed<sup>24</sup>[by order of the Government concerned];

(3) proclamations, orders or regulations issued by Her Majesty,<sup>24-1</sup> or by the Privy Council, or by any department of Her Majesty's<sup>24-1</sup> Government,

by copies or extracts contained in the *London Gazette*, or purporting to be printed by the Queen's Printer;

(4) the Acts of the Executive or the proceedings of the Legislature of a foreign country,

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some<sup>25</sup>[Central Act];

(5) the proceedings of a municipal body in<sup>1</sup>[a State]

by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body;

(6) public documents of any other class in a foreign country,

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of<sup>2</sup>[an Indian Consul] or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

23. Ins. by the A.O. 1937.

24. Subs. by the A.O. 1937, for "by order of Government".

24-1. The words "Her Majesty" stand modified. See the A.O. 1950.

25. Subs. by the A.O. 1957, for "public

Act of the Governor-General of India in Council".

1. Subs. by the A.O. 1948, for "British India".

2. Subs. by the A.O. 1950 for "British Consul".

*West Bengal State Amendment.* [78-A. Copies of public documents to be as good as the original documents in certain cases. Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where any public documents concerning any areas within a partitioned district or sub-district have been kept in East Bengal, then copies of such public documents shall, on being authenticated in such manner as may be prescribed from time to time by the State Government by notification in the official Gazette, be deemed to have taken the place of, and to be, the original documents from which such copies were made and all references to the original documents shall be construed as including references to such copies.

*Explanation.* In this section,—

(1) "partitioned district or sub-district" means any district or sub-district which as a result of the award of the Boundary Commission appointed under Section 3 of the Indian Independence Act, 1947, have fallen partly within West Bengal and partly within East Bengal;

(2) "East Bengal" means the territories now comprised in the Province of East Bengal forming part of the Dominion of Pakistan.]<sup>8</sup>

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| s. 3 ("Proof.")                             | ss. 63, Cl. (1). & 65, Cl. (e) (Secondary evidence by certified copies.) |
| s. 3 ("Document.")                          |  |
| s. 74 ("Public document.")                  | ss. 80—90 (Presumption as to other documents.)                           |
| s. 79 (Presumption as to certified copies.) |  |

Taylor, Ev., Chap. IV, Part V (Matters evidenced by Public Documents); Phipson, Ev., 11th Ed., 454; Wills, Ev., 3rd. Ed., 417—423; Best, Ev., 424—430; Roscoe, N.P. Ev., 96—130.

### SYNOPSIS

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|---|---|
| 1. Proof of other official documents.   | lished in Gazette and that published by Superintendent, Government Printing : |
| 2. Acts, orders or notifications :      | —Clause (3).  |
| —Clause (1).                            |   |
| 3. Sanction to prosecute.               | 6. Proceedings of Municipal Bodies :  |
| 4. Proceedings of the Legislature :     | —Clause (5).  |
| —Clause (2).                            | —Clause (6).  |
| —"Hansard's Debates."                   |   |
| 5. Conflict between version of Act pub- |   |

**1. Proof of other official documents.** As already mentioned, this section provides for proof of a special character in the case of certain official documents. Although the section provides a convenient mode, it is, by its very terms, not exhaustive.<sup>4</sup> It is a permissive and not an exclusive section. The Court is not bound to have recourse exclusively to the mode of proof set out in the section in respect of public documents.<sup>5</sup> A document proved under this section should be marked as an exhibit. It is not proper to take judicial notice of it and return it to the party producing it.<sup>6</sup>

**2. Acts, orders or notifications.** *Clause (1).* The section indicates with precision how official documents of the nature mentioned in it are to be

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| 3. Evidence (West Bengal Amendment) Act, 1955 (29 of 1955), S. 3 (6th October, 1955.)                | 5. Seodoyal Khemka v. Joharmull Manmull, A. I. R. 1924 Cal. 74 : I.L.R. 50 Cal. 549 : 75 I.C. 81. |
| 4. Kalijiban v. Emperor, A.I.R. 1936 Cal. 316 : I.L.R. 63 Cal. 1053 : 163 I.C. 41, per Henderson, J. | 6. Sahdon Singh v. Balam Singh, A. I.R. 1937 Pat. 334 : 170 I.C. 61.                              |

proved. A notification issued by the Government or by a department of the Government is a public document and a certified copy thereof may be produced to prove the existence, conditions or contents of that document under Section 65 of the Act. Under this section such a copy has to be certified by the head of department which issued the notification. Extract from a Gazette certified by the District Medical Officer is not admissible; only a true copy certified by the head of the department concerned would be admissible.<sup>6-1</sup> Copy of notification declaring certain area as reserved forest under Travancore Forest Act, duly certified by the Chief Conservator of Forests is admissible under this section.<sup>6-2</sup> Such copy can be received in evidence also, if the official Gazette in which the notification purported to have been printed by order of the Government has been produced for inspection of the Court.<sup>7</sup> Where a notification is published in the Gazette, a copy of the Gazette must be produced,<sup>8</sup> and an extract from the newspapers is inadmissible as proof.<sup>9</sup> The Court cannot take judicial notice of it.<sup>10</sup> Even if a copy of the Gazette notification is produced for the first time in revision before the High Court its genuineness can be presumed under Section 81.<sup>11</sup> Where a notification fixing an election is published in the local Gazette, it is proof of the order of the Government and under Section 114 there is a presumption that the act of publication was done regularly, namely, in accordance with the rules.<sup>12</sup> Where a notification is not published in the Gazette, as required by law, it cannot be said to have been made, and is, in fact, not a notification. It cannot be proved under this clause by the production of the Revenue records.<sup>13</sup> Authentication of the publication of an Act or Ordinance is not an authentication of the publication of rules made under the Act or Ordinance and published in a Gazette of a subsequent date.<sup>14</sup> An order purporting to be

- 6.1. Sarjang Sah v. State of Bihar, 1973 BLJR 790 : 1973 B.B.C.J. 560 (Pat.).
- 6.2. State of Kerala v. Adichan Sasi, 1975 Ker.L.T. 839.
7. Janu Khan v. The State, A.I.R. 1960 Pat. 213 : 1960 B.L.J.R. 12; Gopal Sao v. State of Bihar, 1968 B.L.J.R. 308 (310); Sadhu Patra v. The State of Orissa, 36 Cut.L.T. 395 (398).
8. The Municipal Committee, Akola v. Madhava Wasudeo, A.I.R. 1951 Nag. 464 : I.L.R. 1949 Nag. 778; Pannalal v. The State, A.I.R. 1953 M.B. 84 : I.L.R. 1953 M.B. 67 : 1952 M.B.L.J. 829; Union of India v. Sital, (1958) N.L.J. Notc 64. See also Collector of Cawnpore v. Jugul Kishore, A.I.R. 1928 All. 355 : 107 I.C. 578.
9. Motilal Nehru v. Emperor, A.I.R. 1931 All. 12 : 129 I.C. 443 : 1930 A.L.J. 1535.
10. Collector of Cawnpore v. Jugul Kishore, A.I.R. 1928 All. 355 : 107 I.C. 578; Mansid Oraon v. The King, A.I.R. 1951 Pat. 380; Jai Gopal Singh v. Divisional Forest Officer, A.I.R. 1953 Pat. 310; Pyli and others v. State of Kerala, I.L.R. (1966) 1 Ker. 320 : 1966 Ker.L.J. 76 : 1966 Ker.L.R. 125 ; 1966 M.L.J. (Cr.) 413 : 1966 Ker.L.T. 102 (104) (all cases relating to Forest Acts); Mathuradas v. State, A.I.R. 1954 Nag. 296; Pannalal v. State, A.I.R. 1959 M.B. 84 (cases under Textile Control Orders fixing prices by notifications); but see Maqbool Hussain v. Government of U. P., A.I.R. 1947 Oudh 210 : I.L.R. 22 Luck. 428.
11. Bawa Sarup v. Emperor, A.I.R. 1925 L. 299 : 88 I.C. 22; Nanak Chand v. Emperor, A.I.R. 1931 L. 273 : 134 I.C. 769.
12. Commissioner, Corporation of Madras v. Ekambara Naicker, A.I.R. 1927 M. 980 : 106 I.C. 144: 26 M.L.W. 569. (F.B.) overruling Ekambara Naicker v. Commissioner of the Madras Corporation, A.I.R. 1927 M. 22 : 99 I.C. 18 : 1926 M.W.N. 842.
13. Emperor v. Fazal Rahman, A.I.R. 1937 Pesh. 52 : 170 I.C. 772 : 38 Cr.L.J. 1042 : 1937 Pesh.L.J. 52.
14. Maharaja Krishnagopal Mills Ltd. v. Union of India, I.L.R. 1953 Raj. 128 : A.I.R. 1953 Raj. 145 (F.B.).

an order of the President of India but not purporting to be published by order of the Government, is no proof of the order. Such an order, if not proved under Section 78, can be proved by production of the original or its certified copy under Section 77, or possibly even by an affidavit of a responsible official.<sup>15</sup>

**3. Sanction to prosecute.** A sanction to prosecute is a public document and can always be proved by production of certified copies obtained under Section 76.<sup>16</sup> Where a copy of a letter sanctioning prosecution purporting to be issued from the office of the Chief Secretary to the Government was signed by an officer for the Chief Secretary, it was held that it could not be regarded as a certified copy under Section 76, that it could not attract a presumption under Section 79 as it did not purport to have been signed or certified by the head of the department, and that there was therefore no legal proof of the sanction.<sup>17</sup> In *Superintendent and Remembrancer of Legal Affairs, Bengal v. Moazzem Hussain*,<sup>18</sup> the charge-sheet purported to contain the sanction of the District Magistrate but there was no evidence that the word "sanction" has been affixed on the charge-sheet by the District Magistrate, and it was held that there was no legal proof of the sanction. But the sanction appearing on the charge-sheet is the original and not a copy and as observed by Malik, C. J., in *Sagarmal v. State*,<sup>19</sup> "A sanction is a public document and if a certified copy of such document is admissible without further evidence, we see no reason why the original should not be presumed to be genuine when the original itself is produced."<sup>20</sup>

**4. Proceedings of the Legislature.** Clause (2). In England, Parliamentary Journals, signed by the Speaker, are provable either at common law by production of the originals or examined copies (i.e., certified copies), or under Statute, by copies purporting to be printed by the printers to the Crown or by the printers to either House of Parliament (Evidence Act, 1845, S. 3); or perhaps by authority of Her Majesty's Stationery Office (Documentary Evidence Act, 1882, S. 2).<sup>21</sup>

"Hansard's Debates".—Relying on *McCarthy v. Kennedy*,<sup>22</sup> Phipson says that "Hansard's Debates" are not admissible as Parliamentary Journals under these Acts<sup>23</sup> and in "*The Englishman*" Ltd. v. *Lajpat Rai*,<sup>24</sup> Hansard was held to be only an appropriate book of reference under Sec. 57. But it must be

- 15. *Brahmeshwar Prasad v. State of Bihar*, A. I. R. 1950 Pat. 265, 268; I. L. R. 29 Pat. 335.
- 16. *State v. Sagarmal*, A. I. R. 1951 All. 515; I. L. R. (1952) 2 All. 543; 52 Cr. L. J. 225.
- 17. *Mohammad Oziullah v. Beni Mardhab*, A. I. R. 1922 Cal. 298, I. L. R. 50 Cal. 135; 71 I. C. 239.
- 18. A. I. R. 1947 Cal. 318; 48 Cr. L. J. 815 followed in *Chandmal v. State*, A. I. R. 1949 M.B. 423 and *State v. Fulchand*, A. I. R. 1956 M. B. 50; see however *Danpat v. State*, I. L. R. (1959) 2 All. 185; A. I. R. 1960 A. 40.
- 19. A. I. R. 1951 All. 816 at 817; I. L. R. (1952) 1 All. 862; 1951 A. L. J. 447; 1951 A. W. R. (H.C.) 638.
- 20. See also *State v. Sagarmal*, A. I. R. 1951 All. 515; I. L. R. (1952) 2 All. 543; 52 Cr. L. J. 225; *State v. Jangir Singh*, A. I. R. 1954 Pepsu 84; *State v. Gurdeo Singh*, A. I. R. 1956 Pepsu 11; *Gayadin v. The State*, A. I. R. 1958 All. 39; 1957 All. W. R. (H.C.) 624; *Danpat v. State*, I. L. R. (1959) 2 All. 185; A. I. R. 1960 All. 40.
- 21. Phipson, Ev., 11th Ed., p. 454.
- 22. "The Times", 4th March, 1905.
- 23. Phipson, Ev., 11th Ed., p. 454.
- 24. 37 Cal. 760; 61 I. C. 81; 14 C. W. N. 713.

remembered that up to 1909 the publication of the debates in Parliament was the private venture of one Hansard (though assisted in later years, by a Government grant); but in 1909 it was taken over from the original Hansard or his successors-in-title, and the volumes have ever since been published under the authority of the two Houses and are printed at the present day by Her Majesty's Stationery Office.<sup>25</sup> It would therefore appear that Hansard's Debates are now admissible as Parliamentary Journals.

Section 57 provides that the Court shall take judicial notice of "the course of proceedings of Parliament"; but the course of proceedings appears to be something distinct from the proceedings themselves; they may be proved under Sec. 78(2) by the Journals of the House of Commons or by copies purporting to be printed by order of the Government.<sup>1</sup>

The proceedings of Parliament fall under either the second or fourth of the categories of Sec. 78. The Legislatures to which the second category refers are intended to include all the Legislatures which have the power to make laws for India or for any part thereof. Therefore, the volumes of the official Parliamentary Debates afford adequate legal proof of the passing of the proceedings by the Houses of Parliament. The expression "Journals" in Sec. 78, is plainly to be given a broad and general meaning, since it is not confined to the Journals of the Houses of Parliament, but includes journals of other Legislatures also; and there is no reason, therefore, why in its application to Parliament, it should necessarily be confined to only the copies of the Official Journal of the two Houses. It includes the official record of such proceedings printed under authority of the Parliament.<sup>2</sup> In *South Australia v. The Commonwealth*,<sup>3</sup> the High Court of Australia, while holding that reports and speeches in Parliament were generally inadmissible, recognized that the legal position may be different if the *bona fides* of the Parliament or the Crown in Parliament can be and are challenged, and relying on this it has been held in India that official reports of the proceedings of State Legislative Assembly during the passage of a statute impugned in the case were admissible as public documents under this clause.<sup>4</sup> Reports of debates can only be evidence of what was stated by the speakers in the Legislative Assembly, and are not evidence of any facts contained in the speeches.<sup>5</sup> A newspaper is not a document by which the proceedings of the Legislature may be proved under this clause.<sup>6</sup>

**5. Conflict between version of Act published in Gazette and that published by Superintendent, Government Printing.** It has been held that under this clause there can be no doubt that the publication in the *Gazette of*

- 25. See "An introduction to the Procedure of the House of Commons," by Sir Gilbert Campion, Clerk of the House at pp. 72-73; which is referred to in *Niharendu Dutt Mazumdar v. Emperor*, A. I. R. 1942 F. C. 22 at 25; I. L. R. 1942 Kar. 56 (F.C.): 200 I.C. 289.
- 1. "The Englishman", Ltd: v. Lajpat Rai, 37 Cal. 760.
- 2. *Niharendu Dutt Mazumdar v. Emperor*, A. I. R. 1942 F.C. 22 at 25:
- 3. 65 C. L. R. 373 at p. 410.
- 4. *Gajapati Narayan Deo v. The State of Orissa*, A. I. R. 1953 Orissa 185: I. L. R. 1953 Cut. 71.
- 5. Rt. Hon'ble Gerald Lord Strickland v. Carmelo Misjud Bornici, A. I. R. 1935 P.C. 34; 153 I.C. 1: 41 M. L. W. 665.
- 6. *State v. Jhalu*, A. I. R. 1953 H.P. 40.

*India* is the proper method of proving an Act of the Legislature<sup>7</sup> and that if there is a conflict between that and the version of the Act printed by the Superintendent, Government Printing, India, preference will be given to that in the *Gazette of India* as the latter does not purport to be published by the authority of the Government of India.<sup>8</sup> But in *Seodoyal Khemka v. Joharmull Manmull*,<sup>9</sup> it was held that the Court was not bound to have recourse exclusively to the mode of proof in respect of published documents set out in this section; and having regard to the intrinsic evidence in the Acts themselves, the version contained in the published Acts and not that contained in the *Gazette* was the right one.

**Clause (3)**—In connection with the third clause of the section may be read the provisions of the Documentary Evidence Act, 1868,<sup>10</sup> as amended by the Documentary Evidence Act, 1882,<sup>11</sup> which, subject to any law that may be from time to time made by the Legislature of any British Colony or Possession (including therein India), is declared to be in force in every such Colony and Possession.<sup>12</sup>

An official report of the proceedings of the House of Lords has been accepted as proof of the fact that a Proclamation of Emergency was approved by that House.<sup>13</sup>

**6. Proceedings of Municipal Bodies** *Clause (5)*—The record of the proceedings of a Municipal Body in India is a public document being the record of the acts of an official body within clause (ii) of sub-section (1) of Sec. 74, and the officer who is authorised by the ordinary course of his official duties to give copies of public documents is for these purposes a public officer. The Secretary of a Municipality is an officer who by the ordinary course of his official duty is authorized to deliver copies of the public documents of which he has the custody as a Secretary.<sup>14</sup> The proceedings of a Municipal Board may under this clause be proved by a copy of such proceedings certified by the keeper thereof.<sup>15</sup> Printed copies of the proceedings, however, would not be sufficient legal proof unless they answer the description given in this section, namely, being a printed book purported to be published by the authority of such body.<sup>16</sup>

In a case, a copy of a resolution of a Municipal Corporation authorising its Assistant Municipal Prosecutor under section 20 of the Prevention of Food Adulteration Act, 1954, to institute and conduct prosecution for an offence under that Act which was not certified by the legal keeper of records but by the Head Clerk of the Central Office, was received in evidence as the Head Clerk had been autho.

- 7. See *Rai Brij Nandan Prasad v. Mahabir Prasad*, A. I. R. 1927 Pat. 142: 97 I.C. 316; *Rup Kishore v. Bhagat Govind Das*, A. I. R. 1922 Lah. 211: 62 I.C. 748, affirmed in *Bhagat Govind Dass v. Rup Kishore*, A. I. R. 1924 L. 65; I. L. R. 4 Lah. 367: 77 I. C. 409.
- 8. *Subramania Aiyar v. Shanmugam Chettiar*, A. I. R. 1926 M. 65: 92 I. C. 566: 22 L. W. 538.
- 9. A. I. R. 1924 Cal. 74: I. L. R. 50 Cal. 549: 75 I.C. 81.
- 10. 31 & 32 Vict., c. 37.
- 11. 45 Vict., c. 9.
- 12. See Taylor, Ev., s. 1527.
- 13. *Bimal Protiva Debi v. Emperor*, 1942 Cal. 464: 202 I.C. 150: 75 C. L. J. 90.
- 14. Reference under S. 46 of Act I of 1879; 19 All. 293 at 295.
- 15. *Akshay Kumar Chand v. Commissioner of Bogra Municipality*, A. I. R. 1923 Cal. 675: 75 I. C. 506.
- 16. *Corporation of Calcutta v. Promotho Nath*, A. I. R. 1915 Cal. 428: 30 I.C. 643.

rised by the Commissioner to certify copies of municipal records as true copies as shown by the Book Manual of Papers.<sup>17</sup>

*Clause (6)*—The fourth and sixth clauses deal with foreign public documents.<sup>18</sup> The words "of any other class," in the sixth clause, mean "other than the documents mentioned in the fourth clause". Copies not properly certified are not admissible.<sup>19</sup> As to the proof of foreign judicial records, see Sec. 86 post, and Sec. 65 ante. Even if a copy of evidence given in a foreign Court is not certified by the Political Agent in a manner which fully satisfies the requirements of Secs. 76 and 86, Sec. 86 does not exclude other proof.

The proof required by this clause is for the purpose of enabling the Court to decide whether a document is a document which falls within the definition of "public document" in Section 74, because unless the character of the document is that it is an act of a public officer, legislative, judicial or executive, it would not be a public document. The Court should not insist upon proof of a matter which is self-evident.<sup>20</sup> A presumption of the document being a true copy may also arise under Sec. 114.<sup>21</sup>

A copy of a School Leaving Certificate given by a schoolmaster in a Native State wherein the age of the pupil was recorded and certified, as required by Sec. 78, clause (6), by the Political Agent assigned to that State by the Government of India, was admissible in evidence under Sec. 35.<sup>22</sup> A copy of the birth entry from the birth record of the Town Committee of a town in Pakistan is not admissible in evidence in the absence of attestation by the High Commissioner for India in Pakistan under this clause.<sup>23</sup>

The Evidence Act (I of 1872) does not contain the whole law of evidence governing this country. Under Sec. 2, which saves certain rules of evidence, the English Extradition Act, which is applicable to this country, is part of the *lex fori*. Records, therefore, of the Berlin Court which are authenticated in the manner prescribed by Secs. 14 and 15 of the English Extradition Act, can be properly admitted in evidence.<sup>24</sup>

Where a foreign judgment is relied on, the production of any document purporting to be certified copy of such foreign judgment is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.<sup>25</sup>

17. Tillo Ram Karam Chand v. State, 69 Punj. L. R. (D) 22: 1967 Cr. L. J. 1295: A. I. R. 1967 Delhi 71 (72).
18. As to the proof of foreign judicial records v. S. 66 post, and S. 65 ante, Haranund v. Ram Gopal, 27 Cal. 639: 22 I. A. 1: 2 Bom. L. R. 562: (1899) 4 C. W. N. 429 (P. C.); Vallabh Das v. Pran Shankar, A. I. R. 1929 Bom. 24: 113 I.C. 312: 30 Bom. L. R. 1519.
19. Shamsher Navain Singh v. Mohammad Sale, A. I. R. 1926 Pat. 29 (2): 90 I.C. 329.
20. East India Trading Co. v. Badat & Co., I. L. R. 1959 B. 1004: A. I. R. 1959 B. 414: 61 Bom. L. R. 333.
21. See Haranund v. Ramgopal, 27 Cal. 639: 27 I.A. 1: 2 Bom. L. R. 562: (1899) 4 C. W. N. 429 (P. C.); Vallabh Das v. Pran Shankar, A. I. R. 1929 Bom. 24: 113 I.C. 312: 30 Bom. L. R. 1519.
22. Maharaj Bhanu Das Narayan Boa Gosavi v. Krishna Bai Chentamani Deshpande, A. I. R. 1927 Bom. 11: I. L. R. 50 Bom. 716: 99 I.C. 397: 28 Bom. L. R. 1225.
23. Union of India v. Amrik Singh, I. L. R. (1962) 2 Punj. 597: A. I. R. 1963 Punj. 104.
24. In the matter of Rudolf Stalimann, 39 Cal. 164 at 185.
25. C.P.C., S. 14.

Clause (6) makes it clear that apart from the two certificates—one by the legal keeper of the original documents, and the other by the Consul General—there shall also be proof of the character of the document according to the law of the foreign country before the document is admitted. It is a condition precedent. Proof can be by direct or circumstantial evidence, and it can also be made by placing before the Court facts giving rise to presumption, rebuttable or irrebuttable. While this clause lays down three conditions for admitting the document in evidence, the admission of the judicial record is not a condition precedent for drawing the requisite presumption under Section 86 of the Act. If the three conditions laid down in this clause are fulfilled, the document can legitimately be admitted in evidence.<sup>1</sup>

As to the presumption declared by the Act with regard to certified copies of foreign judicial records, see Section 86 post; and for the presumption as to documents admissible in England without proof of seal or signature, see Section 82 post. See also notes to Sections 74 and 75 ante.

(Introduction to Sections 79—90)

*Presumption as to documents.* When a document, whether private or public, has been offered in evidence, certain presumptions may arise in respect of it which are enumerated in the following Sections (79—90). Those presumptions, however, are not conclusive. An inference is drawn from certain facts in supersession of any other mode of proof. That inference may be one which the Court is bound to accept as proved until it is disproved; in this case it is said that the Court "shall presume"; or the inference may be one as to which the Court is at liberty either to accept it as proved until it is disproved, or to call for proof of it in the first instance; in this case it is said that the Court "may presume". All that the law does for this last class of inferences is to allow the Courts to dispense with evidence should it think fit to do so. The two latter classes of inferences play an important part in the proof of documents. Sections 79—85 and Section 89 provide for cases in which the Court shall presume certain facts about documents; Sections 86—88, 90, provide for cases in which the Court may presume certain things about them. In the one case, the Court is bound to consider the presumption as proved until the contrary is shown; in the other, the Court may, if it pleases, regard the presumption as proved until the contrary is shown, or may call for independent proof in the first instance.<sup>2</sup> Many classes of documents, which are defined in the Act, are presumed to be what they purport to be, but this presumption is liable to be rebutted. Two sets of presumptions will sometimes apply to the same document. For instance, what purports to be a certified copy of a record of evidence, it may under Section 79 be presumed to be an accurate copy of the record of evidence and under Section 80, the facts stated in the record itself, as to the circumstances under which it was taken, i. e. it was read over to the witness in a language which he understood which must be presumed to be true.<sup>3</sup> All the following sections, down to Section 90 inclusive, are illustrations of and founded upon the principle *omnia praesumuntur*

1. Badat & Co. v. East India Trading Co., (1964) 2 S. C. A. 1: A. I. R. 1964 S.C. 538.

2. Cunningham, Ev., 45, 46; see notes to S. 4 ante.  
3. Steph., Introd., 170, 175.

*rite et solemniter esse acta.*<sup>4</sup> The presumption which is directed to be raised by the last-mentioned section is of great importance in obviating the effects of the lapse of time as to proof of documents. As years go on, the witnesses who can personally speak to the attestation or execution of a document, or to the handwriting of those who executed or attested it, gradually die out. If strict proof of execution or handwriting were necessary it would, after a generation, become impossible to prove any document. On the other hand, there is some reason to suppose that documents, of which people take care for a long series of years, are authentic. The law acts upon this probability and provides that the presumption in the case of documents proved or purporting to be thirty years old, and produced from proper custody, that is the place in which and under the care of the person with whom, it would naturally be, the Court may presume that the signature and every other part of such a document is in the handwriting of the person by whom it purports to be written, and that it was duly executed and attested by the persons by whom it purports to be executed and attested.<sup>5</sup> This section concludes the express provisions contained in the Act as to presumptions in the case of documents, but other presumptions may, of course, be raised under the provisions of Section 114 as is indeed indicated by illustration (i) to that section, according to which the Court may presume that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged, though, in considering whether such a maxim does or does not apply to the particular case before it, the Court will also have regard to such facts as the following, viz., that though the bond is in the possession of the obligor, the circumstances of the case are such that he may have stolen it.<sup>6</sup> There are many other presumptions as to documents, known to English law, for which no express provision is made in the Act, and which, therefore, can be raised only under the general provision contained in Section 114 post,<sup>7</sup> under which section the more important of those presumptions will be found considered.

The provisions of the Evidence Act as to presumptions relating to documents have to be supplemented by Section 3 of the Commercial Documents Evidence Act XXX of 1939 which runs as follows :

**"3. Presumption as to genuineness of documents.** For the purposes of the Evidence Act 1 of 1872, and notwithstanding anything contained therein, a Court—

- (a) shall presume, within the meaning of that Act, in relation to documents included in Part I of the Schedule, and
- (b) may presume, within the meaning of that Act, in relation to documents included in Part II of the Schedule,—

that any document purporting to be a document included in Part I or Part II of the Schedule, as the case may be, and to have been duly made by or under the appropriate authority was so made and that the statements contained therein are accurate."

The documents in relation to which the Court "shall" presume are : (1) Lloyd's Register of Shipping. (2) Lloyd's Daily Shipping Index. (3) Lloyd's

4. Norton, Ev., 260.

5. Cunningham, Ev., 48, 49.

6. S. 114, Illust. (i), post.

7. Cunningham, Ev., 222.

Loading List. (4) Lloyd's Weekly Casualty Reports. (5) Certificate of delivery of goods to the Manchester Ship Canal Company. (6) Official logbook, supplementary official logbook and official wireless logbook kept by a British ship. (7) Certificate of Registry, Safety Certificate, Safety Radio-Telegraph Certificate, Exemption Certificate, Certificate of Survey, Declaration of Survey, International Load Line Certificate, Indian Load Line Certificate, Report of Survey of a ship provisionally detained as unsafe, Report of Survey to be served upon the master of a ship declared unsafe upon survey. Decking Certificate, Memorandum issued under Article 56 of the International Convention for the Safety of Life at Sea, 1929. (8) Certificates A and B, issued under the Indian Merchant Shipping Act, 1928.<sup>8</sup> (9) The following documents relating to marine insurance, namely, insurance policy, receipt for premium, certificate of insurance and insurance cover note. (10) Certificate concerning the loss of country aircraft issued by the appropriate authority under Department of Commerce, Mercantile Marine Department Circular No. 2 of 1938. (11) Protest made before a Notary Public or other duly authorised official by a Master of a ship relating to circumstances calculated to affect the liability of the ship-owner. (12) Licence or permit for radio-telegraph apparatus carried in ships or aircraft. (13) Certificate of registration of an aircraft granted by the Government of the country to which the aircraft belongs. (14) Certificate of airworthiness of an aircraft granted or validated by, or under the authority of, the Government of the country to which the aircraft belongs. (15) Licences and certificates of competency of aircraft personnel granted or validated by, or under the authority of, the Government of the country to which the personnel belongs. (16) Ground Engineer's Licence issued by a competent authority authorised in this behalf by the Government. (17) Consular certificates in respect of goods shipped or shut out, Consular certificates of origin, and consular invoice. (18) Certificate of origin of goods issued (but not merely attested) by a recognised Chamber of Commerce, or by (an Indian or British Consular Officer, or by an Indian or British) Trade Commissioner or Agent. (19) Receipt for payment of customs duty issued by a Customs authority. (20) Schedule issued by a Port, Dock, Harbour, Wharfage or Warehouse authority or by a Railway Company showing fees, dues, freights or other charges for the storage, transport or other services in connection with goods. (21) Tonnage schedule and schedule of fees, commission or other charges for services rendered, issued by a recognised Chamber of Commerce. (22) The publication known as the Indian Railway Conference Association Coaching and Goods Tariffs. (23) Copy, certified by the Registrar of Companies of the memorandum or the articles of association of a company, filed under the Indian Companies Act, 1913.<sup>9</sup> (24) Protest, nothing and certifying the dishonour of a bill of exchange, made before a Notary Public or other duly authorized official.

The Documents in relation to which the Court "may presume" are :

- (1) Survey Report issued by a competent authority—(in) in respect of cargo loaded, or (ii) certifying the quantity of coal loaded, or (iii) in respect of the security of hatches.
- (2) Official log-book, supplementary official log book and official wireless log book kept by a foreign ship.
- (3) Dock certificate, dock chalan, dock receipt or warrant, Port Warehouse certificate or warrant issued by, or under the authority of, a Port, Dock, Harbour or Wharfage authority.
- (4) Certificate issued by a Port, Dock, Harbour or

8. Now see the Merchant Shipping Act, 1958 (44 of 1958), Part IX.

9. See now the Companies Act, 1956 (1 of 1956).

Wharfage or other authority having control of acceptance of goods for shipping, transport or delivery, relating to the date or time of shipment of goods, arrival of goods for acceptance, arrival of vessels for acceptance or delivery of goods, or to the allocation of berthing accommodation to vessels. (5) Export application issued by a Port authority showing dues paid weight and measurement and the shutting out of a consignment. (6) Certificate or receipt showing the weight or measurement of a consignment issued by the official measurer of the Conference Lines, or by a sworn or licensed measurer, or by a recognised Chamber of Commerce. (7) Reports and publications issued by a Port authority showing the movement of vessels, and certificates issued by such authority relating to such movement. (8) Certificate of safety for flight signed by Licensed Ground Engineer. (9) Aircraft log book, Journey log book and log book, maintained by the owner or operator in respect of aircraft. (10) Passenger List or, Manifest of Goods carried in public transport aircraft. (11) Passenger ticket, issued by a Steamship Company or Air Transport Company. (12) Air Consignment Note and Baggage Check, issued by an Air Transport Company in respect of goods carried by air, and the counterfoil or duplicate thereof retained by the carrier. (13) Aircraft Load Sheet. (14) Shortage warrant of a warehouse recognised by a Customs, Excise, Port, Dock, Harbour or Wharfage authority. (15) Acknowledgment receipt for goods granted by a Port, Dock, Harbour, Wharfage or Warehouse authority or by a Railway or Steamship Company. (16) Customs or Excise pass and Customs or Excise permit or certificate, issued by a Customs or Excise authority. (17) *Force Majeure* certificate issued by a recognised Chamber of Commerce. (18) Receipt of a Railway or Steamship Company granted to a consignor in acknowledgment of goods entrusted to the company for transport. (19) Receipt granted by the Posts and Telegraphs Department. (20) Certificate or survey award issued by a recognised Chamber of Commerce relating to the quality, size, weight or valuation of any goods, count of yarn or percentage of moisture in yarn and other goods. (21) Copy, certified by the Registrar of Companies of the Balance Sheet, Profit and Loss Account, and audit report of a company, filed with the said Registrar under the Companies Act, 1956, and the rules made thereunder.

79. *Presumption as to genuineness of certified copies.* The Court shall presume <sup>10</sup>[to be genuine] every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer <sup>11</sup>[of the Central Government or of a State Government, or by any officer <sup>12</sup>[in the State of Jammu and Kashmir] who is duly authorised thereto by the Central Government]: Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

10. Ins. by the A. O. 1948.

11. The original words beginning from "in British India" and ending with the words "to be genuine" have been successively amended by the

A. O. 1937, 1948 and 1950 to be read as above.

12. Subs. by Act III of 1951, for the words "in Part B State".

The Court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such paper.

s. 3 ("Court.")  
s. 4 ("Shall presume".)  
s. 5 ("Document".)

ss. 68, clause (1), 65, clauses (e), (f).  
76, 77 ("Certified copies".)  
s. 3 ("Evidence".)

Norton, Ev., 260, 261; Taylor Ev., s. 171.

### SYNOPSIS

1. Principle.  
2. Scope.

3. Presumption not conclusive.  
4. Mode of proof, objection in appeal.

**1. Principle.** *Omnia prae sumuntur rite et solemniter esse acta* is a maxim of peculiar force when applied to official acts and documents. The last clause of the section is also based upon the above-quoted maxim. It is very old law that where a person acts in an official capacity, it shall be presumed that he was duly appointed and it has been applied to a great variety of officers and illustrated by many cases. For, it cannot be supposed that any man would venture to introduce himself into the public station which he was not authorized to fill. See Introduction, ante, and notes, post.

**2. Scope.** As is indicated by its terms, this section applies only to certificates,<sup>13</sup> certified copies, or other documents certified by officers in India. A certificate of the visitors of a lunatic asylum made receivable by Section 473, Cr. P. C., 1898 (now Section 337 of Cr. P. C., 1973), and signed by the Superintendent of the asylum comes under the purview of this section.<sup>14</sup> The section has no application to original documents,<sup>15</sup> but if a certified copy of a sanction to prosecute is presumed to be genuine, there is no reason why the original should not be presumed to be genuine.<sup>16</sup> But if the original itself is tendered in evidence it must be proved like any other document.<sup>16-1</sup>

Section 82 post provides for similar presumptions in the case of documents of a like character certified by officers other than those specially designated in this section. The presumption that the document itself is genuine of course includes the presumption that the signature and the seal,<sup>17</sup> where a seal is used, are genuine.<sup>18</sup> Where a deed is registered, the certificate of registration requires no proof, and its genuineness must be presumed under this section.<sup>19</sup> The presumption to be raised by the section is, however, made subject to the proviso that the document is substantially in the form and purports to be

13. e.g., a certificate given by a registering officer under S. 60, Act III of 1877; S. 58 of Act XVI of 1908 (Registration Act); see *Muhammad Hassan v. Sohara*, 1924 Lah. 389; 71 I.C. 805, and see Cr. P. C., S. 467 (now Sec. 331), 473 (now Sec. 337), 511 (now Sec. 296).

14. *Kalidas v. R.*, 63 Cal. 425.

15. *Bishnath Prasad v. Emperor*, 1948 Oudh 1: 230 I.C. 144.

16. *Sager Mal v. State*, A. I. R. 1951

All. 816: 1951 A. L. J. 447; 1951 A. W. R. (H.C.) 696,

16-1. *C. H. Shah v. S. S. Malpathak*, A. I. R. 1973 Bom. 14; 74 Bom. L. R. 505: 1972 Mah. L. J. 816.

17. See S. 76 ante.

18. See *Gurdit Singh v. Surjeet Singh*, A. I. R. 1960 Pepsu 56.

19. *Govind Ram v. Abdul Wahab*, I.L.R. 1963 Raj. 954; A. I. R. 1963 Raj. 234.

executed in the manner directed by law in that behalf.<sup>20</sup> No presumption will be raised if the copy is proved to be incorrect or it had been issued by a person without competent authority or without complying with the provisions of law. The presumption is permissible only if the certified copy was executed substantially in the form and in the manner provided by law.<sup>21</sup>

A certified copy of revenue record raises a presumption of correctness of the record and genuineness of the copy unless contrary is proved.<sup>21-1</sup> Correctness of copies of birth and death registers of local bodies shall be presumed under Section 79.<sup>21-2</sup>

**3. Presumption not conclusive.** This section, as indeed all the following sections down to Section 90 inclusive, is an illustration of, and is founded upon, the principle *omnia praesumuntur rite et solemniter esse acta*. But though the Courts are directed to draw a presumption in favour of official certificates, it is not a conclusive but a rebuttable presumption. It is but a *prima facie* presumption, and if the certificate or certified copy be not correct, such incorrectness may be shown.<sup>22</sup> The presumption raised by the last clause also is a presumption which shall only stand *donec probatur in contrarium*—until the contrary be proved.<sup>23</sup> And when a public officer is required by law to be appointed in writing, and it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.<sup>24</sup> So also as to documents admissible in England without proof of seal or signature, the Court shall presume that the person signing it held, at the time when he signed it, the judicial or official character which he claims.<sup>25</sup>

**4. Mode of proof, objection in appeal.** In a case it was said that the original sale-deed was eaten away by white-ants and a certified copy of that document was marked as an exhibit in the trial Court without objection from the other side. It was held that no objection could be taken to the mode of proof in the appellate Court.<sup>1</sup>

**80. Presumption as to documents produced as record of evidence.** Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any

20. See *Md. Oziullah v. Beni Madhab, A. I. R. 1922 Cal. 298; I. L. R. 50 Cal. 135; 71 I.C. 239; 26 C. W. N. 878; 37 C. L. J. 180.*

21. *Bhinka v. Charan Singh, A. I. R. 1959 S.C. 960; 1959 A. L. J. 557; 1959 Cr. L. J. 122; 1959 All. W. R. (H.C.) 440; 1959 All. Cr. R. 337; 1960 S.C.J. 892; 1959 (Supp.) 2 S. C. R. 798; Ganpati v. Damodar, 1960 Jab. L. J. 122.*

21-1. *Budhu Ahir v. I. C. Pandey, 1972 A. W. R. (H.C.) 341; 1972*

*Cr. L. J. 1377; 1972 All. Cr. R. 180.*

21-2. (1974) 1 Cr.L.T. 550 (Punj.).  
22. *Norton, Ev., 260; see S. 4 ante.*  
23. *Taylor, Ev., s. 171; Norton, Ev., 260, 261.*  
24. *S. 91, Excep. 1, post.*  
25. *S. 82 post.*

1. *Bhadar Munda v. Dhuchua Oraon, 1970 B. L. J. R. 8; A. I. R. 1970 Pat. 209 (211); Motilal v. Sardar Mal, A.I.R. 1976 Raj. 40.*

judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

s. 3 ("Document".)  
s. 3 ("Court".)  
s. 3 ("Evidence".)

ss. 24–30 (Confessions.)  
s. 33 (Relevancy of depositions.)  
s. 4 ("Shall presume".)

### SYNOPSIS

1. Principle.
2. Scope of the section.
3. "Record of evidence".
4. Dying declarations.
5. Heading of deposition.
6. "Confession".
7. "Judicial proceeding".
8. Taken in accordance with law.
9. Purporting to be signed by any Judge, Magistrate or officer.
10. Presumptions :
  - Secondly.
  - Thirdly.
11. Identity of party making statement.

**1. Principle.** This section also gives legal sanction to the maxim *omnia praesumuntur rite et solemniter esse acta*, with regard to documents taken in the course of a judicial proceeding.<sup>2</sup> When a deposition or confession is taken by a public officer, there is a degree of publicity and solemnity which affords a sufficient guarantee for the presumption that everything was formally, correctly and honestly done.<sup>3</sup> See Introduction, ante and notes, post.

**2. Scope of the section.** The presumptions to be raised under this section<sup>4</sup> which deals with the subject of depositions of witnesses and confessions of prisoners and accused persons, are considerably wider than those under Section 79. They embrace not only the genuineness of the document, but also that it was duly taken and given under the circumstances recorded therein. This section, occurring as it does in that part of the Act which deals not with relevancy but with proof, does not render admissible any particular kind of evidence, but only dispenses with the necessity for formal proof in the case of certain documents taken in accordance with law, raising with regard to documents taken in the course of a judicial proceeding, the presumption that all acts done in respect thereof have been rightly and legally done,<sup>5</sup> i. e. (i) that the documents purporting to be record of evidence or statements or confessions are genuine, (ii) that the statements as to the circumstances under which they were taken made by the officer who affixed his signature are true, and (iii) that the evidence, statement or confession was duly taken.<sup>6</sup> The law allows certain presumptions as to certain documents, and on the strength of these presumptions dispenses with the necessity of proving by direct evi-

2. R. v. Viran, (1886) 9 M. 224, 227.

3. Norton, Ev., 261, 262.

4. See the following cases as to the law prior to the Act, R. v. Fatik, (1868) 1 B. L. R. A. (Cr.) 13; R. v. Jata, (1809) 11 W. R. (Cr.) 36; R. v. Misser, (1870) 14

W. R. (Cr.) 9.

5. R. v. Viran, (1886) 9 M. 224, 227.

6. Padam Prasad Upadhyaya v. Emperor, A. I. R. 1929 Cal. 617; 119 I. C. 193; 50 C. L. J. 106; 38 C. W. N. 1121 (S.B.).

dence what it would otherwise be necessary to prove.<sup>7</sup> The section applies to a report submitted by a Commissioner empowered to examine witnesses.<sup>8</sup>

As already observed,<sup>9</sup> two sets of presumptions may apply to the same document. For instance, what purports to be a certified copy of a record of evidence is produced. It must, by Section 79, be presumed to be an accurate copy of the record of evidence. By the present section the facts stated in the record itself as to the circumstances under which it was taken, e. g., that it was read over to the witness in a language which he understood, must be presumed to be true. As to the relevancy of deposition, see Section 33 ante, and notes thereto.

A declaration of citizenship made under the Goa, Daman and Diu (Citizenship) Order, 1962, is not evidence, it does not come under any of the categories specified in Section 80.<sup>10-1</sup>

**3. "Record of evidence".** The first portion of the section only refers to documents produced as a record of evidence. It is only a document which purports to be a record of memorandum of the evidence,<sup>10</sup> or any part of the evidence given by a witness in a judicial proceeding,<sup>11</sup> or before any officer authorized by law to take such evidence<sup>12</sup> with regard to which the presumptions prescribed by this section are to be made. The presumption of correctness cannot attach to the record of a Court which was not competent to try the case. If the Court was not competent to try the case, it was not functioning as a Court at all and could not record statements of witnesses.<sup>13</sup> Statements made by persons to police officers during the course of a police inquiry do not come within the purview of this section. Chapter XII of the Criminal Procedure Code deals with the powers of investigation of the police. A police officer making an investigation under this chapter may examine witnesses and reduce their statements into writing.<sup>14</sup> But such investigation is not in itself a judicial proceeding,<sup>15</sup> and no statements, other than a dying declaration, made by any person to a police officer in the course of an investigation under this chapter shall be used as evidence against the accused.<sup>16</sup> Such statements, therefore, are not and cannot have the effect of depositions, do not prove themselves, and cannot be treated as evidence.<sup>17</sup>

- 7. R. v. Shivya, (1876) 1 B. 219, 222; see for example Budree v. Bhoosee, (1876) 25 W. R. 134.
- 8. Mohanlal v. Sundar Lal, (1949) E.P. 295 : 51 P.L.R. 57.
- 9. Introduction to Ss. 79-90 ante, Steph., Introd., 170-171.
- 9-1. G. Y. Bhandare v. Erasmc, A. I. R. 1972 Goa 25.
- 10. See S. 3 ante.
- 11. See notes under Sec. 1 ante.
- 12. As to officers authorised to take evidence, see notes under S. 33 ante.
- 13. Anwar Ali v. State, 1955 Cal. 535: 56 Cr. L. J. 1348; Emperor v. Ajit

- Kumar Ghose, 1945 Cal. 159: 220 I. C. 237: 78 C. L. J. 217.
- 14. Cr. P. C., S. 161.
- 15. Purshottam Ishvar Amin v. Emperor, A.I.R. 1921 Bom. 3 (F. B.) I.L.R. 45 Bom. 834 : 60 I.C. 593.
- 16. Cr. P. C., S. 162.
- 17. Roghuni Singh v. R., (1882) 9 C. 455, 458; 11 C. L. R. 569; R. v. Sitaram Vithal, (1887) 11 B. 657; Purshottam Ishvar Amin v. Emperor, supra, statement of witness recorded by Magistrate during police investigation. They may, however, be used for the purpose of refreshing memory; see S. 159 post.

A memo of test identification is not record of evidence of witnesses.<sup>17-1</sup> Presumption of contents of identification memo would arise only if the memo amounted to evidence within the meaning of Section 3.<sup>17-2</sup>

**4. Dying declarations.** A statement relevant under the provisions of Section 32, Evidence Act, is not inadmissible by reason of the fact that the Magistrate who recorded it was not competent to record a statement of a witness under Section 164, Cr. P. C., Consequently a dying declaration made to a Magistrate is not inadmissible because the Magistrate was not empowered under Section 164 to record it as it was not made in course of investigation under Chapter XII of the Criminal Procedure Code, 1973.

But the dying declaration, in such a case, must be proved for it cannot be said to be a record of the evidence given by a witness before an officer authorized by law to take such evidence and the presumption mentioned in Section 80, Evidence Act, cannot arise. Where, however, the Magistrate is empowered to record a statement, it is not necessary for him to prove that he took the statement, and the fact that the accused was not present at the time when the dying declaration was taken makes no difference in this respect.<sup>18</sup>

When a dying declaration has appended to it a certificate that it has been read over to the deponent and declared to be correct and this is signed by the Magistrate who recorded the statement, Section 80 of the Evidence Act creates a presumption that the circumstances under which it is stated to have been taken are true, the investigation by the Magistrate being a judicial proceeding.<sup>19</sup>

**5. Heading of deposition.** The heading of a deposition descriptive only of the witness forms no part of the evidence given by him on solemn affirmation.<sup>20</sup>

**6. "Confession".** The confession by any prisoner or accused person in accordance with law is admissible without examining the Magistrate who recorded it.<sup>20-1</sup> The use of the expression "statement or confession" in the section in juxtaposition to "any prisoner or accused person", and the context in which those words occur, point to the conclusion that a statement as well as a confession of any prisoner or accused person duly taken by a Magistrate

- 17-1. Gopi v. State of Rajasthan, 1974 W.L.N. 78 (Raj) Presumption of contents of Identification memo would arise only if the memo amounted to evidence within the meaning of Sec. 3.
- 17-2. Pritam Singh v. State, A. I. R. 1971 Raj. 184: 1971 Cr. L. J. 974: I. L. R. (1970) 20 Raj. 459: 1970 W. L. N. (I) 38.
18. Sulaiman v. The King, A. I. R. 1941 Rang. 301: 197 I.C. 131; 1941 R. L. R. 258 (case-law discussed). See also Surajbali v. Emperor, A. I. R. 1934 All. 340: I. L. R. 56 All. 750: 152 I.C. 249.
19. In re Karuppan Samban, 31 I.C. L.E.-218

- 359: 16 Cr. L. J. 759.
20. Maqbulan v. Ahmad, 26 A. 108: 31 I. A. 38: 6 Bom. L. R. 233: 8 C. W. N. 241 (P.C.); Lakshan Chandra v. Takim Dhali, A. I. R. 1924 Cal. 558: 80 I.C. 357: 28 C. W. N. 1033: 39 C. L. J. 90; Ma Tin v. Ma Nyun, 1938 Rang. 81: 176 I.C. 242; Ramgahan Missir v. Mst. Ramdasi Kuar, A. I. R. 1933 Pat. 627; but see Jadunath Singh v. Bisheswar Singh, A. I. R. 1939 Oudh 17: 178 I.C. 950: 1938 O. W. N. 1267.
- 20-1. Bandhu v. State, 1976 Cr. L. J. 325: (1975) 41 Cut.L.T. 961.

is to be presumed to be genuine.<sup>21</sup> The "statement" does not have reference to a statement made by a witness, as distinguished from a confession made by a prisoner or an accused person.<sup>22</sup> The statement recorded by a Magistrate in the course of police investigation under Section 164 is not evidence in another stage of a judicial proceeding.<sup>23</sup> An identification memo is not a record of evidence of a witness within the meaning of this section and consequently does not prove itself.<sup>24</sup> As to the provisions of the Criminal Procedure Code relating to the recording of confessions, *v. ante*, Section 24, and the cases cited in the notes to that section.

Where confessions are recorded strictly in accordance with law, the usual presumption arises under the provisions of this section, that the confessions are voluntarily made. The burden is on the accused of showing that their confessions were not voluntarily made.<sup>25</sup> The Magistrate's mere admission in cross-examination that he filled up the form of questions and answers required by Sec. 164, Criminal Procedure Code, in recording the confession, as a matter of routine, is not sufficient in itself substantially to throw doubt on the statement, which the Magistrate certified by his signature to the prescribed memorandum, that he had given the prescribed warnings to the accused that he was not bound to make the statement. This circumstance is not sufficient in itself to displace the presumption which the Court is directed to make by this section.<sup>1</sup> All that the section says is that the Court will presume that the confession was duly recorded and that the circumstances under which the confession was recorded are such as have been set down in the record made by the Magistrate. It says nothing about there being any presumption regarding the voluntariness of the confession.<sup>2</sup> Where there is nothing on the record to show that the Magistrate ever did question the accused to ascertain that he was making his confession voluntarily the provisions of Sec. 164 and Sec. 364 of Cr. P. C., 1898 (Sec. 281 of Cr. P. C., 1973) are not complied with and when the defect has not been remedied by the Magistrate's evidence under Section 533, Cr. P. C., 1898 (now Section 463 of Cr. P. C., 1973), the record of the confession is inadmissible.<sup>3</sup> A confession recorded outside India, but in conformity with the provisions of the Criminal Procedure Code, is admissible under this section.<sup>4</sup>

**7. "Judicial proceeding".** The section only raises a presumption in the case of documents taken in the course of a judicial proceeding. Therefore,

21. Ram Sanchi v. State, A. I. R. 1963 A. 308; 1963 A. L. J. 61.
22. *Ibid.*
23. Purshottam Ishvar Amin v. Emperor, I. L. R. 45 B. 834; A. I. R. 1921 B. 3; 60 I.C. 593 (F.B.).
24. Ram Sanchi v. State, *supra*.
25. Maung Tha Ka Do v. Emperor, A. I. R. 1935 Rang. 491; 60 I.C. 292. See also Pharho v. Emperor, A.I.R. 1932 Sind. 201 : 141 I.C. 392.
1. Emperor v. Jamuna Singh, A. I. R. 1947 Pat. 305; I. L. R. 25 Pat. 612.
2. Emperor v. Thakur Das Malo, A. I. R. 1943 Cal. 625; I. L. R. (1943) 1 Cal. 487; 209 I.C. 550.
3. Ondi Boro v. Emperor, A. I. R.

- 1948 Cal. 193; 49 Cr. L. J. 294; Shanti v. State, A. I. R. 1978 Orissa 19 (F.B.).
4. Govind v. R., A. I. R. 1921 Nag. 39; 69 I. C. 257; 17 N. L. R. 113, Lal Singh v. Emperor, A. I. R. 1938 All. 625; I. L. R. 1938 All. 875; 178 I.C. 694; Emperor v. Anandrao Gangaram, A. I. R. 1925 Bom. 529; I. L. R. 49 Bom. 642; 89 I.C. 1046; 26 Cr. L. J. 1473 ; 27 Bom. L. R. 1034; Empress v. Nagla Kala, I. L. R. 22 Bom. 235 (but see Emperor v. Dhenka Amra, A.I.R. 1914 Bom. 41 : 24 I.C. 169; 16 Bom. L. R. 261; Panchanathan Pillai v. Emperor, 1929 Mad. 487; I. L. R. 52 Mad. 529; 121 I.C. 157; 29 L. W. 645.

statements by way of a confession recorded by a Magistrate in his character of an Executive Officer, there being no law authorizing the taking of such statements, are not receivable under this section.<sup>5</sup> As to statements made to the Police, *v. ante*.

Presumption of genuineness is available to certified copies of deposition of witnesses recorded in commitment proceedings.<sup>5-1</sup>

**8. Taken in accordance with law.** The statements as to which this section says that certain presumptions are to be drawn are statements or confessions taken in accordance with law. This section does not render admissible any particular kind of evidence, but only dispenses with the necessity of formal proof in the case of certain documents taken in accordance with law. If a document has not been taken in accordance with law, Sec. 80 does not operate to render it admissible. The section merely gives legal sanction to the maxim *omnia praesumuntur rite et solemniter esse acta* with regard to documents taken in the course of a judicial proceeding.<sup>6</sup> So, in the case last cited it was contended that when the confessions there in question were taken by the Deputy Magistrate, he was acting not under the Criminal Procedure Code but under the provisions of the Mapilla Act (XX of 1859); it was, however, held that there was nothing in that Act authorizing the examination of a suspected person or the taking from him of any statement or confession and that though such course might not be improper or even advisable, this section did not, therefore, apply. The Deputy Magistrate might have been acting in an executive capacity under the orders of the District Magistrate, but the statements, if recorded by him as an Executive Officer, were not receivable under this section.<sup>7</sup> A confession recorded by the Second Class Magistrate not specially empowered in that behalf, during investigation of a case, cannot be put in evidence under Sections 74 and 80 of the Evidence Act.<sup>7-1</sup> Where no procedure is prescribed in law for recording the statements of a person under section 171-A of the Sea Customs Act, 1878 (now Sec. 108 of the Customs Act, 1962) no presumption can be raised under the present section and the question whether the confession made was free and voluntary must be decided on the facts and circumstances of the case.<sup>8</sup> Genuineness under this section can be presumed only, when the document has been executed substantially in the form and in the manner provided by law. Where, therefore, a *patwari* issues a certified copy of *khatauni* without complying with the provisions of the law governing its issue, its genuineness cannot be presumed.<sup>9</sup>

Where the Magistrate has neither acted nor purported to act under Sec. 164 or Section 364 (now Section 281), Cr. P. C., and nothing has been tendered in evidence as recorded or purporting to be recorded under either Sec. 164 or Section 364 (now Section 281), oral evidence of the Magistrate is not

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- 5. R. v. Viran, (1886) 9 M. 224, 227, 228.
- 5-1. Saudagar Singh v. State of Punjab, (1974) 76 Punj. L. R. 57.
- 6. R. v. Viran, (1886) 9 M. 224, 227, 228; see also Padam Prasad Upadhyaya v. Emperor, A. I. R. 1929 Cal. 617; 119 I.C. 193; 33 C. W. N. 1121 (S.B.).
- 7. *Ibid.*
- 7-1. Nika Ram v. State of H. P., A. I. R. 1972 S.C. 2077; 1972 Cr. L. J. 1317; (1972) 2 S. C. C. 80.
- 8. State of Rajasthan v. Budhuram, I. L. R. (1968) 18 Raj. 962; 1969 Cr. L. J. 311; A. I. R. 1969 Raj. 49 (50).
- 9. Bhinka v. Charan Singh, A. I. R. 1959 S.C. 960; 1959 A. L. J. 55; 1959 A. W. R. (H.C.) 440; 1959 All. Cr. R. 337; 1960 S. C. J. 892; 1959 (Supp.) 2 S. C. R. 798; 1959 Cr. L. J. 1223.

admissible. Section 164 is not meant to allow evidence to be put in a form in which it can prove itself under Sec. 74 or Sec. 80, Evidence Act. It is a section conferring powers on Magistrates and delimiting them. If oral evidence be allowed in such a case all the precautions and safeguards laid down by Secs. 164 and 364 (now Sec. 281) would be of such a trifling value as to be almost idle. The effect of Secs. 164 and 364 (now Sec. 281) is clearly to prescribe the mode in which confessions are to be dealt with by Magistrates when made during an investigation, and to render inadmissible any attempt to deal with them by allowing oral evidence.<sup>10</sup>

A memorandum of identification proceedings held by a Magistrate under Section 164, Cr. P. C., 1973, is not admissible without proof. This section does not apply to such a memorandum, and it cannot be presumed to be genuine and must be proved to be so by evidence.<sup>11</sup> In order that such memorandum may be governed by this section the following conditions must be fulfilled :

- (1) the memorandum must be a memorandum of evidence ;
- (2) the evidence must be given by a witness ; and
- (3) the evidence must be given in a judicial proceeding, or before an officer authorised by law to take it.

If the above conditions are fulfilled, the other requirements that the evidence must be taken in accordance with law, and that the memorandum must purport to be signed by a Magistrate or an officer authorised by law to take the evidence are also fulfilled.<sup>12</sup> A record of a statement made under Section 164, Cr. P. C., is not a record of evidence, merely because it might be used for a certain purpose in a trial before a Court. A memorandum of evidence within the meaning of this section is a memorandum of a statement made as evidence.<sup>13</sup>

Section 356, sub-section (1) of the Criminal Procedure Code, 1898 (now Sections 275 (1), (4), 276 (1) (3) and 277 of Cr. P. C., 1973) is mandatory, so if a Magistrate neither takes down the evidence nor was it taken down in his presence but merely makes and signs a memorandum of it, such memorandum is not a record of evidence within the meaning of this section.<sup>14</sup>

A provision requiring, with a view to ensure accuracy, a deposition to be read over to a witness is in its nature directory. If it were not complied with in a particular case, the deposition, while it may lose the benefit of this section, may be proved in some other way.<sup>15</sup> It has been held that if a de-

10. Nazir Ahmad v. King-Emperor, A. I. R. 1936 P.C. 253 (2): 68 I.A. 372; I. L. R. 17 Lah. 629: 163 I. C. 881. See also Kashmira Singh v. State of Madhya Pradesh, A. I. R. 1952 S.C. 159: 1952 Cr. L. J. 839: 1952 S.C.R. 526: 1952 S. C. J. 201: (1952) 1 M. L. J. 754.
11. Shieoraj v. State, I. L. R. (1964) 1 A. 405; A. I. R. 1964 A. 290: 1963 A. L. J. 1128: 1964 A. W. R. (H.C.) 680: 1964 (2) Cr. L. J. 1 (F.B.); State v. Debraj Bhakta, 34 Cut. L. T. 17 (22).
12. Shieoraj v. State, I. L. R. (1964) 1 A. 405; A. I. R. 1964 A. 290: 1963 A. L. J. 1128: 1964 A. W. R. (H.C.) 680: 1964 (2) Cr. L. J. 1 (F.B.).
13. Ibid.
14. Sadananda v. Krishna, A. I. R. 1915 Cal. 664; I. L. R. 42 C. 381: 27 I. C. 672.
15. Elahi v. R., A. I. R. 1918 Cal. 289 (2): 45 Cal. 825: 45 I.C. 258. See Imam Din v. Niamat, A. I. R. 1920 Lah. 318; I. L. R. 1 Lah. 361: 58 I. C. 830.

position is not read over to the witnesses, it is only an irregularity and the irregularity does not vitiate the conviction, or the decree.<sup>16</sup> Therefore, where a deposition has been duly recorded under Order XVIII, Rule 5, C. P. C., the appellate Court cannot embark on an enquiry whether the deposition had been accurately recorded, especially when there had been no challenge or complaint on that account by the aggrieved party.<sup>17</sup> This section, when read with Sections 164, 364 and 360 of the Criminal Procedure Code, 1898 (now Sections 164, 281 and 278 of Cr. P. C. of 1973) leads to the result that if a confession or deposition is duly recorded and certified by a Magistrate or Judge, its authority or genuineness must be presumed and it must be taken on record straightway. The practice of calling the recording Magistrate, etc., to speak to its authenticity is an undesirable one.<sup>18</sup>

Where the certificate of the Committing Magistrate endorsed on the deposition sheet states that the deposition was read over to the witness and that the witness admitted it to be correct, the Court is bound to accept it as correct under this section, until the contrary is proved. The duty of displacing the presumption lies on the person who questions it. The Court is of course bound to consider such evidence such as it adduced but it is not bound to believe evidence nor is there any duty whatever on the Court to conduct an enquiry on its own.<sup>19</sup>

The essential requirements for raising the presumption under this section as to the genuineness of a document purporting to be the record of the evidence given by a witness in a judicial proceeding, appear to be that the witness should be duly sworn and examined and that deposition should be signed by the Judge. The law does not require that the Judge should certify at the end of a deposition that it was read over to or by the witness.

A substantial compliance with Rule 5 of Order XVIII, C. P. C., is sufficient to entitle the deposition to the benefit of the presumption created by this section.

However strictly Rule 5 of Order XVIII, C. P. C., may be construed, the practice of handing over the deposition of a witness who understands English to read it over himself, is a sufficient compliance with the rule for all purposes and depositions so read over by the witness prove themselves under the provisions of Section 80 of the Evidence Act.<sup>20</sup> See also ante, Notes to Section 24. As to the manner in which evidence should be taken and recorded in civil and

16. Mohammad Farooq v. Rex through Tufail Ahmad, A. I. R. 1950 All. 501; 1950 A. L. J. 277; 1950 A. W. R. (H.C.) 323; 51 Cr. L. J. 1346 (see also the cases discussed therein); Bhagwan Singh v. State of Punjab, A. I. R. 1952 S.C. 214; 1952 S. C. R. 812; 1952 S. C. J. 284; 1952 (1) Mad. L. J. 816; 1952 Cr. L. J. 1131; 1952 Mad. W. N. 533; 1952 Mad. W. N. (Cr.) 157; 1952 S. C. A. 518: 7 D. L. R. S.C. 322; Abdul Rahman v. King-Emperor, A. I. R. 1927 P.C. 44; 54 I. A. 96; I. L. R. 5 Rang. 53; 100 I. C. 227.

17. Channoo Mahto v. Jang Bahadur, A. I. R. 1957 Pat. 293.  
18. Kashmira Singh v. State of M. P., A. I. R. 1952 S.C. 159; 1952 Cr. L. J. 839; 1952 S. C. J. 201; 1952 Mad. W. N. 402: (1952) 1 Mad. L. J. 754; 1952 S.C.R. 526; 7 D. L. R. S.C. 275; 1952 S. C. A. 474; Bhagwan Singh v. State of Punjab, A. I. R. 1952 S.C. 214.  
19. Bhagwan Singh v. State of Punjab, A. I. R. 1952 S.C. 214 at p. 218.  
20. Romesh Chandra v. Emperor, A. I. R. 1919 Cal. 514; I. L. R. 46 Cal. 895; 50 I.C. 660.

criminal proceedings, see Civil Procedure Code, Order XVIII ; Criminal Procedure Code, 1973, Sections 273 to 283. As to confessions see Sections 24–30 ante and the Criminal Procedure Code, 1973, Sections 164, 281 and 463.

**9. Purporting to be signed by any Judge, Magistrate or officer.** One of the requisites for the raising of a presumption under this section is that the deposition or confession should purport to be signed by the Judge, Magistrate or officer who recorded it. But, it has been held, that mere omission to sign the depositions does not preclude the Court from presuming that the copies are what they purport to be, namely, true copies certified by competent authority of deposition made in a suit.<sup>21</sup> It is submitted that the last cited decision is not correct having regard to the clear language of the section. In a decision from Andhra Pradesh it was held that if the deposition of a witness is not signed by the judge who recorded it, it does not conform to the provisions of the section and presumption under the section cannot be raised. But the inadvertent omission of the Judge to sign the deposition will not make it *non est* or invalid.<sup>22</sup>

**10. Presumptions.** With respect to presumptions, first, if the provisions of the first clause of the section are fulfilled, the Court must, in all cases, presume that the document is genuine, *viz.*, that it is as it purports to be, a record of evidence given or of a confession made and that the signature appended is that of the Judge, Magistrate, or other officer by whom it purports to be signed. This presumption is, however, independent of the others. Thus, it may well be that the document is genuine in the sense above mentioned, and yet it may not have been duly taken under the general provision of the law regulating the recording of depositions and confessions. If there be no obligation to do an act, and it is not stated upon the document that such act has been done, there may be a presumption of genuineness and due taking but there will be none as to that act having been done. Thus, before the deposition of a medical witness taken by a committing Magistrate, can, under Section 509 of the Code of Criminal Procedure, 1898 (now Section 291 of Cr. P. C., 1973), be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record, or be proved by the evidence of witnesses to have been taken and attested by the Magistrate in the presence of the accused. The Court ought not, if it does not so appear, or if it be not so proved, to presume either under Section 80 or Section 114, illustration (e) of this Act, that the deposition was so taken and attested.<sup>23</sup> But the depositions of the medical witnesses are not inadmissible merely because the Magistrate has failed to append certificates in the prescribed form.<sup>24</sup> There is no provision in the Criminal Procedure Code which makes the attestation of the deposition by the Magistrate in the presence of the accused obligatory. Unless it is made obligatory, the concluding words of this section as to its having been "duly taken" cannot apply. The document may be genuine and yet not attested in the presence of the accused and if there be no obligation to so attest the deposition, the statement might have been duly taken though not so attested.<sup>25</sup> Though this section will not be of any assistance in a case under Section 509 of the Criminal Procedure Code, 1898 (now Section 291 of Cr. P. C., 1973) where there are no "statements as to the circumstances under

21. Sarabjit v. Mata Din, A. I. R. 1920 Oudh 122: 60 I. C. 437.

v. Pohp, (1887) 10 A. 174, 177, 178.

22. Khaja Begum v. Abdul Hameed, (1967) 2 Andh. W. R. 66 (67).

24. Nawab v. Emperor, A. I. R. 1933 Lah. 131: 142 I. C. 577.

23. Kachali v. R., (1890) 18 C. 129; R. v. Riding, (1887) 9 A. 720; R.

25. R. v. Pohp, *supra* at p. 187.

which the deposition was taken purporting to be made by the person signing it", yet if a Magistrate records a statement at the foot of the deposition to the effect that the deposition was taken in the presence of the accused and was attested by him, the Magistrate, in the presence of the accused, and signs such statement, the Court would be bound to presume that such statement was true and to admit the deposition under Section 509 of the Criminal Procedure Code, 1898, (now Section 291 of Cr. P. C., 1973).<sup>1</sup> If there be no such statement, it must be proved in such a case *aliunde* that the requirements of the Code have been fulfilled.

*Secondly.* The Court must presume that any statements as to the circumstances under which the document was taken purporting to be made by the person signing it are true. The memorandum endorsed upon or appended to the record of evidence on confession is to be taken as evidence of the facts stated in the memorandum itself.<sup>2</sup> Thus, if the evidence has been recorded in a different language from that in which the witness spoke, the Court will presume that the records contain the equivalent of the words spoken by him, if from the memorandum attached to the deposition it appears to have been read over to the witness in his own language and to have been acknowledged by him to be correct.<sup>3</sup> There may be a presumption that the statements as to the circumstances under which the document was taken are true and none as to the document having been duly taken, for the circumstances if assumed to be true, may not disclose a due taking.<sup>4</sup> Such statements if made are to be taken as true whether or not there is any obligation either to do the acts recorded or to make a record of them.<sup>5</sup>

*Thirdly.* The document must be presumed to have been duly taken. In certain cases, the document will not be presumed to have been "duly taken" unless it purports to give all the facts as to which such presumption is to be raised.<sup>6</sup> In the case last cited, it was said that the law allows certain presumptions as to certain documents and on the strength of these presumptions dispenses with the necessity of proving by direct evidence what it would otherwise be necessary to prove. One of these presumptions relates to confessions. This section says that such confession is to be presumed to be duly taken. But as a necessary basis for this presumption, the document must purport to show all the facts of which it would otherwise be necessary for the Court to be satisfied by direct evidence before the confession could be used against the accused. Those facts are, first, that the confession was accurately taken down or repeated; secondly, that the confession was taken in the immediate presence of a

1. Kachali v. R., (1890) 18 Cal. 129, at p. 133.
2. R. v. Gonowari, (1874) 22 W.R. 2; R. v. Nussuruddin, (1874) 21 W. R. (Cr.) 5; Kachali v. R., (1890) 18 C. 129.
3. R. v. Gonowari, (1874) 22 W. R. 2; R. v. Mungal, (1875) 23 W. R. 28. In the former case the deposition of the prisoner had been taken in English. The only evidence offered for the purpose of satisfying the Court that this deposition represented a true translation of the words which the accused person actually spoke in Hindustani was

an endorsement or memorandum to be found at the foot of the deposition signed by the Magistrate in these words: "The above was read to the witness in Hindustani, which he understood, and by him acknowledged to be correct." It was held that the memorandum was evidence of the facts stated in the memorandum itself which facts themselves afforded some evidence that the translation was correct.

4. R. v. Nussuruddin, (1874) 21 W.R. (Cr.) 5.
5. Kachali v. R., (1890) 18 C. 129.
6. R. v. Shiva, (1876) 1 B. 219, 222.

Magistrate ; thirdly, that no inducement had been held out to the accused. If these three facts, viz. the accuracy of the record, the presence of a Magistrate and the voluntary nature of the confession—would otherwise have to be proved by direct evidence, they must all be stated on the face of the document before the Court can draw a presumption of their having occurred ; and these are the very three facts which are stated in the memorandum and certificate mentioned in Sections 164 and 364 of the Criminal Procedure Code, 1898, (now Sections 164 and 281 of Cr. P. C., 1973). If, therefore, such a memorandum and certificate in the terms required by the Code be not attached to the confession, no presumption will be raised, and it will not be admissible in evidence.<sup>7</sup>

But, if the confession contains a certificate or memorandum at its foot as required by Section 164, Cr. P. C., a presumption arises that all the necessary formalities have been complied with and that the statements contained in the memorandum are true and correct.<sup>8</sup>

In other cases, however, the presumption of due taking may be raised independently of the question whether facts are expressly stated on the record which may form the basis of the presumption.<sup>9</sup>

The distinction between these cases is that no presumption that a document is duly taken can arise when, on the face of the document, it appears that it has not been duly taken.<sup>10</sup> Therefore (a) if the law expressly requires a statement of the circumstances under which a document was taken to be re-

7. R. v. Shiyva, (1876) 1 Bom. 219, 222.
8. Mathai Mathew v. State, A.I.R. 1952 T. C. 305 : 53 Cr.L.J. 1304 ; Tukaram Khandu Koli v. Emperor, A.I.R. 1953 Bom. 145 : I.L.R. 55 Bom. 336 : 143 I.C. 280 (F.B.).
9. Cf Budree v. Bhoosseé, (1876) 25 W.R. 134; R. v. Samiappa, (1891) 15 M. 63; R. v. Pohp, (1887) 10 A. 174; R. v. Viran, (1886) 9 M. 224. The case, however, of R. v. Nussuruddin, (1874) 21 W.R. (Cr.) 5, does not appear to be in conformity with the text or the words of the section, but the grounds of the decision in this case are not at all clear. A statement of a witness in the shape of a former deposition can only be used as evidence against an accused person if it was duly taken in his presence before the committing Magistrate (Cr. P.C., 1898, S. 288). In this case, a document purporting to be the deposition of a witness made before a Magistrate appeared on the record, but there was no evidence to prove that the document exhibited evidence of this witness duly taken by the committing Magistrate in the presence of any of the persons who were tried in the Sessions Court and against whom it was used. The Court observed that a certificate

was, no doubt, appended to it, initialled by some person, and on the supposition that this person was a Magistrate that certificate would under this section afford *prima facie* evidence of the circumstances mentioned in it relative to the taking of the statement. But this certificate was merely in these words—"Read to deponent and admitted correct," and did not give any of the facts necessary to render a deposition admissible under S. 288 of the Criminal Procedure Code, 1898. It was held, therefore, that the presumption of due taking could not be raised under this section. But Sec. 353 of the Code of 1898 requires all evidence (except when otherwise provided) to be taken in the presence of the accused. And though there was no evidence in the case to show that the deposition had been so taken, this section should, it would seem, have dispensed with the necessity of such proof. The statement in the Magistrate's certificate was a complete statement required by law for the purpose of affecting the witness himself and had nothing to do with any possible future use of the deposition against the prisoner.

10. See R. v. Viran, *supra* at p. 240.

corded and appended to that document,<sup>11</sup> there will be, in the absence of such statement or of a perfect statement, no presumption of due taking.<sup>12</sup> In such a case, it appears on the face of the document that it has not been duly taken and that an express statutory provision has not been carried out. (b) Where the law casts no obligation upon the Magistrate or Judge to record the circumstances under which a statement was made and taken, it will be presumed that the statement was "duly taken", that is, that all the conditions required by law have been fulfilled, notwithstanding that the document does not purport to give the facts as to which such presumption is to be raised, for when the law creates an obligation to take a statement in a particular manner, it will be presumed upon the maxim *omnia praesumuntur rite et solemniter esse acta* that it had been duly taken. (c) Unless an act with regard to the taking of a statement is made obligatory, the concluding words of the section, as to the statement having been "duly taken", cannot apply to raise a presumption of the act having been done; for, if the act be not obligatory, it may well be that the statement may have been duly taken and yet that particular act has not been done.<sup>13</sup>

One of the presumptions arising under this section is that the witness did actually say what is recorded. The section provides, *inter alia*, that the Court shall presume that the evidence was duly taken, and it cannot be considered to have been duly taken, if it does not contain what the witness actually stated.<sup>14</sup>

The presumptions raised by this section were applicable in the case of confessions recorded by Magistrates of Native States.<sup>15</sup> All the presumptions are rebuttable.<sup>16</sup> Thus, a person who questions the accuracy of the record will be at liberty to give evidence to show that the statements made and language used have not been accurately recorded. Witnesses confronted by their former depositions often swear that they were never explained to them before signature or that what they said has not been correctly taken down.<sup>17</sup> Where a witness when examined before the Sessions Court and asked about his deposition taken before the committing Magistrate denied that it was the deposition made by him, it was said that the presumption allowed by this section could not be made.<sup>18</sup> It is conceived, however, that in such cases the presumption may still be operative notwithstanding the statement of the witness; for though such a statement is given on oath, and affords some evidence against the presumption, still the Court may consider the fact to which the

11. As in cases under Ss. 164, 281 of the Criminal Procedure Code, 1973.
12. R. v. Shiva, (1876) 1 B. 219, 222.
13. R. v. Pohp, (1887) 10 A. 174, 177, 178, v. ante. "
14. R. v. Samiappa, (1891) 15 M. 63, 65. The case of R. v. Fatik, (1868) 1 B.L.R.A. (Cr.) 12, is now of no authority, the decision having been given before this Act and based upon the ground of the non-existence of any general provision of the law such as is enacted by the present section.

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15. R. v. Sundar, (1890) 12 A. 595.
16. See S. 4 definition of "shall presume".
17. Norton, Ev., 262.
18. R. v. Nussuruddin, (1874) 21 W.R. (Cr.) 5. The ground of this ruling and the exact nature of the denial made by the witness do not appear in the report; possibly there may have been a question as to the identity of the deponent, in which case, of course, no presumption would arise until that was proved; v. post.

presumption relates not "disproved", and that the deposition was in fact duly taken.<sup>19</sup>

**11. Identity of party making statement.** Evidence must be given of the identity of the person making the deposition, for there is no presumption raised by the section.<sup>19-1</sup> A deposition given by a person is not admissible in evidence against him in subsequent proceeding without its first being proved that he was the person who was examined and gave the deposition.<sup>20</sup> Thus, a pardon was tendered to an accused and his evidence was recorded by the Magistrate. Subsequently, the pardon was revoked, and he was put on his trial before the Sessions Judge along with the other accused. At the trial, the deposition given by him before the Magistrate was put in and used in evidence against him,<sup>21</sup> without any proof being given that he was the person who was examined as a witness before the Magistrate. It was held, that the deposition was inadmissible without proof being given as to the identity of the accused with the person who was examined as a witness before the Magistrate.<sup>22</sup>

Where, in the case of a registered document, the Registrar's endorsement showed that in 1881 a person, claiming to be *P* and to have become son of *H* by adoption made by his widow, presented the document for registration and admitted execution, and that he was identified by two persons one of whom was the scribe of the document and was known to the Registrar, it was held, that what remained to be shown was that the person who admitted execution before the Registrar was *P* and no impostor, and the question was one of fact except in so far as there was, as matter of law, a presumption that the registration proceedings were regular and honestly carried out.<sup>23</sup>

Under Section 80 no presumption can be made regarding the identity of the deponent. But, if the deponent admits that, on a particular date in a particular suit, his deposition had been recorded, and a true copy of such statement is produced in the Court, then no further proof of identity is necessary. The Court can turn to the deposition itself to find out whether there is inherent evidence of the identity of the deponent.<sup>24</sup> Where the document containing the deposition of a particular person is a very old document, one can turn to the deposition itself to find out whether there is inherent evidence of the identity of the deponent.<sup>25</sup>

The same rule applies to confessions. The mere production of a certified copy of the statement would not be sufficient to prove the identity of the person who made it, or to prove for instance that the statement had in fact been voluntarily made, but there would be a presumption under Section 80 that it had been duly made, if there were no irregularity.<sup>1</sup> But, it has been

- 19. See S. 3, ante, definition of "disproved".
- 19-1. Gopi v. State of Rajasthan, 1974 W.L.N. 78 (Raj.).
- 20. Brajaballab v. Akhoy Bagdi, 1926 Cal. 705 : 93 I.C. 115 : 30 C.W.N. 254; Sulaiman v. R., 1941 Rang. 301 : 197 I.C. 131 : 1941 R.L.R. 258; Krishnavenamma v. Hanumantha Rao, 1933 Mad. 860 : 146 I.C. 1093 : 38 L.W. 778.
- 21. See Cr.P.C., S. 308.
- 22. R. v. Durga Sonar, (1885) 11 Cal. 550.
- 23. Gopal Das v. Sri Thakurji, A.I.R. 1943 P.C. 83 : I.L.R. 1943 Kar. 69 : 207 I.C. 553 : 1943 A.L.J. 292 : 10 Bom.L.R. 7.
- 24. Abbasali Shah v. Mohammad Shah, A.I.R. 1951 M.B. 92.
- 25. Sarabjit v. Mata Din, A.I.R. 1920 Oudh 122 : 60 I.C. 437; Bhagwat Prasad v. Sher Khan, A.I.R. 1926 Oudh 489 : 94 I.C. 985.
- 1. Mohammad Ali v. Emperor, A.I.R. 1934 All. 81 : I.L.R. 56 All. 302 : 147 I.C. 390 (F.B.).

held in a Lahore case that a statement made by a dead person recorded in accordance with the law by an officer authorised to record it and signed by him must under Section 80 be presumed to be genuine, and as having been made by the person by whom it purports to have been made.<sup>2</sup>

*81. Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents.* The Court shall presume the genuineness of every document purporting to be the London Gazette or [any official Gazette, or the Government Gazette] of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament [of the United Kingdom] printed by the Queen's Printer, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

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| s. 2 ("Court.")                   | Gazette).                                 |
| s. 4 ("Shall presume".)           | s. 57, Cl. (2) (Judicial notice of Acts.) |
| s. 3 ("Document.")                | s. 35 (Entries in public records.).       |
| s. 37 (Relevancy of statements in | s. 90 (Definition of "proper custody").   |

#### SYNOPSIS

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| 1. Principle. <i>Omnia praesumuntur rite et solemniter esse acta.</i> | 6. Record of rights.                                   |
| 2. Presumption rebuttable.  | 7. Report of Court of Enquiry.                         |
| 3. Gazettes.  | 8. Acts of Parliament :<br>—Entries in public records. |
| 4. Gazetteers.  | 9. "Proper custody."                                   |
| 5. Newspapers.  |  |

**1. Principle. *Omnia praesumuntur rite et solemniter esse acta :*** the documents mentioned are official documents or in the nature of such. See Introduction, ante.

**2. Presumption rebuttable.** The presumption under this section effects a *prima facie* inference of genuineness which may be rebutted.<sup>5</sup>

**3. Gazettes.** "Official Gazette" includes a State Gazette.<sup>6</sup> Under this section, the genuineness of the Gazette must be presumed, though it is not formally tendered at the trial. It is enough, if the Court has the Gazette before it.<sup>7</sup> Notifications and orders published in the Gazette need no proof, as the Court will take judicial notice of them under Section 57 and presume their genuineness under this section.<sup>8</sup>

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| 2. Hari Ram v. Emperor, A.I.R. 1926 Lah. 122 : 89 I.C. 897.  | 1951 N.L.J. 1; Gokal Dass v. Devinder Das, A.I.R. 1949 H.P. 11; S. 4 ante, "shall presume". |
| 3. Subs. by the A.O. 1937, for "the Gazette of India, or the Government Gazette of any L.G. or".   | 6. Bawa Sarup v. The Crown, A.I.R. 1925 Lah. 299 : 88 I.C. 22 : 26 P.L. R. 566.             |
| 4. Ins. by the A.O. 1950.  | 7. Ibid. Nanak Chand v. Emperor, A.I. R. 1931 Lah. 273 : 134 I.C. 769.                      |
| 5. Kamakhya v. Abhiman, A.I.R. 1934 P.C. 182 : 41 I.A. 933 ; I.L.R. 13 Pat. 589; Trimbu v. State, A.I. R. 1950 Nag. 203 : 51 Cr.L.J. 1372; | 8. State v. Nilam Das, 1952 H.P. 74.  |

See as to the relevancy of statements made in notifications appearing in the Gazette, Section 37 ante, and as to notification in the Gazettes of the appointment of public officers, Section 57, seventh clause, ante.<sup>9</sup>

**4. Gazetteers.** Statements in Gazetteers cannot be relied on as evidence of title but they do provide historical material. Statements in them can be relied on as providing historical material, and the practice followed, e. g. by a Math and its head. Gazetteers can be consulted on matters of public history.<sup>10</sup> A final report of settlement operation based on specific data on which entries are made in the record of rights should be taken as more reliable and authentic than the statements in that regard made in District Gazetteers.<sup>10-1</sup>

**5. Newspapers.** A report of a speech made in a newspaper is not admissible in evidence to prove the speeches. The persons who had made the speeches, or the persons in whose presence the speeches were made, or the reporter of the newspaper, who heard the speeches and sent the report to be published in the newspaper, must be produced. In the absence of such evidence the Court cannot presume that the speech, as reported in the newspaper, was in fact made.<sup>11</sup>

Where there is proof that a certain person is the publisher of a certain newspaper, this section raises a presumption that a newspaper bearing that particular name is the newspaper in question and that every copy of it was issued by him.<sup>12</sup> Where the accused is charged of publication of defamatory matter in newspaper, the production of the newspaper raises presumption of the publication by him and the onus shifts on him to disprove it.<sup>12-1</sup>

But one specimen of a newspaper is not a copy of another specimen of the same newspaper of the same date. The presumption under this section is of the genuineness of the specimen actually produced.<sup>13</sup> A mere production of a newspaper is not proof of the truth of its contents.<sup>14</sup> The presumption of genuineness attached to a newspaper cannot be treated as proof of the facts reported therein, as a statement of a fact contained in a newspaper is only hearsay and therefore inadmissible in evidence, unless the maker of the statement deposes in Court to have perceived the facts reported.<sup>15</sup>

9. As to proclamations, orders, and regulations contained in the London Gazette, see S. 78, clause 3; and as to the King's Printer see 45 Vict., c. 9, ss. 2, 4.
10. Srinivas v. Surjanarayan, A.I.R. 1967 S.C. 258: 1966 Supp. S.C.R. 436: (1967) 1 S.C.A. 575: 1967 S.C. D. 6: 83 Cut.L.T. 105.
- 10-1. Kandan Soren v. Jitan Hembrom, A.I.R. 1973 Pat. 206: I.L.R. (1974) 53 Pat. 21: 1973 Pat.L.J.R. 153.
11. Khilumal v. Arjundas, I.L.R. 1959 Raj. 524: A.I.R. 1959 Raj. 280.
12. Jeremiah v. Vas, (1912) 36 M. 457. But Benson, C.J., doubted whether this section is not confined to pub-

lic documents.

- 12-1. Dilip Chakraborty v. Public Prosecutor, 1976 Cr.L.J. 1800: 81 C.W. N. 125.
13. Ramchandra v. Emperor, A. I. R. 1930 Lah. 371: 120 I.C. 798.
14. Bawa Sarup Singh v. The Crown, A.I.R. 1925 Lah. 299: 88 I.C. 22: 26 P.L.R. 566.
15. Harbhajan Singh v. State of Punjab, A.I.R. 1961 Punj. 215; Munir Khan v. State, A.I.R. 1971 Cal. 53: 1971 Cr.L.J. 208; Jagit Kaur v. U. S.C. Singh, I.L.R. 1975 H.P. 1000: 1975 A.C.J. 26; N. Ramalingam v. M. Karunanidhi, (1972) 49 Ele. L. R. 399 (Mad.).

As regards reports of debates of the Legislative Assembly, they can only be evidence of what was stated by the speakers in the Legislative Assembly, and are not evidence of any facts contained in the speeches.<sup>16</sup>

**6. Record of rights.** An entry in the records of rights is presumed to be correct and the record of rights is presumed to be genuine. The onus is on the defendant to prove that the entry in favour of the plaintiff in the record of rights is not correct.<sup>17</sup>

**7. Report of Court of Enquiry.** The report of the Court of Enquiry, appointed under rule 75 of the Aircraft Rules, 1937, is the report of a statutory enquiry relating to the causes of the accident. It bears all the authentic marks of official recognition, and must be held properly and duly proved under this section. But the evidence tendered before the Court of Enquiry is not necessarily admissible evidence, unless certain conditions are fulfilled.<sup>18</sup>

**8. Acts of Parliament.** All public Acts are the subject of judicial notice as also all local and personal Acts directed by Parliament to be judicially noticed.<sup>19</sup>

*Entries in public records.* The last part of the section refers to and includes the documents mentioned in Section 35 ante, most of which are declared to be public documents by Section 74. Courts repose great confidence on the fidelity and accuracy of official documents kept in due course of business and properly and regularly kept. Where in old *touzi* ledgers certain dates are mentioned as the dates fixed for the payment of revenue in respect of a *touzi*, and those ledgers, which are official documents, kept in due course of business are being acted upon for a number of years, the presumption is that the entries as regards the *kist* dates in the ledgers are correct.<sup>20</sup> An order sheet is a public document being the record of an act of a public judicial officer and the presumption is that it is genuine.<sup>21</sup> There is no presumption of correctness attached to a mutation as to the date of death of the last holder.<sup>22</sup>

**9. "Proper custody".** As to the meaning of "proper custody" reference should be made to the Explanation to Section 90 post, which is declared by that section to apply also to this. According to that Explanation documents are said to be in proper custody if they are in the place in which and under the care of the person with whom, they would naturally be; but no custody is improper, if it is proved to have had a legitimate origin, or if the circumstances of the case are such as to render such origin probable.

**82. Presumption as to document admissible in England without proof of seal or signature.** When any document is produced

- 16. Rt. Hon'ble Gerald Lord Strickland v. Carmelo Misfrud Bonnici, A.I.R. 1935 P.C. 34: 153 I.C. 1: 41 L.W. 665.
- 17. Ramakrishna v. Arjuna, A.I.R. 1963 Orissa 29.
- 18. See Indian Airlines Corporation v. Madhuri, A.I.R. 1965 C. 252.
- 19. S. 57, clause (2), and see ante, notes
- 20. Ananga Mohan v. Kalidas, A.I.R. 1947 Cal. 283: 226 I.C. 393.
- 21. Nand Kumar v. Emperor, A.I.R. 1937 Pat. 534: 172 I.C. 237.
- 22. Dalpat Singh v. Rajwant Singh, A.I.R. 1954 Punj. 33: 55 P.L.R. 468.

before any Court, purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

s. 3 ("Document.")  
s. 3 ("Court".)

s. 4 ("Shall presume.")

8 & 9 Vict., c. 113, s. 1 ; 14 and 15 Vict., c. 99, ss. 9–11, 14 ; Steph. Dig., Arts. 79, 80 ; Wills, Ev. Taylor, Ev. Phipson, Ev. Roscoe, N. P. Ev.

### SYNOPSIS

1. Principle.
2. Documents admissible in England or Ireland without proof of seal or

stamp or signature or of the official character.

**1. Principle.** See Introduction, ante, and notes, post.

**2. Documents admissible in England or Ireland without proof of seal or stamp or signature or of the official character.** This section which reproduces the provisions of the ninth and tenth sections of 14 & 15 Vict., c. 99, Statute making certain documents admissible throughout the Queen's Dominions<sup>23</sup> lays down a rule both of presumption and admissibility with regard to the documents therein mentioned. The Court must presume (a) that the seal or stamp or signature is genuine, and (b) that the person signing the document held, at the time when he signed it, the judicial or official character which he claims. But over and beyond such presumptions which are the proper subject-matter of this portion of the Act, the section further enacts that the document shall be admissible in India for the same purpose for which it would be admissible in England or Ireland. As the documents which are the subject-matter of the section are documents admissible in England without proof of seal,<sup>24</sup> stamp or signature, it is necessary shortly to consider the provisions of the above mentioned Statute.

The following are some of the documents which in England can be proved by certified copies and which are of like occurrence in Indian Courts—Birth, Marriage or Death Register,<sup>25</sup> and other similar registers mentioned,<sup>1</sup> certain

23. Steph. Dig., Art. 80.

24. As to the seals of which English Court take judicial notice, see ante, S. 37, clause 6, and notes on that clause.

25. 6 and 7 Will. IV. c. 86, as amended by 37 and 38 Vict., c. 88, ss. 32, 33, 35.

1. Taylor, Ev.,

documents relating to companies,<sup>2</sup> Copyright Registers,<sup>3</sup> Orders in Lunacy,<sup>4</sup> Newspapers Proprietors' Registers,<sup>5</sup> Patent Office Registers,<sup>6</sup> Registers and other Documents under the Merchant Shipping Act, 1894,<sup>7</sup> official books and registers may be proved either by production of the originals or copies. In practice they are now always proved by means of examined or certified copies unless the circumstances render it necessary that the Court should examine the original entry.<sup>8</sup> Other documents are provable by examined or certified copies under the general provisions of 14 & 15 Vict., c. 99, s. 14 (v. ante),<sup>9</sup> or by certified copies under the provisions of particular Statutes. A certificate issued by the Manchester Chamber of Commerce testifying to a coal strike is not within the section.<sup>10</sup>

In the case of a document tendered in evidence under this section the question for determination will be whether, assuming that the fact to be proved thereby is a relevant fact, the document is or is not one which is admissible in England in proof of that fact without proof of its authentication. If it is so, then the document is admissible in India to prove that fact; and if so admissible, the Court must raise the presumptions relating to its authenticity which are declared by this section. Again, the question whether the evidence is admissible in England must be determined by reference to the particular Statute governing the case, or if there be none to the general provisions of 14 & 15 Vict., c. 99, s. 14, above mentioned. If under either Statute proof by means of an authenticated document is admissible then under 8 & 9 Vict., c. 113, no proof of the authentication is necessary and the document is one which in England is the subject of the provisions of Sections 9, 10 and 11 of 14 & 15 Vict., c. 99 and in India the present section.<sup>11</sup>

Thus the Chief Magistrate of the City of Glasgow being a person lawfully authorised to administer oaths, a declaration as to the execution of a power-of-attorney taken before him and authenticated by his certificate and the common seal of the City of Glasgow, and by a Notarial certificate, was held to be sufficient proof of the execution of the power.<sup>12</sup> Both declarations in this case were made under Section 16 of the Statutory Declarations Act, 1885.<sup>13</sup> It was held that since a declaration as to the execution of a power taken under this Act or the Probate and Letters of Administration Amendment Act, 1958<sup>14</sup> at any place to which the Act extends, before a person "lawfully authorised to administer oaths" would be admissible in England or Ireland as evidence of the execution of the power, it should for that purpose, if both conditions be fulfilled, be also admissible in this country under the provisions of the present section.<sup>15</sup>

2. 8 and 9 Vict., c. 16 s. 60; 25 & 26 Vict., c. 89, ss. 61, 174, rules 4, 5, 8; 40 and 41 Vict., c. 26, s. 6.
3. 5 and 6 Vict., c. 45 s. 11; 7 and 8 Vict., c. 12, s. 8; 25 and 26 Vict., c. 68, ss. 4, 5.
4. 53 Vict., c. 5, ss. 144, 152; Lunacy Orders, 1883, Order CIX.
5. 44 and 45 Vict., c. 60, s. 15.
6. 46 and 47 Vict., c. 57, ss. 89, 100.
7. 57 and 58 Vict., c. 60; see Taylor, Ev., 10th Ed., pp. 1157-1158.
8. Taylor, Ev., s. 1595; and see notes to those paragraphs as to the principal instances in which it is necessary to produce the original

document itself. Quaere: whether this is so in regard to such documents in India.

9. See Taylor, Ev., s. 1600.
10. Girdhardas v. Kerawala, A.I.R. 1926 Bom. 253 : 93 I.C. 622; 28 Bom.L.R. 232.
11. Taylor, Ev., s. 1601.
12. In the goods of Henderson, deceased, (1895) 22 C. 491.
13. 5 and 6 Will. IV. c. 62.
14. 31 and 32 Vict., c. 95.
15. It is not clear why in this case it should have been considered necessary, in the matter of the seals appended to the certificates, to have

In the following cases,<sup>16</sup> decided on the Original Side of the High Court at Calcutta, similar evidence was held to be admissible. A power-of-attorney executed in England in the presence of the Mayor of Lyme and Regis, the Mayor of Godalming, each of whom made a declaration under the Statutory Declarations Act, 1835, before a Commissioner to administer oaths in the Supreme Court of Judicature in England was accepted as proved.<sup>17</sup> A power-of-attorney executed in England in the presence of a solicitor and a clerk in his service, the former of whom made a declaration before the Mayor of the Borough of Guildford, who was also a Justice of the Peace, and who authenticated the declaration by his certificate and official seal, was accepted as proved.<sup>18</sup> A power-of-attorney executed in Scotland in the presence of a writer to the signet and a law clerk, and certified by a declaration of the writer to the signet, and which declaration was authenticated by a certificate of the Lord Provost of Edinburgh under the seal of the Corporation of the City of Edinburgh, was rejected as not having been executed before, and authenticated by, any of the persons mentioned in Section 85 of this Act.<sup>19</sup> The present section does not appear to have been considered. It is submitted, however, with reference to observations in that case to Section 85 post, that this latter section is an enabling section, its object being to add to the facilities of proof and not to exclude any other mode of proof than that allowed by that section. It has been since so held, it being pointed out that in arriving at this decision, Norris, J., seems to have assumed, contrary to the fact, that the provision contained in Section 85 is of an exhaustive character, and that no other mode of proving the execution of a power is admissible. So, on an application for letters of administration with the will annexed, made by the attorney of the executors therein named, it appeared that the applicant's power-of-attorney was not executed in the presence of a Notary Public, but with regard to the execution by each of the executors one of the attesting witnesses had made a declaration before a Notary Public to the effect that he witnessed the execution of the power-of-attorney by one of the executors, and that the signature of the other attesting witness was the proper signature of the person bearing that name, and such declaration was signed, sealed and certified by a Notary Public; it was held that the power-of-attorney was sufficiently proved.<sup>20</sup> In another case, an application for Letters of Administration was made under a power-of-attorney executed in England in the presence of unofficial witness, one of whom made a declaration as to the execution of the power before the "Lord Provost and Chief Magistrate of Aberdeen". The declaration was authenticated by the certificate of the Lord Provost under his signature and seal of office, and the Lord Provost's certificate was authenticated by the certificate of a Notary Public under his hand and official seal. The dec-

recourse to the provisions of S. 57, clause (6) (judicial notice of seals), since if the documents in question was one which was admissible in England without proof of seal or signature (and only in such case was the evidence offered within the scope of this section), the Court was bound to presume the genuineness of the seal and signature under the provisions of the present section, wholly independent of the question whether the seal was one which came within the purview of S. 67, clause (6).

16. The authors are indebted for the notes of these cases to Mr. Belchambers, the late Registrar of the High Court, Original Side.
17. In the goods of John of Eliot, deceased, 15th December, 1886, per Trevelyan, J.
18. In the goods of Williams Abbott, deceased, 19th November, 1887, per Trevelyan, J.
19. In the goods of Primrose, deceased, 16 C. 776, 13th July, 1889, per Norris, J.; see S. 85 post.
20. *In re Sladen*, (1898) 21 M. 492.

laration was accepted.<sup>21</sup> An application for Letters of Administration was made under a power-of-attorney executed in England in the presence of unofficial witnesses, one of whom under the Statutory Declarations Act, 1835, made a declaration as to the execution of the power before a Notary Public who authenticated the declaration by a certificate under his signature and official seal. The declaration was accepted.<sup>22</sup> An original will executed in England was sent to Calcutta with a power-of-attorney authorizing the person named therein to apply to the Calcutta Court for Letters of Administration with a copy of the will annexed. The power executed in England before two solicitors. One of the attesting witnesses, who was also an attesting witness to the will, made a declaration as to the execution of the power under the Statutory Declarations Act, 1835, before a Notary Public who authenticated the declaration by a certificate under his signature and official seal. The only evidence of the execution of the will was a déclaration made under the Statutory Declarations Act, 1835, before a Commissioner to administer oaths in the Supreme Court of Judicature in England. The will and the power were both (as they would have been in England or Ireland) deemed to have been sufficiently proved.<sup>23</sup> An application for Letters of Administration with a copy of the will annexed was made under a power-of-attorney executed in England before two persons described as solicitor's clerks. One of these persons made a declaration as to execution of the power under the Act above mentioned before the Lord Mayor of London. The declaration authenticated by a certificate of the Lord Mayor under his signature and seal of office was accepted.<sup>24</sup> An application for Letters of Administration with a copy of the will annexed was made under a power-of-attorney executed in England, before a solicitor who made a declaration as to the execution of the power under the Statutory Declarations Act, 1835, before the Lord Mayor of London. This declaration authenticated by a certificate of the Lord Mayor under his signature and seal of office was accepted.<sup>25</sup> An application for Letters of Administration with the will annexed was made under a power-of-attorney executed in England. In order to furnish proof of the execution of the power, one of the attesting witnesses made a declaration under the above mentioned Act of the facts before a Notary Public who authenticated the declaration by a certificate under his signature and the official seal. It was held that as a certificate of a Notary Public in the Queen's Dominions authenticating a declaration made before him as to the execution of power would be admissible in England or Ireland in proof of the execution of the power, such a declaration was also admissible for the same purpose under the present section.<sup>1</sup> Certified copy of Probate granted by the Probate Division of the High Court, is admissible in the Indian Courts.<sup>2</sup> In the case cited it has been held that a Register of Births and Deaths kept under Madras Act, III of 1899 is a public document and a certified copy of an entry in it is admissible under this section and Section 35.<sup>3</sup>

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21. In the goods of Henry Packer, deceased, 6th April, 1892, per Hill, J.
22. In the goods of Henry Packer, deceased, 20th June, 1892, per Hill, J.
23. In the goods of H. W. Agar, deceased, 31st August, 1892, per Hill, J.
24. In the goods of William Cornell, deceased, 16th September, 1892, per Pigot, J.
25. In the goods of Henry Francis, de-

- ceased, 2nd May, 1893, per Sal<sup>o</sup>, J.
1. In the Goods of Anna Hinde, deceased, 11th January, 1895, per Ameer Ali, J.
2. Blackwood & Sons v. A. N. Parasuraman, A.I.R. 1959 Mad. 410.
3. Krishnamachariar v. Krishnamachariar, A.I.R. 1915 Mad. 815 : I.L.R. 38 Mad. 166 ; 19 I.C. 452 : 24 M.L.J. 517 : 1913 M.W.N. 355.

It is to be noted that the provisions of this section are, as are also those of Section 85 post, cumulative (*v. ante*). Thus, in addition to the mode of proof here admitted other methods are, in particular cases, provided for by Section 78 *ante*.

**83. Presumption as to maps or plans made by authority of Government.** The Court shall presume that maps or plans purporting to be made by the authority of "[the Central Government or any State Government] were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

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| s. 3 ("Court.")<br>s. 4 ("shall presume.")<br>s. 36 (Relevancy of statements in maps) | or plans made under the authority of Government.) |
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Norton, *Ew.*, 200, 201.

#### SYNOPSIS

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| 1. Principle.<br>2. Government maps and plans.<br>3. "Accurate". | —Maps prepared at previous settlement.<br>—Maps prepared for a cause. |
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**1. Principle.** The presumption in this, as in other section, is based on the maxim *omnia prae sumuntur rite et solemniter esse acta*; for it will be presumed that Government in the preparation of maps and plans for public purposes will appoint competent officers to execute the work entrusted to them, and that such officers will do their duty. Survey maps are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence as to the state of things at the time that they were prepared. They are not, however, conclusive and may be shown to be wrong, but in the absence of evidence to the contrary, they are judicially receivable as correct when made.<sup>5</sup> But maps and plans made for the purposes of any cause are not the subject of such a presumption being made *post item motam*.

**2. Government maps and plans.** The maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were made.<sup>6</sup> For the presumption to be made under this section the map must purport to have been made by the authority of Government, that is, by the Government as such for public purposes. This section does not deal with the admissibility of a private map which will depend on whether it is otherwise relevant.<sup>7</sup> Therefore a map, prepared by an officer of Government, while in charge of

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| 4. The original word "Government" has successively been amended by the A.O., 1937 and 1948, the Repealing and Amending Act, 1949 (40 of 1949) s. 8 and Sch. II and the A.O. 1950 to read as above.<br>5. Maung Thin v. Na Zi Zan, 44 I.C. 247; A.I.R. 1918 L.B. 28(2). | 6. Jagadindra Nath Roy v. Secretary of State for India, I.L.R. 30 Cal. 291 : 30 I.A. 44 (P.C.); Radha Kishun v. Shyam Das, A.I.R. 1933 Pat. 671 : I.L.R. 13 Pat. 51 : 15 P.L.T. 28.<br>7. Sib v. Nilkantha, (1912) 17 C.L.J. 642. |
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a *khas-mahal* Government being at the time in possession of the mahal merely as a private proprietor, is not a map purporting to have been made under the authority of Government within the meaning of this section, the accuracy of which is to be presumed, such a map may be evidence under the thirteenth section of this Act.<sup>8</sup> A plan of a road prepared by the officers of the Public Works Department and signed by the Executive Engineer and Sub-divisional Officer of the P.W.D., when transferring the land to the District Board, must be presumed to be accurate under Section 83, Evidence Act.<sup>9</sup> The maps and plans mentioned in the section are maps and plans made by the Government for public purposes, as for instance a Government survey-map.<sup>10</sup> Printed maps showing the different wards of a city are admissible not only under Section 83 but also under Sections 36 and 87, Evidence Act, as well as Section 213, Bombay Land Revenue Code.<sup>11</sup> A map or plan made by the Government for private purposes or where the Government is acting otherwise than in a public capacity, is not the subject of this section.<sup>12</sup> In the undermentioned case there was tendered in evidence a document purporting to be a map of the silted bed of the river Sankho. It was held that as the map upon the face of it was neither a *thak* map nor a survey-map such as is made by, or under the authority of, Government for public purposes, and as it appeared to have been made by Government for a particular purpose, which was not a public purpose, namely, the settlement of the silted bed of a certain river, the provisions of Section 36 and of the present section were not applicable to this map.<sup>13</sup> But, though in the case of a map, not coming within this section, no presumption of accuracy can be made, the mode in which a case is dealt with and the absence of objection may lead to the inference that any objection to want of proof of its accuracy has been waived.<sup>14</sup>

**3. "Accurate".** By section 83 the Court shall presume that maps purporting to be made by the authority of Government were so made and are accurate.<sup>15</sup> The word "accurate" in this section means accuracy of the drawing and the correctness of the measurement. It may be assumed that the map was correctly drawn according to the scale on which it is said to have been prepared, but that is all.<sup>16</sup> Thus the accuracy of a *thakbust ameen's* map, which may be assumed under this section, does not refer to the laying down of

8. Junmajoy v. Dwarka, (1879) 5 C. 287; Ram v. Bunseedhar, (1833) 9 C. 741, 743; Kanto v. Jagat, (1895) 23 C. 335, 338; Dinomoni v. Brojo, (1901) 29 C. 191, 199 in which the map was held to be sufficiently proved; but see Taruknath v. Mahendronath, (1870) 13 W.R. 56.
9. Prabhu Ram v. Emperor, A.I.R. 1937 Lah. 155; I.L.R. 17 Lah. 843; 167 I.C. 573; 38 Cr.L.J. 438; 39 P.L.R. 143.
10. Joggessur v. Bycunt, (1880) 5 C. 822; Omrita v. Kalee, (1876) 25 W.R. 179; Niamutoollah v. Himmu, (1874) 22 W.R. 519, 520. Survey-maps and Survey-proceedings being public documents are provable by certified copies (see Ss. 74-77); sometimes, however, these copies and occasionally the maps made

- by public officers, are prepared with little skill. See observation in Protab v. Ranee, (1873) 19 W.R. 361 at p. 364.
11. Secretary of State v. Chimanlal, A. I. R. 1942 Bom. 161; I. L. R. 1942' Bom. 357; 201 I.C. 420; 44 Bom. L. R. 295.
12. Ram Chunder v. Bunseedhur, 9 C. 741; Upendra Nath Chattopadhyaya v. Radha Govinda Bundo-padhyaya, 1927 C. 189; 98 I.C. 85, 338.
13. Kanto v. Jagat, (1895) 23 C. 335, 338.
14. Madhabi v. Gyanendra, (1904) 9 C. W. N. 111, 113.
15. Balai Chandra Ghose v. Tarapada Ghose, 70 C. W. N. 266, 275.
16. Omrito v. Kalee, (1876) 25 W.R. 179.

boundaries according to the rights of the parties. If it were so, the Deputy Collector would be usurping the functions of the Civil Court. To be binding on the parties to a suit, such a map must be supported by evidence that it was drawn in their presence or in that of their agents.<sup>17</sup> Nor can a *thakbust* map be regarded as raising a presumption of correctness as to the amount of *debutter* land in one of the villages shown in the map, as the *ameen* who made it had no authority to determine what lands were *debutter* but only to lay down, and to map, boundaries.<sup>18</sup> Accuracy as to the information contained in a map must depend upon the source from which information is obtained. Where sufficient evidence as to informants, who have been questioned, is not forthcoming, and it is not also clear how far that evidence has been tested by checking the evidence of one of the informants as against that of another, and it is admitted that corrections have been made in the map from time to time, the contents of such a map cannot be relied upon as authoritative.<sup>19</sup> *Thakbust* statements are admissible and have evidential value,<sup>20</sup> unless they deal with matters altogether outside the scope of the survey.<sup>21</sup> The presumption in regard to the accuracy of a map is in no way affected by the fact that such map has been superseded by a later survey map made under the same authority, and by an order of the Board of Revenue. It does not disprove the presumption to show that the general survey has been set aside because it is quite consistent with that order that the actual bearing of the land in suit should be correct.<sup>22</sup> Where a civil *ameen* makes a local inquiry as to the situation of certain disputed lands with reference to the Collectorate map put in by the plaintiffs, and not objected to by the defendants who are present and recognise the boundary as that whereon the inquiry is to be based, the map must be taken to be one which the parties recognise as correct and trustworthy irrespective of the question whether it was prepared with the authority of Government.<sup>23</sup>

*Maps prepared at previous settlement.* Even though the settlement maps, which are not documents of title, prepared at a subsequent settlement supersede those prepared at the previous settlement, it is open to the Court to take them all into consideration as historical material in considering whether a particular field falls within a particular village. It is further entitled to draw inferences from all these documents and to form its conclusion on the basis of such inferences.<sup>24</sup>

*Maps prepared for a cause.* Maps or plans made for the purposes of any cause must be proved to be accurate.<sup>25</sup> The onus of proving that such a map

17. Omrito v. Kalee (1876) 25 W.R. 179.

18. Jardo v. Laloni moni, 18 C. 224; 17 I. A. 145.

19. Nana Akpandji v. Fiaga Egbomesse, 1939 P.C. 143; 182 I.C. 56.

20. Krishna Promoda v. Dhirendra Nath, A. I. R. 1929 P. C. 50; 56 I.A. 74; I. L. R. 56 Cal. 813; 113 I.C. 465; 49 C. L. J. 112; 83 C. W. N. 289.

21. Jagdeo Narain Singh v. Baldeo Singh, A. I. R. 1922 P.C. 272; I. L. R. 2 Pat. 38; 49 I.A. 399; 71 I.C. 984; 36 C. L. J. 499; 27 C. W. N. 925; 45 M. L. J. 460; 1923 M. W. N. 361; 3 P. L. T.

605; Harihar Prasad v. Janak Duari, A. I. R. 1941 Pat. 118; 191 I. C. 275; 7 B.R. 153; 21 P. L. T. 873.

22. Jogessur v. Bycunt, (1880) 5 C. 822.

23. Gunga v. Radhika, (1873) 21 W. R. 115.

24. Lachmi Narain v. Lachmi Narain, A. I. R. 1948 Oudh 139; 1947 A. W. R. (C.C.) 366; 1947 O. W. N. (C.C.) 509.

25. See Kesho Prasad Singh v. Mst. Bhagjogna Kuer, A. I. R. 1937 P. C. 69; I. L. R. 16 Pat. 258; 167 I. C. 329; 1937 A. L. J. 638; 1937 A. W. R. 459; 39 Bom. L.

is accurate lies on the party who produces it.<sup>1</sup> They must be proved by the persons who made them. They are *post item motam*, and lack the necessary trustworthiness. Where maps are made for the purposes of a suit, there is, even apart from fraud, which may exist, a tendency to colour, exaggerate, and favour which can only be counteracted by swearing the maker to the truth of his plan.<sup>2</sup> Where the maps are prepared by a party himself, it is difficult to attach any importance to the recitals made by the party in it; which tends to show something in his favour.<sup>3</sup> The rights of property as between two parties cannot be affected by a map drawn for a totally different purpose and a purpose totally irrelevant to the subject of the dispute between them.<sup>4</sup>

84. *Presumption as to collections of laws and reports of decisions.* The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country.

s. 3 ("Court".)

s. 4 ("Shall presume".)

s. 38 (Relevancy of statements as to any law contained in law books.)

### SYNOPSIS

1. Principle.

2. Law books and reports.

1. Principle. See Introduction, ante, and notes to Sec. 38 ante.

2. Law books and reports. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.<sup>5</sup> This section which corresponds with the twelfth section of the preceding Act, lays down a rule of presumption in relation to such books, which is, however, rebuttable, and dispenses with proof of the genuineness of the books of any country containing laws and rulings. Section 57, first and second clauses, ante, require Courts to take judicial notice of the existence of all laws and Statutes in India and in the United Kingdom. Section 74 (ante) declares statutory records to be public documents, and Section 78 ante enacts a method of proof in the case of Acts and Statutes.

A newspaper cannot be regarded as a book purporting to be a report of the rulings of a court. The report of a case in a newspaper is therefore not

R. 731: 65 C. L. J. 241: 41 C. W. N. 577: (1937) 2 M. L. J.

631: 1937 M. W. N. 593: 45 L. W. 580: 1937 O. W. N. 396: 18 P. L. T. 257: 1937 P. W. N. 290.

1. Ram Kishore v. Union of India, A. I. R. 1965 C. 282: (1966) 1 S. C. R. 430.

2. Norton, Ev., 200, 201; Damodaran v. Karimba Plantation Ltd., A. I.

R. 1959 Ker. 358: 1959 Ker. L. J. 372.

3. Ram Kishore v. Union of India, A. I. R. 1966 S.C. 644: (1966) 1 S. C. R. 430.

4. John Kerr v. Nuzzur, (1864) 2 W. R. 29 (P.C.).

5. S. 38 ante; see notes to that section and Act XVIII of 1875 (Indian Law Reports).

relevant under Section 38 (*ante*) nor can the presumption under the present section arise, strictly speaking.<sup>6</sup>

85. *Presumption as to powers-of-attorney.* The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, [Indian] Consul or Vice-Consul, or representative[\* \* \* \*] of the [Central Government], was so executed and authenticated.

s. 3 ("Court".)  
s. 4 ("Shall presume".)

s. 57, clauses (6), (7) ("Judicial notice")

Act VII of 1882 (Powers-of-attorney); Act XVI of 1908 as amended by Act IV of 1914 and Acts V and XV of 1917, Sections 32, 33 (Registration); 52 & 53 Vict., c. 10, s. 6.

### SYNOPSIS

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| 1. Principle.  | 4. Notary Public.  |
| 2. Powers-of-attorney.   | 5. Scope of presumption:<br>—Authentication by Justice of the Peace. |
| 3. "Authenticated", meaning of :<br>—Rebuttal of presumption.<br>—Judicial notice of seals and signatures. | 6. Statement in power-of-attorney, proof of.                         |

1. **Principle.** See Introduction, *ante*. The fact of execution before and authentication by persons of the position and office of those in the section mentioned affords a guarantee and *prima facie* proof of such execution and authentication respectively.

The Privy Council observed in *Gangamoyi v. Troilucyanath Chowdhry*,<sup>10</sup> in the case of a will, the execution of which was disputed :

"The registration is a solemn act, to be performed in the presence of a competent official appointed to act as Registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present, are competent to act and are identified to his satisfaction, and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order. Of course it may be shown that a deliberate fraud upon him has been successfully committed; but this can only be very much stronger evidence than is forthcoming here."

2. **Powers-of-attorney.** A power-of-attorney is a writing given and made by one person authorizing another, who, in such a case, is called the

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| 6. Superintendent and Remembrancer of Legal Affairs v. Sardar Bahadur Singh, (1969) 73 C. W. N. 547: 1969 Cr. L. J. 1120; A. I. R. 1969 Cal. 451 (457) (nevertheless, the Court relied on the report of a decision of the Supreme Court published in the 'Statesman', Cal- | cutta Ed.,<br>7. Subs. by the A. O. 1950, for "British".  |
|  | 8. The words "of Her Majesty, or" rep. by the A. O. 1950. |
|  | 9. Subs. by the A. O. 1937, for "G of I".                 |
|  | 10. I. L. R. 33 Cal. 537.                                 |

attorney of the person or donee of the power, appointing him to do any lawful act in the stead of that person, as to receive rents, debts, to make appearance and application in Court,<sup>11</sup> before an officer of registration<sup>12</sup> and the like.<sup>13</sup> It may be either general or special, to do all acts or to do some particular act. The nature of this instrument is to give the attorney the full power and authority of the maker to accomplish the acts intended to be performed, and its scope may be interpreted by implication of the nature of the business with which the attorney is entrusted.<sup>14</sup> If authority is established the mere fact that the principal did not receive any benefit does not rid him of his liability.<sup>15</sup>

Provision is made for these instruments by Act VII of 1882 (powers-of-attorney) which, among other things, enacts that where an instrument creating a power-of-attorney has been duly deposited in a High Court or the Court of the Recorder of Rangoon, a certified copy of such instrument shall, without further proof, be sufficient evidence of the contents of the instrument and of the deposit thereof in the High Court. This section enacts a presumption of due execution and authentication in favour of powers-of-attorney executed before, and authenticated by, the person therein mentioned.<sup>16</sup> The provision is mandatory, and it is open to the Court to presume that all the necessary requirements for the proper execution of the power-of-attorney have been duly fulfilled.<sup>17</sup>

**3. "Authenticated", meaning of.** The authentication is not merely attestation, but something more. It means that the person authenticating has assured himself of the identity of the person who has signed the instrument as well as the fact of execution. It is for this reason that a power-of-attorney bearing the authentication of a Notary Public or an authority mentioned in this section is taken as sufficient evidence of the execution of the

11. See Order III, rule 2, Civ. P. C.  
 12. See as to powers-of-attorney executed in favour of persons authorised thereby to present documents for registration, Act XVI of 1908, ss. 32, 33. By the terms of the latter section any power-of-attorney mentioned therein may be proved by the production of it without further proof when it purports on the face of it to have been executed before, and authenticated by, the person or Court therein before-mentioned. Except for registration purposes there is no presumption as to the genuineness or otherwise of a registered power-of-attorney; and mere registration is not itself sufficient evidence of its execution; Salimatal Fatima v. Koylashpoti, (1890) 17 C. 903, dissenting from the report in Krito Nath v. Brown, (1886) 14 C. 176, 180.  
 13. Wharton, Law Lexicon, sub. voce. See also Belchamber's Practice of the Civil Courts, p. 403.

14. Bank of Bengal v. Ramanathan, 1915 P.C. 121; 43 I.A. 48: I. L. R. 43 Cal. 527; 32 I. C. 419: 14 A. L. J. 217; 18 Bom. L. R. 387; 23 C. L. J. 348; 20 C. W. N. 329; 30 M. L. J. 232; 3 L. W. 210; (1916) 1 M. W. N. 150: 9 Bur. L. T. 1; cf. Bryan v. La Banque Du Peuple, 1893 A. C. 170; 2 L. J. P. C. 68; 41 W. R. 600; 68 L. J. 546.  
 15. ib.  
 16. S. 69 of the earlier Act, contained a restriction which is not in the present section, viz., that the power should have been executed at a place distant more than 100 miles from the place of production, in order that its execution and authenticity could be presumed.  
 17. Performing Right Society, Ltd. v. Indian Morning Post Restaurant, 1939 Bom. 347: I. L. R. 1939 Bom. 295; 184 I.C. 673: 41 Bom. L. R. 530.

instrument by the person who appears to be the executant on the face of it.<sup>18</sup>

The section does not prescribe any specific form of attestation. 'Authentication' ordinarily means 'establish the truth of, establish the authorship of, make valid'. 'Subscribed' means 'to write one's name at the foot of a document or sign a document'. When a Notary Public asserts that he had satisfied himself about the identity of the person in question and also about the fact that the executant had signed the document after having admitted its contents to be correct, this means authentication as envisaged in this section. It is not necessary that the Notary Public should use the particular word 'authentication' in the attestation made by him on the document.<sup>19</sup>

That the executant of the power-of-attorney has been identified to the satisfaction of the Notary Public flows from the Notary Public's endorsement on the document that it had been subscribed and sworn before him even though the Notary does not say so in his endorsement. There is a presumption of regularity of official acts and the Notary Public must have satisfied himself in the discharge of his duties that the person who was executing it was the proper person. The power-of-attorney executed before a Notary Public in California and complying with the laws of that State and authenticated as required by that law, must be considered duly authenticated in accordance with the laws in India. Such a power-of-attorney is valid and effective both under Section 85 of the Evidence Act and Section 33 of the Registration Act.<sup>20</sup>

*Rebuttal of presumption.* The presumption, no doubt, is rebuttable. But unless rebutted the presumption stands and the document can be admitted in evidence as a document executed by the person alleged to have executed it without any further proof.<sup>21</sup>

*Judicial notice of seals and signatures.* The Court may be required to take judicial notice of the seals, signatures and office of the persons so authenticating the power.<sup>22</sup>

**4. Notary Public.** A Notary Public has by the law of nations credit everywhere.<sup>23</sup> A "Notary" means a person appointed as such by the Government. Formerly, under Section 138 of the Negotiable Instruments Act,<sup>24</sup> the Governor-General was empowered to appoint any person to be a Notary Public under that Act. Now under Section 3 of the Notaries Act,<sup>25</sup>

18. *Wali Mohammad v. Jamal Uddin*, 1950 All. 524; 1950 A. L. J. 466; 1950 A. W. R. 507; *Kulsumunisa v. Ahmadi Begum*, A. I. R. 1972 All. 219 (224). See also cases cited therein.
19. *Jugraj Singh v. Jashwant Singh*, I.L.R. (1967) 2 Punj. 402. A. I. R. 1967 Punj. 345 (347).
20. *Jugraj Singh v. Jaswant Singh*, (1971) 1 S. C. W. R. 79 (86); A. I. R. 1971 S. C. 761; (1971) 1 S.C.R. 38; (1971) 1 S.C.A. 136; (1970) 2 S.C.C. 386; (1971) 1 S. C. J. 141; 73 Punj. L. R. 314; 1971 U. J. (S.C.) 379.
21. *Wali Mohammad v. Jamal Uddin*, 1950 All. 524; 1950 A. L. J. 466; 1950 A. W. R. 507.
22. See S. 57, clauses (6) and (7) ante; see *Performing Right Society, Ltd. v. Indian Morning Post Restaurant*, 1939 Bom. 347; I. L. R. 1939 Bom. 295; 184 I. C. 673; 41 Bom. L. R. 530.
23. *Hutcheson v. Mannington*, 6 Ves. 823.
24. Act XXVI of 1881.
25. LIII of 1952.

the Central Government for the whole or any part of India, and any State Government for the whole or any part of the State, may appoint as notaries any legal practitioners or other persons who possess such qualifications as may be prescribed. Section 8 specifies the various functions of notaries. One of these functions is to "prepare, attest or authenticate any instrument intended to take effect in any country or place outside India in such form and language as may conform to the law of the place where such deed is intended to operate,"<sup>1</sup> and another is to "translate and verify the translation of any document from one language to another".<sup>2</sup> No act specified in sub-section (1) of Section 8 of the Act shall be deemed to be a notarial act except when it is done by a notary under his signature and official seal.<sup>3</sup> It has been said that, according to English law, the seal of a foreign or Colonial Notary Public will not generally be judicially noticed, although such a person is an officer recognised by the whole commercial world.<sup>4</sup> The sixth clause of Section 57 of this Act does not, however, draw any such distinction. In order to comply with the provisions of this section, the power-of-attorney must be executed before, and authenticated by, one of the persons mentioned therein.<sup>5</sup> So, on an application for letters of administration to the estate of a deceased, who was domiciled in Scotland and to whose estate one *P* had been appointed executor dative *qua* father, the application being made by one *K* under a power-of-attorney by *P*, such power not having been executed and authenticated in the manner prescribed by this section, it was held that the application must be refused.<sup>6</sup> Though the power-of-attorney was not admissible under this section, it seems to have been assumed that the provision herein contained is of an exhaustive character and that no other mode of proving the execu-

1. Clause (g) of sub-section (1) of S. 8 of the Notaries Act, 1952.
2. ib., clause (1).
3. S. 8(2), Notaries Act, 1952. As to notarial acts by persons abroad and judicial notice of the seal and signature of such person, see 52 and 53 Vict., c. 10, s. 6; Taylor, Ev., ss. 1567-1568.
4. Taylor, Ev., s. 6 and cases there cited which are not uniform. But see Armstrong v. Storkham, 24 L. J. Ch. 176, in which a power-of-attorney executed in British Honduras and in the presence of a Notary Public was proved in England under the Chancery Procedure Act, by the production of the Notary's certificate under his hand and official seal. See also Hayward v. Stephens, 36 L. J. Ch. 185. A distinction has, however, been drawn between foreign Notaries Public in countries not under the King's Dominions and Notaries Public within the King's Dominions. In the former case proof is required in verification of the signature of the Notary Public; Lord Kinnaird v. Lady Saltoun, 1 Maddock, 227; Garvey v. Hibberd, 1 J. and W. 180; 5 D. M. and G. 910; In re

- Earl's Trusts, 4 K. and J. 300; In re Davis' Trusts, L. R. 8 Eq. 98; Cook v. Wilby, L. R. 25 Ch. D. 769. In the other case no proof is required. See also Nye v. Macdonald, L. R. 3 P. C. 331.
5. In the goods of A. J. Primrose, deceased, 16 C. 776, 779, the judgment in that case says "executed before or be authenticated by"; the section, however, says "executed before and authenticated by".
6. ib., referring to Anonymous case in Fulton, (1837) 72; In the goods of Macgowan, Morton, (1841) 370, see, however, observations on this case in notes to S. 82, ante, the notes of cases referred to under S. 82, and In re Sladen, (1898) 21 M. 492, in which case the power-of-attorney was not executed in the presence of any of the persons designated in this section. There is a clear distinction between the two modes of proof. These declarations of execution having taken place were made before Notaries Public, in the case of the present section the power must be executed before and authenticated by the Notary Public to be admissible.

tion of a power is admissible. That assumption is not warranted by the language of the section nor can it have been intended to exclude other legal modes of proving the execution.<sup>7</sup>

**5. Scope of presumption.** The power-of-attorney as well as its verification have to be presumed to be true under this section.<sup>7-1</sup> Even if there was no presumption in favour of the particular power-of-attorney, it does not follow that there was an opposite presumption that it had not been duly executed.<sup>8</sup> When a document, purporting to be a power-of-attorney and to have been executed before and authenticated by a Notary Public, is produced before the Court, an affidavit of identification as to the person purporting to make the power being the person named therein is unnecessary.<sup>9</sup> A registered power-of-attorney is admissible in evidence to prove agency under Section 85, Evidence Act, and unless its genuineness is suspected, in which case proof of its execution can be called for, the agent should be allowed to appear and act within the meaning of Order III, rule 2, C. P. C.<sup>10</sup> An entry in the register of power-of-attorney mentioned by the registering officer is a public document and a true copy of it being a certified copy within the meaning of Section 63 (1) is admissible as proof of the original entry. The weight to be attached to the entry depends upon the accuracy of the abstract of the power. But the Court is entitled to presume the correctness of the extract in accordance with the usual presumption that official acts are regularly performed and hence the original entry itself is good evidence of the contents of the power-of-attorney and is relevant under Section 35.<sup>11</sup>

No presumption of genuineness of a power-of-attorney which, though registered in Pakistan, has not been duly authenticated as required by the section.<sup>12</sup>

*Authentication by Justice of the Peace.* A power-of-attorney executed in England before a Justice of the Peace and authenticated by his signature alone without his official seal was, in the undermentioned case, accepted.<sup>13</sup>

**6. Statement in power-of-attorney, proof of.** A statement in a power-of-attorney would not prove itself, it has to be proved like any other statement made by a person.<sup>14</sup>

7. In re Sladen, (1898) 21 M. 492, 494; Performing Right Society, Ltd. v. Indian Morning Post Restaurant, 1939 Bom. 347: I. L. R. 1939 Bom. 295: 184 I.C. 673: 41 Bom. L.R. 530; *v. ante*, S. 82.
- 7-1. Kulsumun-nisa v. Ahmad Begum, A. I. R. 1972 All. 219.
8. Mst. Ram Kailash Kunwari v. Ishwari Saran, 1936 All. 475: 163 I.C. 754: 1936 A. L. J. 684: 1936 A. W. R. 497.
9. In the goods of Mylne, I. L. R. 33 Cal. 625: 9 C. W. N. 986.
10. Mst. Habib-un-Nissa v. Musharraf Ali, 1916 Oudh 207: 33 I. C. 661: 18 O. C. 372.
11. Pattu Kumari Bibi v. Nirmal Kumar Singh Nawalkha, 1939 Cal. 569: 185 I.C. 691: 70 C. L. J. 5: 43 C. W. N. 907.
12. D. Sardar Singh v. Pissumal Harbhagwandas, A. I. R. 1958 Andh.

- Pra. 107, 108; Nar Bahadur v. Anil Krishna, A. I. R. 1970 Manipur 57 (63).
13. In the goods of Biddon, 19th November, 1889, per Wilson, J. In another case (In the goods of Homfray, 27th June, 1891, per Wilson, J.) a power-of-attorney executed in England in the presence of unofficial witnesses, and accompanied by an original letter, from the person who executed the power, which letter was proved by the affidavit of the applicant was accepted. But this was apparently under the provisions of S. 82 *ante*.
14. Siva Pratap Bhattacharjee v. C. I. T., Madras, 20 M. L. W. 395: 84 I. C. 131: A. I. R. 1924 Mad. 880 (882); Nar Bahadur v. Anil Krishna, A. I. R. 1970 Manipur 57 (63).

86. *Presumption as to certified copies of foreign judicial records.* The Court may presume that any document purporting to be a certified copy of any judicial record of <sup>15</sup>[any country not forming part of India or] of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of <sup>16</sup>[\* \* \* \*] the <sup>17</sup>[Central Government] <sup>18</sup>[in or for] <sup>19</sup>[such country] to be the manner commonly in use in <sup>20</sup>[that country] for the certification of copies of judicial records.

<sup>21</sup>[An officer who, with respect to <sup>22</sup>[any territory or place not forming part of] <sup>23</sup>[India or] Her Majesty's dominions, is a Political Agent therefor, as defined in Section 3, <sup>24</sup>[clause (43)], of the General Clauses Act, 1897, (10 of 1897) shall, for the purposes of this section, be deemed to be a representative of the <sup>25</sup>[Central Government] <sup>1</sup>[in and for the country] comprising that territory or place].

s. 3 ("Court".)

s. 4 ("May presume".)

s. 78, clause (6) (Proof of foreign public document).

## SYNOPSIS

|                              |                                   |
|------------------------------|-----------------------------------|
| 1. Principle.                | 3. Judgment of a foreign country. |
| 2. Foreign judicial records. | 4. "Political Agent".             |

1. **Principle.** See Introduction, ante. In addition to the presumption of accuracy, which exists in the case of the certified copy itself, there is an additional guarantee afforded by the authenticating certificate.

2. **Foreign judicial records.** This section says that if a copy of a foreign judicial record purports to be certified in a given way, the Court may presume it to be genuine and accurate. But it has been pointed out by the Privy Council that though this be so, the section does not exclude other proof. So, to prove that a particular suit was brought in a certain foreign Court between *R* and *C*, one *B* was examined who deposed that in his presence the evidence of *C* was taken by the Judge and the suit was adjudicated and the order passed. He also put in a document which he swore was a copy of *C*'s deposition and was in the handwriting of one of the officers of the foreign Court. In the same manner, he proved the deposition of *R* in that suit. The High

15. Subs. successively by the A. O., 1950 and Part B States (Laws) Act, 1951.
16. The words "of Her Majesty, or" rep. by the A. O. 1950.
17. Subs. by the A. O. 1937, for "G. of I".
18. Subs. by the Indian Evidence (Amendment) Act, 1891 (3 of 1891), S. 8, for "resident in".
19. Subs. by Act 3 of 1951 S. 3 and Schedule for "such Part B State or country".
20. ib., substituted for "that State or country".
21. Subs. by the Indian Evidence Act, 1899 (5 of 1899), S. 4, for the paragraph added by Act 3 of 1891, S. 8.
22. Subs. successively by the A. O. 1950 and Part B State (Laws) Act, 1951.
23. Ins. by the A. O. 1950.
24. Subs. by the A. O. 1950, for "clause (40)".
25. Subs. by the A. O., 1937, for "G. of I".
1. Subs. successively by the A. O. 1950 and Part B States (Laws) Act, 1951.

Court rejected this evidence on the ground that it did not comply with the provisions of the present section. But, it was held, that this section does not exclude other proof than that provided by it. That the statement of *B*, that *R* and *C* gave evidence in his presence was primary evidence of those matters. That the depositions of *C* and *R* were public documents under Sec. 74, and the proof of those records by *B* was secondary evidence, and as such admissible under Secs. 65 and 66.<sup>2</sup> In a subsequent case<sup>3</sup> where a copy of the evidence given in a Court in Cutch was not certified by the Political Agent in the manner required by Secs. 76 (a) and 86, but was certified to be a "true copy" by a higher officer of the State than the trial Judge, it was held that under Sec. 114 a presumption arose that the copy was a correct copy of the record of the deposition as recorded by the Judge who tried the suit, and that the fact, that the certificate as to its being a "true copy" is given by a higher officer of the State than the trial Judge, is really an additional reason for accepting its authenticity and there is no reason to suppose that the mode of certificate, viz., "true copy" is not the one ordinarily in use in Cutch, just as it is in India. If the copies are not certified as required by this section, the Court should give the party producing them sufficient opportunity, either to have them certified by the representative of the Central Government or to have them proved by any other mode of proof.<sup>4</sup>

Foreign judicial records are provable in this country under the provisions of Section 78, sixth clause, ante. The present section enacts a presumption in the case of certified copies of such records when authenticated in the manner mentioned therein. Having regard to the definition of "may presume",<sup>5</sup> the Court may either regard the genuineness and accuracy of such copies, as proved, unless and until it is disproved, or it may call for proof of it. In the case cited, a copy of a document which had been proved in a German Court was admitted; it was held that there might be cases in which a copy would not suffice and the original must be produced.<sup>6</sup> This section is an instance of documents to which Section 65, clause (f), refers.<sup>7</sup> And now Section 14 of the Civil Procedure Code enacts that "the Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record, but such presumption may be displaced by proving want of jurisdiction".<sup>8</sup> The provisions of this section are imperative and must be complied with, and, in the absence of the certificate referred to in the section, the statements of witnesses taken in a foreign Court are not admissible in evidence.<sup>9</sup> In one case, the Court refused to accept depositions taken in the Court of the Jaipur State, though forwarded by the Resident in due course, because of the absence of the certificate referred to in the section.<sup>10</sup> The Calcutta High Court, being a Court in India, no certificate is

2. Haranund v. Chetlangia, (1899) 27 C. 639. See also State v. Abdul Hamid, A. I. R. 1957 Punj. 86; 1957 Cr. L. J. 537; 59 Punj. L. R. 282; Vallabhdas Mulji v. Pranshankar, A. I. R. 1929 Bom. 24; 113 I.C. 313; 30 Bom. L. R. 1519.
3. Vallabhdas Mulji v. Pranshankar, A. I. R. 1929 Bom. 24; 113 I.C. 313; 30 Bom. L. R. 1519.
4. Gordhandas v. Tikamdas, A. I. R.

5. 1951 Ajmer 54 (2).
6. S. 4 ante.
7. In the matter of Rudolf Stallmann, (1911) 39 C. 164.
8. Hurish v. Prosunno, (1874) 22 W. R. 303.
9. Civ. P. C., S. 14.
10. State v. Abdul Hamid, A. I. R. 1957 Punj. 86.
- Murli Das v. Achut Das, A. I. R. 1924 Lah. 493; I. L. R. 5 L. 105; (1923) 92 I.C. 138.

necessary, and Section 86 as amended, authorises a presumption as to its genuineness.<sup>11</sup> The section, however, is not exhaustive of the modes of proof of foreign judicial records.

**3. Judgment of a foreign country.** Before a judgment of a foreign country can be considered by production of its copy, it must appear that—

- (1) the copy of the judgment is certified by the legal keeper of the original within the meaning of Section 78 (6) of the Act;
- (2) there is a certificate under the seal of an Indian Counsel certifying that the copy is certified by the officer having the legal custody of the original;
- (3) there is also proof of the character of the document according to the law of the foreign country.

This section lays down that the Court may presume the genuineness and accuracy of any document purporting to be a certified copy of any judicial record of any foreign country, if such a copy is duly certified in the manner and according to the rules in use in the country for certification of copies of judicial records. To give rise to this presumption, it is not necessary that the judgment of the foreign country should have already been admitted in evidence. The presumption may be drawn before the said judgment is admitted.<sup>12</sup>

**4. "Political Agent".** Under Sec. 3 (43) of the General Clauses Act,<sup>13</sup> "Political Agent" shall mean,—

(a) in relation to any territory outside India, the principal officer, by whatever name called, representing the Central Government in such territory; and

(b) in relation to any territory within India to which the Act or Regulation containing the expression does not extend, any officer appointed by the Central Government to exercise all or any of the powers of a Political Agent under that Act or Regulation.

In a case under the Extradition Act, 1903, the expression "Political Agent" has been held to include an Assistant Political Agent.<sup>14</sup>

The substitution in the first clause of this section of the words "in" and "for" in place of "resident in", as also the addition of the second clause<sup>15</sup> were occasioned by the ruling in the case under-mentioned,<sup>16</sup> in which it was held that there was no representative of Her Majesty or of the Government of India residing in the State of Cooch Bihar, and that consequently certified copies of judicial records of that State could not be received in evidence in the Courts of British India under the provisions of this section as then framed. In the case cited below,<sup>17</sup> a copy was admitted of a judgment of the Court of a

11. Hulasi v. Mohanlal, I. L. R. 10

Raj. 94.

12. Badat & Co. v. East India Trading Co., (1964) 2 S. C. A. 1; A. I. R. 1964 S.C. 538.

13. X of 1897.

14. Hadibandhu Padhan v. Emperor, A. I. R. 1946 Pat. 196: I. L. R.

24 Pat. 699: 288 I.C. 59: 48 Cr. L. J. 40: 13 B. R. 125.

15. By S. 8 of Act III of 1891.

16. Ganee v. Tarini, (1887) 14 C. 546.

17. Monmohiney v. Greshchunder, (1873) 8 Mad. Jur. 14.

French Colony, at which neither Her Majesty nor the Indian Government had a representative on the testimony of a witness who was acquainted with the handwriting of the Registrar of such Court, and who swore that such Registrar was the keeper of the Court's records and had duly signed and sealed the document.

**87. Presumption as to books, maps and charts.** The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts, and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

|                                 |  |
|---------------------------------|--|
| s. 3 ("Court.")                 | s. 36 (Relevancy of statement in maps, charts and plans.)  |
| s. 4 ("May presume.")           | s. 83 (Maps or plans made by the authority of Government.) |
| s. 3 ("Relevant.")              |  |
| s. 3 ("Fact.")                  |  |
| s. 57 (Documents of reference.) | s. 90 (Maps or plans thirty years old.)                    |

#### SYNOPSIS

1. Principle.
2. Books, maps and charts.

**1. Principle.** See Introduction and notes to Secs. 36, 57 ante.

**2. Books, maps and charts.** In all the cases, when the Court is called upon to take judicial notice of a fact, and also in all matters of public history, science, or art, the Court may resort for its aid to appropriate books or documents of reference.<sup>18</sup> The Court under this section may presume<sup>19</sup> that such books were written and published by the person, and at the time and place by whom or at which, they purport to have been written or published. Further, statements of facts in issue, or relevant facts made in published maps or charts generally offered for public sale, or in maps or plans, made under the authority of Government, as to matters usually represented or stated in such maps, charts, or plans, are themselves relevant facts.<sup>20</sup> Under this section, the Court may presume<sup>21</sup> that any published map or chart was written and published by the person and at the time and place by whom, or at which, it purports to have been written or published. The section raises no presumption of accuracy. Thus, a Court can only presume that a history book to which it may be called to refer was written or published by the person and at the time and place, by whom or at which it purports to have been written or published. The presumption is with regard to publication and authorship, etc., but not with regard to accuracy.<sup>22</sup> Official reports may be referred to for the purpose of gathering historical facts but only subject to the rule laid down by their Lordships of the Privy Council in *Marland Rao v. Malhar Rao*,<sup>23</sup> that opinions expressed in official reports should not be treated as conclusive in respect of matters requiring judicial determination.<sup>24</sup>

18. See S. 57, penultimate clause, and notes on that clause ante.

J. 389.

23. A. I. R. 1928 P.C. 10; 55 I. A. 45; I. L. R. 55 Cal. 403; 107 I.C. 7.

19. See S. 4 ante.

24. Raj. Rajendra Malojirao Shitole v. State of Madhya Bharat, A. I. R. 1953 M. B. 97; 1922 M. B. L. J. 469.

20. S. 36, see notes on that section, ante.

21. See S. 4 ante.

22. *Brajraj Singh v. Yogendrapal Singh*, 1952 M. B. 146; 1952 M. B. L.

Where portions of a map showing the different wards of a city coloured under the directions of the Collector, one of the colours indicating leasehold lands the lease of which was going to expire in a particular year, it was held that the map was not only admissible in evidence but that it could be relied upon in proof of the fact that the land so coloured was a leasehold land, the lease of which was going to expire in that particular year.<sup>25</sup> Although the section raises no presumption of accuracy, this might, if the case were a proper one, be presumed under the general provisions contained in Section 114 post. In the case, however, of maps and plans purporting to be made by the authority of Government, the Court must presume that they were so made and that they are accurate, but maps or plans made for the purposes of any cause, that is, maps specially prepared for that purpose and with a view of their use in evidence must be proved to be accurate.<sup>1</sup> In the case of any map thirty years old, the Court may presume that the signature and every other part of it which purports to be in the handwriting of any particular person is in that person's handwriting.<sup>2</sup>

A pamphlet on schizophrenia published in England by a charitable society, the author of the pamphlet not being disclosed, cannot be relied on as authoritative on the subject.<sup>3</sup>

**88. Presumption as to telegraphic messages.** The Court may presume that a message forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent ; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

s. 8 ("Court.")  
s. 4 ("May presume.")

s. 15 (Course of business.)  
s. 114, Illus. (f) (General presumptions).

Roscoe, N. P: Ev., 43 ; Wharton, Ev., ss. 76, 1323 ; Wood's Practice, Ev., 2, note (3) ; A treatise on Communication by Telegraph by Morris Gray (Boston), 1885, Chapters X-XII.

### SYNOPSIS

1. Principle.

2. Telegraphic messages.

**1. Principle.** See Introduction and notes, post.

**2. Telegraphic messages.** Under this section there is a presumption that the telegraph office has correctly transmitted a message given to it for transmission. If a telegraphic message is forwarded, that is, delivered by the office to the person to whom such message purports to be addressed, the Court

25. Secretary of State v. Chimanlal, 1942 B. 161; I. L. R. 1942 B. 357; 201 I.C. 420; 44 Bom. L. R. 295.

1. S. 83 ante.  
2. S. 90, see S. 3, illustration ante A.

map or plan is a "document".  
3. Dr. Narain v. Mrs. Sucheta, I. L. R. 1969 Bom. 1024; 71 Bom. L. R. 569; 1969 Mah. L. J. 798: A. I. R. 1970 Bom. 312 (317).

may make the presumption mentioned. The section itself, therefore, does not, in the first place, raise any presumption of delivery, but assumes, on the contrary, that such delivery has taken place.<sup>4</sup>

The presumption under this section is limited to what is expressly provided in the section. The form handed over to the Post Office by the sender (and not the form delivered by the Post Office) is the original of a telegram, and either this must be produced by an official from the Post Office or proof of its destruction given before a copy can be admitted<sup>5</sup>

In the case of the Post Office, there is a presumption that a letter properly directed and posted will be delivered in due course.<sup>6</sup> Many recent Statutes provide for service by post, e. g. Sections 51, 52 and 53 of the Companies Act, I of 1956. In the absence of proof of bad faith, service by post in the prescribed manner is good, where the notice is sent to the address of the person to be notified, even if he is known not to be there,<sup>7</sup> but not, if it is known that he will not be there, so as to receive the notice in time.<sup>8</sup> It depends on the Statute whether service in the ordinary way is permitted. Unless excluded, proof that the person was in fact served, though not in the prescribed manner, is sufficient.<sup>9</sup>

This presumption extends to postal telegrams, as the inland telegraphs form part of the Government postal system.<sup>10</sup> Proof that the message was sent over the wires, addressed to a particular person at a particular place, he being shown to be at the time resident at such a place, may present a *prima facie* case of the reception of such telegram by the addressee.<sup>11</sup> Such a presumption may be raised under Section 114 post,<sup>12</sup> and where there is a question whether a particular act was done, the existence of any course of business, according to which it would naturally have been done, is a relevant fact and may be proved.<sup>13</sup> But the sending of a telegram addressed to a person at a given place and the receipt of an answer purporting to be from him in due course are not admissible to prove that he was in the place at the time in question.<sup>14</sup> Though, if it were shown that he was in the place at the time in question, the receipt of an answer would be evidence of the delivery of the message.<sup>15</sup> The presumptions raised by this section are of a two-fold character : first, a presumption of conduct that the due course of business has been followed (*omina praesumuntur solemniter esse acta*), that the officials of the telegraph office have forwarded a message which is in the same terms as that which they have received for transmission ; secondly, a presumption based upon an experience of a physical law, viz., that the message

- 4. See Thakur Singh v. Emperor, 4 I. C. 240; 10 Cr. L. J. 520.
- 5. Punnakotiah v. Kolikamba, A. I. R. 1967 A. P. 83; (1966) 1 Andh. W.R. 209; (1966) 1 Andh. L. T. 21.
- 6. See British and American Telegraph Co. v. Colson, L. R. 6 Ex. 122, per Bramwell; B. Stocken v. Collin, 7 M. W. 515; Roscoe, N. P. Ev., 43; Wharton, Ev., s. 1323.
- 7. Stanley v. Thomas, (1939) 2 K. B. 462.
- 8. Holt v. Dyson, (1951) 1 K. B. 364.
- 9. Sharpley v. Manby, (1942) 1 K.B. 217.
- 10. Roscoe, N. P. Ev., 43.
- 11. Wharton, Ev., s. 76 and see ib., ss. 1323, 1329.
- 12. See Illust. (f).
- 13. See S. 16; and notes to that section.
- 14. Wharton, Ev., s. 76. The rule with regard to replies by telegram appears to stand on a different footing from that relating to letters. See Wood's Practice, Ev., 2, note (3).
- 15. See ib., s. 1328.

as sent by wire from the office of transmission corresponds with that which has been received at the office of despatch. The Court shall not, however, make any presumption as to the person by whom such message was delivered for transmission.<sup>16</sup> Presumably this refers to the entries on telegrams indicating the persons by whom they are sent. It is obvious that there is no guarantee that the person named in the telegram as the sender thereof was in fact the actual sender. This section merely embodies the fact that a telegraph office makes no inquiries and is in no way responsible for the identity of the sender of a message, much less for the truth of its contents.<sup>17</sup> But there is nothing in the section to prevent the telegrams once admitted from being considered along with the rest of the evidence to explain other evidence in the case,<sup>18</sup> and the telegram may be admissible under Section 9 for the purpose of explaining the conduct of the alleged sender.<sup>19</sup> The contents of a telegram are not evidence of the facts stated in it.<sup>20</sup> Where, on the date fixed for the production of evidence, the Court received a telegram from the plaintiff barely stating that he was ill without mentioning the disease, it was held that such a telegram was no evidence whatsoever, and that the Court was not bound to act upon it.<sup>21</sup> As to the proof of the contents of telegrams, see Section 91 post.

Under this section, there is a presumption only to this extent that the message received by the addressee corresponds with the message delivered by transmission at the office of origin. But there is no presumption as to the person who had delivered such a message for transmission.<sup>21-1</sup> That, however, could be proved by circumstantial evidence. For example, the contents of the messages received in the context of the chain of correspondence may well furnish proof of the authorship of the message at the dispatching end.<sup>22</sup>

The presumption under this section will also apply to radio messages.<sup>23</sup>

#### 89. *Presumption as to due execution, etc., of documents not produced.* The Court shall presume that every document, called

16. S. 88; Kishore Chandra Deo v. Ganesh Prasad, A. I. R. 1954 S. C. 316; 1954 S. C. R. 919; 1954 S. C. J. 395; I. L. R. 1954 Pat. 318; (1954) 1 M. L. J. 622; 1954 S. C. A. 975; 33 Pat. 313; 9 D. L. R. (S.C.) 257; Mobarak Ali v. State of Bombay, A. I. R. 1957 S. C. 857; 1957 Cr.L.J. 1346; 1958 S. C. J. 111; 1958 Mad. L. J. (Cri.) 42; 1958 All. W. R. (H.C.) 112; 1958 S. C. A. 665; 1958 S. C. R. 328; 61 Bom. L. R. 49; Saila Behari v. State of Orissa, A. I. R. 1966 Orissa 150; Varadarajulu v. Emperor, A. I. R. 1920 Mad. 928; I. L. R. 42 Mad. 885; 51 I.C. 343. See as to mode of proof of telegrams, Burr. Jones, Ev., s. 209.
17. Emperor v. Abdul Gani Bahadur-bhas, A. I. R. 1926 Bom. 71; I. L. R. 49 Bom. 878; 91 I.C. 690.

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18. Emperor v. Abdul Gani Bahadur-bhas, supra.
19. Raghunath v. Emperor, A. I. R. 1933 Pat. 96; 142 I.C. 809.
20. Judah v. Isolyne Bose, A. I. R. 1915 P.C. 174; 221 I. C. 587; 1945 M. W. N. 634.
21. Mohanlal v. Indermal, A. I. R. 1954 Raj. 238; I. L. R. 1953 Raj. 995.
- 21-1. Sudhir v. State, A. I. R. 1971 Tripura 8; 1971 Cr. L. J. 86.
22. Mobarik Ali v. The State of Bombay, A. I. R. 1957 S.C. 857; 1958 S.C.R. 328; Kishore v. Ganesh, A. I. R. 1954 S.C. 316; Saila Behari v. State of Orissa, A. I. R. 1966 Orissa 150 (1966) 8 O. J. D. 150.
23. Saila Behari v. State of Orissa, A. I. R. 1966 Orissa 150; (1966) 8 O. J. D. 150.

for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

s. 3 ("Court.")  
s. 4 ("Shall presume.")  
ss. 68-72 (Attestation.)

s. 164 (Using documents, production of which was refused on notice.)

Steph. Dig., Art. 86; Norton, Ev., s. 265; Taylor, Ev., ss. 148, 1171, 1874.

### SYNOPSIS

#### 1. Principle.

#### 2. Presumption as to due execution, etc., of documents not produced.

**1. Principle.** The principle underlying the provisions of this section is sometimes described as the "necessity" principle. If a party is in possession of a document, or it is shown that the document is in his power, and, despite the notice given to him to produce that document, he refuses to produce that document, law provides that the conduct of the party justifies an inference being drawn against him, and, in that sense, the principle of necessity is invoked, and Courts are authorised to assume that the document which has not been produced must have been properly attested, stamped and executed in the manner required by law. It would be possible to compare the presumption which can statutorily be raised under this section with the presumption which is permissible to be raised under Section 114, Evidence Act, illustration (g). If a person fails to produce a document in his possession, an inference can be drawn under Section 114, that such person refuses to produce the document, because, if produced, it would be against his interests. On similar lines and for similar reasons, this section authorises the presumption to be drawn in cases to which it applies that the original document is not produced because it would, if produced, show that it was properly attested, stamped and executed in the manner required by law.<sup>24</sup>

**2. Presumption as to due execution, etc., of documents not produced.** When a party is allowed to produce secondary evidence under Section 65, all that the section permits to be done is to enable the party to prove the contents of the documents by the production of the secondary evidence. That by itself would not be of decisive importance to the party, because, before the contents are allowed to be proved, the execution of the document has got to be established according to law; and, in the matter of proving the proper and valid execution of documents, Sections 89 and 90 provide for raising certain artificial presumptions.

The condition precedent for the application of this section appears to be that the original document must have been called for and has not been produced after notice to produce it is given, and these conditions unequivocally suggest that the cases in which the statutory presumption under the section can be raised are cases which fall under Section 65 (a) and Section 65, Evidence Act.<sup>25</sup> No presumption can be raised where notice to produce has not been given to the party in whose possession the document is.<sup>25-1</sup>

24. Kashi Bai v. Vinayak Ganesh, I.L.; 25. ib. R. 1955 B. 999; 57 Bom. L. R.; 25-1. Mira Bai v. Jai Singh, A. I. R. 918; A. I. R. 1956 Bom. 65 (Scope, burden of proof and extent of presumption, etc. explained). 1971 Raj. 303; 1970 W. L. N. (J) 724; 1971 R. L. W. 319.

There is here not only a presumption in favour of innocence, where it may be assumed that everything has been done which the law required, but a presumption which is, or is in the nature of, that which is raised *contra spoliatorem*, from the non-production of the document.<sup>1</sup> As against the party refusing or neglecting to produce it on notice, there is a presumption that it has been properly stamped,<sup>2</sup> attested<sup>3</sup> and executed.<sup>4</sup> The presumption under this section is rebuttable,<sup>5</sup> but once a presumption is drawn under Section 89, it cannot be easily rebutted by the production of the original document at a later stage. Section 164 of the Evidence Act lays down that, when a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.<sup>6</sup>

Evidence to the contrary that the document was not properly stamped, attested or executed may be given. So, it was held that if secondary evidence be tendered to prove the contents of an instrument, either lost or detained by the opposite party, after notice to produce,<sup>7</sup> it will be presumed that the original was duly stamped, unless some evidence to the contrary, as for example that it was unstamped, when last seen,<sup>8</sup> can be given.<sup>9</sup> But this power of giving rebutting evidence is subject to the rule enacted by Section 164 post. Thus, *A* sues *B* on an agreement, and gives *B* notice to produce it. At the trial, *A* calls for the document, and *B* refuses to produce it. *A* gives secondary evidence of its contents. *B* seeks to produce the document itself to contradict the secondary evidence given by *A*, or in order to show that the agreement is not stamped. He cannot do so.<sup>10</sup> The presumption under the section cannot arise in a case where it is admitted that the original document was unstamped.<sup>11</sup> As already observed, English Courts presume that a lost document was duly stamped unless and until evidence to the contrary is given.<sup>12</sup> Under this Act also in the case of documents not coming within the terms of this section, either by reason of notice not being necessary, or the document having been lost or the like, the Court has power, in a proper case, to make a similar presumption under the provisions of Section 114 post.<sup>13</sup>

#### 90. *Presumption as to documents thirty years old.* Where any document, purporting or proved to be thirty years old, is produced

1. Norton, Ev., 265.
2. Hart v. Hart, 1 Hare 1; Taylor, Ev., s. 117.
3. Taylor, Ev., s. 1847; in this case a party who is driven to give secondary evidence of the contents of the document need not call an attesting witness.
4. Jang Bahadur v. Chandraj Singh, A. I. R. 1971 Oudh 406: 41 I.C. 171; Dilip Singh v. Dhani Ram, A. I. R. 1976 Bom. 58.
5. Budhe Ram v. Hira, A. I. R. 1953 H.P. 52.
6. Kashibai v. Vinayak Ganesh, A.I.R. 1958 Bom. 65 : I. L. R. 1955 Bom. 999.
7. See Ss. 65, clause (a), 66 ante.
8. Marine Investment Co. v. Havisiide, L.R. 5 H.L. 624.
9. Taylor, Ev., s. 148 and cases there

- cited; Steph. Dig., Art. 86.
10. S. 164, illust., post. See Budhe Ram v. Hira, 1953 H.P. 52.
11. Muhammad Ayub v. Rahim Baksh, 1922 Lah. 401 (2): I. L. R. 3 Lah. 282; 69 I.C. 723; Mohammad Din v. Attadita, 95 I.C. 444; Ladha Ram v. Harichand, 1988 Lah. 90.
12. Taylor, Ev., s. 148.
13. In Markby, Ev., 67, 68, the opinion is expressed that the section is restricted to cases where a notice to produce is delivered to the adverse party, and that it does not extend to cases where a summons to produce is delivered to a stranger to the suit. See Ahmed v. Abid, A. I. R. 1916 P.C. 41: 43 I.A. 264; I. L. R. 38 All. 494; 39 I.C. 11 (document lost in the Mutiny).

from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

*Explanation.*—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to Section 81.

#### *Illustrations*

(a) *A* has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper.

(b) *A* produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(c) *A*, a connection of *B*, produces deeds relating to lands in *B*'s possession, which were deposited with him by *B* for safe custody. The custody is proper.

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|--------------------|--|
| s. 3 ("Document.") | ss. 45, 67, 73 (Proof of signature and handwriting.) |
| s. 3 ("Proved.")   |  |
| s. 3 ("Court.")    | ss. 68–72 (Attestation of documents.)                |

Steph., Dig., Art. 88; Taylor, Ev., ss. 87, 88, 658–667; Stark., Ev., 291–293, 521–524; Roscoe, N. P. Ev., 102, 103; Phipson, Ev., 11th Ed., 724–726; Powell, Ev., 9th Ed., 282–288; Wills, Ev., 2nd Ed., 383–386.

#### SYNOPSIS

1. State Amendment :  
—Scope of Sec. 90(2) and Sec. 90-A as inserted in Uttar Pradesh.
2. Principle.
3. Scope.
4. Documents to which presumption applies :  
—Wills produced in Probate Court.  
—Unsigned documents.  
—Sealed documents.  
—Copies.  
—Certified copies of registered documents.  
—Documents proving relationship.  
—Memorandum in book of account.  
—Service Books and other documents.
5. Section not confined to evidence of ancient possession.
6. Care and caution in applying presumptions.
7. Discretion of Court :  
—Interference in appeal.  
8. Extent of presumption :  
—Presumption of due execution.  
—Presumption of testamentary capacity.  
—Presumption of due attestation.  
—No presumption of truth of contents of document being acted upon.  
—Presumption as to passing of consideration.  
—Registration endorsement.  
—Presumption as to stamping.  
—Presumption of authority to execute document.

- Documents executed by pardana-shin ladies.
- Documents executed by illiterate persons.
- Presumption as to marks.
- Presumption in cases of wills.
- 9. Thirty years :
- Purporting or proved to be 30 years old.
- Mode of reckoning period.
- 10. Corroboration.
- 11. Custody :
  - Custody of mortgagee and lessee.
  - Custody of member of family.
  - Custody of manager of lunatic.
  - Custody of Court.
  - Custody of Collector.
  - Custody having legitimate origin is proper custody.
- 12. Mutilated documents.
- 13. Construction of ancient documents.

**1. State Amendment.** In its application to Uttar Pradesh, this section has been amended by Section 2 of the Uttar Pradesh Civil Laws (Reforms and Amendment) Act, 1954.<sup>14</sup> The extent of the amendment as given in item No. 1 of the Schedule to that Act is as follows :

- (1) The existing section shall be re-numbered as Section 90 (1), and
  - (a) For the words "thirty years", the words "twenty years" shall be substituted, and
  - (b) The following shall be inserted thereafter as a new sub-section (2) :
 

"(2) Where any such document as is referred to in sub-section (1) was registered in accordance with the law relating to registration of documents and a duly certified copy thereof is produced, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to have been executed or attested."

- (2) After Section 90, add the following as a new Section 90-A :

"90-A. (1) Where any registered document or a duly certified copy thereof or any certified copy of a document which is part of the record of a court of justice, is produced from any custody which the court in the particular case considers proper, the court may presume that the original was executed by the person by whom it purports to have been executed.

- (2) This presumption shall not be made in respect of any document which is the basis of a suit or of a defence or is relied upon in the plaint or written statement.

The explanation to sub-section (1) of Section 90 will also apply to this section."

*Scope of Section 90 (2) and Section 90-A as inserted in Uttar Pradesh.*  
The presumption which was by virtue of sub-section (1) has been by virtue of sub-section (2) extended to certified copies of registered documents. There arises no occasion to raise a presumption under Section 90 till a case for the

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14. U. P. Act No. XXIV of 1954.

reception of secondary evidence has been made out. If the ground for the reception of secondary evidence is that the original has been lost, the party must prove such loss before it can offer secondary evidence. The only effect of the amendment is that a party is no longer required to lead evidence of execution of a document provided the document is twenty years old.<sup>15</sup> The presumption under Section 90, so far as it relates to registered documents, applies only to documents which are more than twenty years old. On the other hand, the presumption available under Section 90-A (1) applies to registered documents or copies thereof which are not more than twenty years old and that is subject to the condition in sub-section (2) of this section that it will not apply to those documents which are the basis of the suit or defence or are relied upon in the plaint or the written statement.<sup>16</sup>

A Division Bench of the Allahabad High Court has applied the restriction contained in sub-section (2) of Section 90-A to a case covered by Section 90 also. In that case a certified copy of a twenty years old registered document which was the basis of the defence was filed and the presumption of its genuineness was sought to be invoked under Section 90 (2). It was held that the U.P. Civil Laws (Amendment) Act introduced Section 90-A also, the sub-section (2) whereof prohibits raising the presumption in respect of any document which is the basis of a suit or defence, as such nothing in Section 90 or Section 90-A as amended in Uttar Pradesh will come to the assistance of the defendant.<sup>16-1</sup> It is respectfully submitted that this view requires reconsideration. Section 90-A is an independent section and not a part of Section 90. The restriction contained in sub-section (2) of Section 90-A is confined to the presumption permissible in sub-section (1) of Section 90-A only, namely the presumption in respect of a registered document less than twenty years old or a certified copy thereof. It is difficult to conceive that the provision of Section 90-A (2) can be stretched to apply to Section 90 also.

Where a copy of a document less than twenty years old from a court record is not referred to in the pleading but is generally relied upon in support of some factual allegation and not as the basis of the suit or defence Section 90-A (2) does not apply and the presumption can be drawn under Section 90-A (1).<sup>16-2</sup> The same principle was stretched in another case,<sup>16-3</sup> in respect of a document which, though not the basis of suit or defence, was relied upon in the pleading.

It is submitted that this view is not free from doubt. According to sub-section (2) of Section 90-A the presumption referred to in sub-section (1) cannot be raised if any of the following conditions exists, namely :—

- (1) the document is the basis of suit, or
- (2) it is the basis of defence, or
- (3) it is relied upon in plaint, or
- (4) it is relied upon in the written statement.

15. Sardaran v. Sunderlal Baldeo Prasad, A.I.R. 1968 All. 363 (367).

16. Deo Chand v. Dy. Director of Consolidation, U.P., 1971 A.L.J. 992 (994); see also Jamila Khatoon v. Dy. Director of Consolidation, U.P. 1971 A.L.J. 843 (846).

16-1. Om Prakash v. Bhagwan, A.I. 1974 All. 389.

16-2. Sakloo Ahir v. Munshi Ahir, 19 A.W.R. (H.C.) 132 : 1971 A.L.J. 370.

16-3. Babu Nandan v. Board of Revenue, A.I.R. 1972 All. 406.

If it is the basis of suit or defence, the restriction applies whether it is relied upon in pleading or not. Similarly, if it is relied upon in pleading, the restriction applies whether it is the basis of the title or defence or not.

The presumption under Section 90-A may be made only if the original shows on the face of it the name of the person by whom it purports to have been executed. Where a document does not show who prepared and signed it, the mere fact that it is twenty or thirty years old does not make it admissible without proof.<sup>17</sup>

The presumption under Section 90-A is with regard to the execution of a document and in that respect Section 90-A is narrower in scope than Section 90 of this Act, under which a presumption may be made that a document is in the handwriting of a person by whom it purports to have been written. The scope of Section 90-A is confined to a presumption regarding the execution only, as it has within its purview not only a registered document but also a certified copy of a document forming part of the record of a Court of justice.<sup>18</sup>

Under section 90 or 90-A, the Court has a discretion, and if, in the exercise of its discretion, a Court does not raise a presumption, interference will not be justified in appeal.<sup>19</sup>

**2. Principle.** The principle underlying Section 90 is that if a document, thirty years old or more, is produced from proper custody and is, on its face, free from suspicion, the Court may presume that it has been signed or written by a person whose signatures it bears or in whose handwriting it purports to be.<sup>20</sup> The ground of the rule is the great difficulty, indeed in many cases the impossibility, of proving the handwriting, execution and attestation of documents in the ordinary way after the lapse of many years.<sup>21</sup> Another ground is the circumstance of age—or long existence—of the document, together with its place of custody, its unsuspicious appearance, and perhaps other circumstances, suffice, in combination, as evidence to be submitted to the jury. The circumstance of age alone is some evidence; but it has never been suggested to be sufficient by itself.<sup>22</sup>

Proof of custody is required as a condition of admissibility to afford the Court reasonable assurance of the genuineness of the document as being what it purports to be.<sup>23</sup>

**3. Scope.** This section in no way touches the question of the relevancy of a document, but deals only with the amount of credit which is to be attached to certain documents whose age and custody raise a presumption of genuineness. It does away, ordinarily, with the necessity of proving those documents<sup>24</sup> for documents thirty years old are said to prove themselves, that

- 17. Chandukutty v. Rama Varma, A.I.R. 1939 M. 926; (1939) 2 M.L.J. 593; Amrita v. Sripat, A.I.R. 1962 A. 111.
- 18. Amrita v. Sripat, *supra*.
- 19. *Ibid.*
- 20. Kalika Prasad v. Jhenjho Kuer, A.I.R. 1964 Pat. 241; 1963 B.L.J.R. 472.
- 21. Wynne v. Tyrwhitt, (1821) 4 B. & Ald. 376; Taylor, Ev., ss. 88, 1874;

Andrews v. Motley, 32 L.J.C.P. 128, 131; Doe v. Wolley, (1828) 8 B. & C. 22; Doe v. Burdeit, (1836) 4 A. & E. 19; Marsh v. Collnett, (1798) 2 Esp. 655.

- 22. Wigmore, S. 2137.
- 23. Doe v. Phillips, 8 Q.B. 158; Bidder v. Bridges, 34 W.R. (Eng.) 514.
- 24. Varvar v. Ashar, Suit No. 755 of 1894 (Calcutta High Court), per Ameer Ali, J.

is, no witnesses need, unless the Court so requires, be called to prove their execution or attestation.<sup>25</sup> Even if a party seeks to prove a document more than thirty years old produced from proper custody, he can fall back on the presumption under this section.<sup>1</sup> Where the party expresses his desire to rely on the presumption and the presumption may be justifiably drawn, the fact that he has witnesses who could formally prove the execution of the document will not by itself be a reason to refuse to draw the presumption.<sup>1-1</sup>

This presumption is not affected by proof that the witnesses are living, and, it seems, even actually in Court nor in the case of wills, by showing that the testator died within thirty years.<sup>2</sup>

The real scope of Section 90 of the Evidence Act seems to be that in the normal circumstances, where it is found that the document in question emanates from an apparently lawful custody and where the document is such that it is likely to have been executed having regard to the common course of conduct, and where there are no circumstances to excite the suspicion of the Court, such as unnaturalness and artificiality surrounding the transaction or an apparent interlineation or correction or tampering with the document, the Court will draw the presumption. It is true that it would be dangerous for the Court to draw the presumption of due execution mechanically on the sight of the document purporting to be thirty years old and coming from proper custody. Inasmuch as the presumption dispenses with proof of due execution in cases of testament where the onus of proof is heavy on the propounders of the will, the Court must act with extreme caution and the utmost circumspection.<sup>3</sup>

Section 90 of the Indian Evidence Act is worded in general terms as it was designed to meet situations varying in character, where passage of time might have obliterated the proof of the genuineness of any disputed document. Under this section wide powers are conferred on the Court. A wrong exercise of the discretion under this provision is likely to strengthen the hands of the forger. It is not difficult to incorporate recitals in a document to show that it is over thirty years old. Hence before raising any presumption under this section, great deal of circumspection is necessary, lest the balance should be tilted in favour of an undeserving cause. The Courts ought to be careful to see that that provision is not made the forger's paradise. The section states that the Court may draw a presumption and not that it must draw a presumption.<sup>4</sup>

25. Norton, Ev., 66; see Mahomed Fe-dye v. Oze-ooddeen, (1868) 10 W.R. 340. When a document is thirty years old it is not necessary to produce the subscribing witnesses to it; Taylor, Ev., s. 1845; see, however, as to firmans of the Kings of Delhi or *sunnuds*, *parwannahs* or other grants of any *viziers* or of any potentates or persons formerly exercising authority in territory subsequently under the Lieutenant-Governor of Bengal; Reg. II of 1819, S. 28. As to the Scheduled Districts, see Reg. III of 1872; Reg. III of 1886, S. 2; Gazette of India, Part I, 5th March, 1881, p. 74, and 22nd

October, 1881, pp. 507-511; Calcutta Gazette, Part I-A, 9th March, 1881, p. 74; 2nd November 1881, pp. 192, 194, 195.

1. Rao Raja Teja Singh v. Hastimal, 1972 Raj.L.W. 133.
- 1-1. Tej Singh v. Hasti Mal, A.I.R. 1972 Raj. 191; 1972 Raj.L.W. 133.
2. Taylor, Ev., s. 87; Doe v. Wolley, (1828) 8 B. & C. 22; Doe v. Burdett, (1836) 4 A. & E. 19; Collnet, (1798) 2 Esp. 655.
3. Dhanpal Chettiar v. Govindaraja Chetty, (1961) 74 L.W. 261 : A.I.R. 1961 Mad. 262.
4. Ravjappa v. Nilakanta Rao, A.I.R. 1962 Mys. 53.

Section 90 makes it clear that the presumption which is to be raised relates only to the signature, execution or attestation of a document and does not involve a presumption that the contents of the document are true<sup>5</sup> or that it had been acted upon or that it has the legal effects it purports to have. The presumption can be raised only with reference to an original document.

A document purporting to have been executed by the executant by the pen of the scribe attracts the presumption under the section for included in that presumption is the one that the scribe was duly authorised to sign for the executant.<sup>6</sup>

In spite of the strict provisions of this section, there may be circumstances under which a copy produced would be available not only to prove the existence of the original document but of the terms thereof as well. The circumstances, therefore, have to be considered, where, on the facts in a particular case, if a copy of a document is found to be admissible as secondary evidence under Section 65, whether the terms thereof can be taken to have been proved, although they do not under this section itself prove themselves on a presumption raised under it.<sup>7</sup>

The presumption of genuineness regarding a thirty years' document can be made even if the application therefore was at a late stage if there is nothing to doubt its genuineness and no prejudice has been caused to the defendant.<sup>8</sup>

**4. Documents to which presumption applies.** The presumption applies in the case of any document, deeds, wills, letters, entries, receipts and the like.<sup>9</sup> Pattas produced from proper custody and bearing proper endorse-

- 5. Amulya Charan Maity v. Sateyswar Maity, I.L.R. (1966) 1 Cal. 395.
- 6. Haji Sheikh Bodha v. Sukhram Singh, I.L.R. 47 All. 31; 22 A.L.J. 857: 88 I.C. 5: A.I.R. 1925 All. 1 (F.B.); Bhalron Prasad v. Ablak Singh, A. I. R. 1934 All. 529 (530); Gulzarilal v. Bhagwath Prasad, I.L.R. (1968) 18 Raj. 481: (1968) 19 Raj.L.W. 501 (505, 506); A.I.R. 1969 Raj. 11 (14); see also M. Acharyulu v. Venkayamma, (1971) 1 A.P.L.J. 350.
- 7. Kotiswar v. Paresh, 60 C. W. N. 821; A. I. R. 1956 Cal. 205, 207; Ramaji v. Manohar, A. I. R. 1961 Bom. 169; 62 Bom. L. R. 322; Subudhi Pradran v. Raghu, A. I. R. 1962 Orissa 40; Sital v. Sant, A. I. R. 1964 S.C. 606; Harihar v. Deonarine, A. I. R. 1956 S. C. 305; 1956 S. C. R. 1; 1956 S. C. J. 279.
- 8. Lalit Kishore v. Laxminarayan, (1968) 19 Raj. L. W. 308 (311); see also Munshi Ram v. Thakar Dass, A. I. R. 1951 Pepsu 87.
- 9. Taylor, *Ew.*, s. 38; see S. 3 ante; L.E.—223

definition of "document". As to wills, see Munnalal v. Mst. Kashibai, A. I. R. 1947 P. C. 15: 73 I.A. 223; I. L. R. 1947 K. 78: 227 I.C. 195; Sarat Chandra v. Panchanan, A. I. R. 1953 Cal. 471: 58 C. W. N. 271; Badri v. Annapurna, 52 I. C. 837; Mahendranath v. Netai Charan, A. I. R. 1944 Cal. 241: I. L. R. (1943) 1 Cal. 392: 215 I.C. 124: 47 C. W. N. 359; Kotayya v. Vardhamma, A. I. R. 1930 Mad. 744; 127 I.C. 619: 59 M. L. J. 461: 32 L. W. 584; Shankar Das v. Dhandevi, A. I. R. 1933 Lah. 53: 145 I.C. 241; Jama Wasil Baki papers; Nirode v. Tagore, (1927) 45 C. L. J. 129; as to account books, see Durga Shanker v. Gangasahai, A. I. R. 1932 All. 500; 1932 A. L. J. 493; Purbai v. Ravji Morag, 1951 Kutch 46; as to grants, see Kameshwar Singha v. Hriday Nath, A. I. R. 1933 Cal. 768: 67 C. L. J. 111; Sihnu v. Lachman Das, A. I. R. 1952 H. P. 41; Tarakeshwar Pal v. Sirish Chandu, 1924 Cal. 236; 80

ment under Order 13, rule 4, C. P. C., may be presumed to be genuine.<sup>10</sup> Settlement Pedigree tables are also within the rule.<sup>11</sup>

*Wills produced in Probate Court.* In a Calcutta case,<sup>12</sup> it was observed that the rule laid down in the section did not apply to proof of a will in the Probate Court. The learned Judges went on, however, to point out that, in any event, the rule was merely discretionary, since the section says, "the Court may presume" and that, in that particular case, there were other circumstances to show that the will was not genuine. Evidently, therefore, the observation that the rule did not apply (even as a matter of discretion) to proof of wills was *obiter*, and it appears to have been treated as such in the subsequent case of *Govind Chandra Pal v. Pullin Behari Banerjee*,<sup>13</sup> in which it was held, that, in a proper case, the presumption could be applied to the proof of a will or a document upon which the title of the party rests. This later decision has been approved and followed in subsequent cases of the same Court,<sup>14</sup> and, in a case, a learned Judge of the Madras High Court also has held that this section is applicable to wills produced in Courts of Probate.<sup>15</sup>

*Unsigned documents.* The presumption under this section is obviously of a limited character, and applies only to signature and handwriting. It does not avail to prove a document when there is no signature. It does not, for example, enable the Court to presume that unsigned accounts of a temple which do not purport to be in the handwriting of any particular person or persons, were written by the authorised accountants of the temple to which the accounts purport to relate.<sup>16</sup> The presumption, referred to in this section, is, as stated above, of a limited character and applies only to signature or handwriting. So, where, there are no names of the executant, scribe or witnesses, the section cannot avail to prove the document, merely because it happens to be more than thirty years old, or is produced from custody which the Court may consider proper.<sup>17</sup> A seal cannot be regarded as signature within the meaning of the definition contained in the General Clauses Act.<sup>18</sup>

- I.C. 628: 27 W. N. 964; *Ram Naresh Singh v. Chirkut*, A. I. R. 1932 Oudh 227: 138 I.C. 513; *Parmodh Chand v. Narain Singh*, A. I. R. 1936 Lah. 104: 163 I.C. 81; as to settlement record, see *Narayani v. Padmanabha*, A. I. R. 1957 Trav.-Co. 246; I. L. R. 1956 T. C. 1162.
- 10. *Halasi v. Mohanlal*, I. L. R. 10. Raj. 94.
- 11. *Mangal Singh v. Manphul Singh*, A. I. R. 1961 Punj. 251: 63 Punj. L. R. 177.
- 12. *Shyam Lal v. Rameshwari Basu*, A. I. R. 1916 Cal. 938: 33 I. C. 273: 23 C. L. J. 82; see also *Gobinda Chandra v. Pullin Behari*, 1927 Cal. 102: 98 I. C. 147: 31 C. W. N. 215.
- 13. *Mahendra Nath v. Netai Charan*, I. L. R. (1943) 1 C. 392: 215 I. C. 124; A. I. R. 1944 Cal. 241; *Sarat Chandra v. Panchanan*, A. I. R. 1953 Cal. 471: 58 C. W. N. 271.
- 14. *Celestine Silva Bai v. Josephine Noronha Bai*, A. I. R. 1956 Mad. 566.
- 15. *Naina Pillai v. Ramanathan*, A. I. R. 1918 Mad. 932: 41 I.C. 788: 33 M.L.J. 84; *Dogar Mai v. Sunam Ram*, A. I. R. 1944 Lah. 58: 212 I. C. 416: 45 P. L. R. 441; *Nimbakdas v. Mst. Mathbabai*, A. I. R. 1930 Nag. 225: 124 I.C. 609; *Chiranjil Lal v. Ramjilal*, A. I. R. 1959 Lah. 285: 182 I.C. 1008; 41 P. L. R. 106.
- 16. *Bhagirathmal v. Bibhuti Bhushan*, A. I. R. 1942 Cal. 309: 200 I.C. 749: 46 C. W. N. 309.
- 17. *Sri Prasad v. Special Manager*, Court of Wards, Balrampur, A. I. R. 1937 Oudh 194: I. L. R. 12 Luck. 400: 164 I.C. 494; *Hiralal v. Parsottam Das*, A. I. R. 1974 Guj. 74.
- 18. *Mansoorali v. Taiyabali*, A. I. R. 1935 Nag. 156: 157 I.C. 302.

What the Court may presume under the section is that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting. There can be no question of signature and handwriting in the case of imaginary persons, like Imams, and so the section does not apply to Imami letters.<sup>19</sup> Where the signature of a particular person is not in issue or sought to be established, Section 90 cannot apply, even if the accounts are old and produced from proper custody. And the presumption under the section cannot be made, where the evidence of the witnesses, in support of the handwriting, cannot be accepted, as it is untrustworthy and open to grave suspicion.<sup>20</sup>

*Sealed documents.* This section makes no provision for any presumption in regard to seals, and a seal cannot be regarded as a signature within the definition contained in the General Clauses Act.<sup>21</sup>

*Copies.* The presumption under this section applies to copies as well as to originals.<sup>22</sup> But the presumption is with reference to the document produced before the Court, whether it is a copy or the original. It had been held in numerous cases following the leading case of *Khetter Chunder Mookerjee v. Khetter Paul Sreeteruino*,<sup>23</sup> that, if a document is shown to have been lost from proper custody, and to be more than thirty years old, secondary evidence of its contents may be given under Section 65 (c) and Section 90, without proof of execution.<sup>24</sup> But this is no longer good law. It is now settled law that the production which entitles the Court to draw the presumption under this section as to the execution and attestation of a document is of the original and not the copy.<sup>25</sup> If the document produced is a copy, admissible as secondary evidence under Section 65 of the Evidence Act, and is produced from proper custody and is over thirty years old, then only the sig-

19. Ganesh Prasad v. Narendra Nath, A. I. R. 1953 S.C. 431; 17 C. L. T. 73. See also Mst. Nanhi v. Badlu, 1940 Lah. 245: 190 I.C. 597.
20. Deputy Commissioner, Lucknow v. Chandra Kishore, A. I. R. 1947 Oudh 180; I. L. R. 21 Luck. 362 (F.B.), per Ghulam Hasan, J., reversed on other points in Chandra Kishore Tewari v. Deputy Commissioner, Lucknow, A. I. R. 1949 P.C. 207; 76 I.A. 17; I. L. R. 1949 All. 531.
21. Bhairo Singh v. Ambika Baksh Singh, A. I. R. 1942 Oudh 374; 199 I.C. 776; Sri Prasad v. Special Manager, Court of Wards, Balrampur, A. I. R. 1937 Oudh 194; I.L.R. 12 Luck. 400; 164 I. C. 494; Special Manager, Court of Wards, Balrampur v. Tribeni Prasad, A. I. R. 1935 Oudh 289; 154 I. C. 965.
22. Subrahmanya Somayajulu v. Seethayya, A. I. R. 1923 Mad. 1; I. L. R. 46 Mad. 92; 70 I. C. 729 (F.B.), overruled on another point in Seethayya v. Subrahmanya, A.

- I. R. 1929 P. C. 115; I. L. R. 52 Mad. 453; 117 I.C. 507; 31 Bom. L. R. 756. But see Putti Lakshmayya v. Garlapati, A. I. R. 1958 Andh. Pra. 720.
- (1880) 5 Cal. 886; 6 C. L. R. 199.
- See Ishri Prasad Singh v. Lalli Jas Kunwar, (1900) 33 All. 294; Dwarka Singh v. Ram Nand, A. I. R. 1919 All. 232; 51 I.C. 275; I. L. R. 41 All. 592; Sawan Singh v. Karimbaksh, 93 P. R. 1910; 8 I. C. 353; 128 P. W. R. 1910; 186 P. L. R. 1910; Raj Bahadur v. Bindeshri, A. I. R. 1918 Oudh 145; 46 I. C. 344.
- Munnalal v. Kashibai, A. I. R. 1947 P.C. 15 cited with approval by the Supreme Court in K. Venkatasubbaraju v. C. Subbaraju, (1968) 2 S. C. R. 292; (1968) 2 S. C. J. 195; 1968 S. C. D. 683; (1968) 2 S. C. J. 513; (1968) 1 S. C. W. R. 940; A. I. R. 1968 S. C. 947. (950); Lal Bahadur Chowdhary v. State of Bihar, 1973 B. L. J. R. 406; I. L. R. (1972) 2 Delhi 699.

natures authenticating the copy may be presumed to be genuine<sup>25-1</sup>; but production of a copy is not sufficient to raise the presumption of the due execution of the original<sup>1</sup>. The certified copy of a statement said to have been made in a mutation proceeding, the original of which had been lost, cannot prove the signature on the original. Nor can the courts raise any presumption under the present section.<sup>2</sup>

In some cases, it has also been observed that the presumption enacted in the section can be raised only with reference to original documents and not to the copies thereof.<sup>3</sup> But these cases also purport to follow the decision of their Lordships of the Privy Council in *Basant Singh v. Brij Raj Saran Singh*,<sup>4</sup> and must be taken to mean only, that when a copy is produced, no presumption under this section can be made that the signature, handwriting, execution, or attestation was in order.<sup>5</sup> Apparently no distinction can be made between cases where the original document is lost or destroyed and other cases.<sup>6</sup> No presumption can be made in favour of any document, unless such document itself is produced before the Court invited to make the presumption. The production of a copy is insufficient.<sup>7</sup> But, in spite of the

25-1. *Kalyan Singh v. Smt. Choti, A.*  
I. R. 1973 Raj. 263; 1973 Raj. L. W. 473; 1973 W. L. N. 240.

1. *Basant Singh v. Brij Raj Saran Singh*, A. I. R. 1935 P.C. 132; 62 I.A. 180; I. L. R. 57 All. 494; 156 I.C. 864 (approved by the Supreme Court in *Harihar Prasad v. Deonarain Prasad*, 1956 S. C. R. 1 at p. 9; A. I. R. 1956 S.C. 305 at p. 309 and re-affirmed in *Shiv Lal v. Chetram*, (1971) 2 S. C. J. 8; 1970 Cur. L. J. 898; 1970 Punj. L. J. 770; A. I. R. 1971 S. C. 2342; *Sital Das v. Sant Ram*, A. I. R. 1954 S.C. 606; *Motishah v. Abdul Gaffar*, A. I. R. 1956 Nag. 38; I.L.R. 1955 Nag. 1000; 1956 N. L. J. 157; *Kashibai Martand v. Vinayak Ganesh*, A. I. R. 1956 Bom. 65; I. L. R. 1955 Bom. 999; 57 Bom. L. R. 918; *Muntaz Hussain v. Brahmanand*, 1936 All. 298; 162 I.C. 56; *Gopal Das v. Sri Thakurji*, 1936 All. 422; *Sangamal v. Gangi Din*, 1946 All. 389; I. L. R. 1946 All. 178; 223 I.C. 467; *Gadey Venkata Ratnam v. Gadey Sitaramayya*, 1950 Mad. 634; (1950) 1 M. L. J. 720; 63 M. L. W. 588; *Harnam Singh v. District Official Receiver*, (1941) 1 Lah. 400; 197 I.C. 581; *Amjad Hussain v. Mst. Raisunisa*, 1941 Oudh 433; I. L. R. 16 Luck. 778; 194 I.C. 855; *Mehtab Singh v. Amrik Singh*, I. L. R. 1957 Punj. 418; 1957 Punj. 146; *Putti Lakshmayya v. Garlapati*, 1958 Andh. Pra. 20; *Penumarthi v. Penumathy*, 1961 Andh. Pra. 361; *Mst. Jhunkati- banu v. Phoolchand*, 1958 Madh. Pra. 261; 1958 M. P. L. J. 513.

2. *Shio Lal v. Chetram*, (1971) 2 S. C. J. 8; 1970 Cur. L. J. 898; 1970 Punj. L. J. 770; A. I. R. 1971 S. C. 2342.

3. *Harihar Prasad v. Deo Narain Prasad*, A. I. R. 1956 S.C. 305; I. L. R. 35 Pat. 221; 1956 S. C. J. 279; 1956 S. C. A. 316; 1956 S. C. C. 124; 1956 S. C. R. 1; *Kashibai Martand v. Vinayak Ganesh*, *supra*; *Ramu v. Kashi*, A. I. R. 1944 All. 5; I. L. R. 1944 All. 9; 210 I.C. 540; 1944 A. L. J. 9; *Ram Kishun Singh v. Kaushal Kishore*, 1958 Pat. 294.

4. A. I. R. 1935 P.C. 132; 62 I.A. 180; I. L. R. 57 All. 494; 156 I.C. 864.

5. See *Kashibai Martand v. Vinayak Ganesh*, *supra*.

6. As the decisions in *Khetter Chunder v. Khetter Paul Sreeterutno*, 5 Cal. 886; *Ishri Prasad Singh v. Lalli Jas Kunwar*, I. L. R. 22 All. 294; *Dwarka Singh v. Ramanand*, A. I. R. 1919 All. 232; I. L. R. 41 All. 592; 51 I.C. 275, have been expressly overruled by their Lordships of the Privy Council in *Basant Singh v. Brij Raj Saran*, A. I. R. 1935 P.C. 132; 62 I.A. 180; I. L. R. 57 A. 494

7. *Shripura v. Kauthaya Lal*, A. I. R. 1918 Nag. 114; 53 I.C. 947; 15 N. L. R. 192, approved by the Privy Council in *Basant Singh v. Brij Raj Saran Singh*, A. I. R. 1935 P.C. 132, *supra*, overruling *Sri Gopinath v. Moti*, A. I. R. 1934 Nag. 67; 148 I.C. 561, 30 N. L. R. 155.

strict provisions of this section, there may be circumstances under which a copy produced would be available not only to prove the existence of the original document but of the terms thereof as well.<sup>8</sup> Although no presumption of law can be made under Section 90, as regards the genuineness of a document, the original of which has not been produced in Court, yet the Court can make a presumption of fact about its genuineness, if such presumption is justified by the proved facts and circumstances of the case,<sup>9</sup> taking into consideration the positive evidence, including the copy, before it.<sup>10</sup> A copy purporting to be more than thirty years old and produced from proper custody might be presumed to be a copy satisfying the requirements of the Act as to secondary evidence, when that very copy contains a statement that it is a true copy, and the presumption of due execution of the original can be drawn from the circumstances that the copy purports to contain the signature of the person who signed the original.<sup>11</sup> This is so also in cases where the executant is dead and there is no means of ascertaining whether the attesting witnesses are alive; in such an eventuality, the registration is *per se* proof of the execution of the document.<sup>12</sup>

*Certified copies of registered documents.* Where a certified copy of a registered document, bearing endorsements made under Section 58 of the Registration Act, is produced before a Court, Section 60 (2) of that Act authorizes the inference to be drawn that the facts mentioned in the endorsement have occurred as therein mentioned. A presumption can be drawn that the document had been executed by the executant and that he had admitted its execution before the registering officer.<sup>13</sup> As to certified copies of registered documents in the State of Uttar Pradesh, see the amended section, ante.

*Documents proving relationship.* Documents more than thirty years old which prove relationship may be admissible in evidence without formal proof, but they may be inadmissible in evidence as the executant may be shown not to have any special means of knowledge about the relationship. The question whether the statement made in the document would be relevant will depend also upon the fulfilment of the conditions laid down in clause (5) of Section 32. If it does not become relevant, this section will not be called for.<sup>14</sup>

*Memorandum in book of account.* A memorandum in a book of account more than thirty years old (evidencing severance of a person from the joint family) can be regarded as proved. But technical proof does not invest it

8. Kotiswar v. Paresh Nath, A. I. R. 1956 Cal. 205, 207; 60 C. W. N. 821.
9. Mst. Shamsunnisa Bibi v. Sheikh Ali Asghar, A. I. R. 1936 Oudh 87; 159 I.C. 780; 1935 O. W. N. 1376; Hans Raj v. Banarsilal, A. I. R. 1937 Lah. 920.
10. Basant Singh v. Brij Raj Saran Singh, A. I. R. 1935 P.C. 132.
11. Sevugan Chettiar v. Raghunatha Doraisingam, A. I. R. 1940 Mad. 273; 1939 M. W. N. 841.
12. Halasi v. Mohanlal, I. L. R. 10 Raj. 94.
13. Kashibai Martand v. Vinayak Ganesh, A. I. R. 1956 Bom. 65;

- Karuppanna Gounder v. Kolandaswami Gounder, A. I. R. 1954 M. 486; (1953) 2 M. L. J. 717; 66 L. W. 1055; 1953 M. W. N. 799. See also Mohamad Saheb Nabi Saheb Ismail Magdum v. Kamal, A. I. R. 1953 Bom. 338; I. L. R. 1953 Bom. 734; 55 Bom. L. R. 291; Pandappa Mahalingappa v. Shivalingappa Murteappa, A. I. R. 1946 Bom. 193; 224 I.C. 169; 47 Bom. L. R. 962; Gopal Das v. Shri Thakurji, 1936 All. 422; Lakshmi v. Nishi, 71 C. W. N. 362 (373).
14. Sheojee v. Prema, A. I. R. 1964 Pat. 187; 1964 B. L. J. R. 152.

with strong evidentiary value for it is open to the plaintiff to show that the memorandum was not true or that it did not recite true facts.<sup>15</sup>

*Service books and other documents.* Entries in Service Books and related letters, etc., if ancient, can be admissible under this section.<sup>15-1</sup>

**5. Section not confined to evidence of ancient possession.** The presumption enacted by this section is often treated as a part of the subject of ancient possession as to which, see notes to the seventh clause of Section 32, ante. But the presumption is applicable whether the document be tendered in support of ancient possession or of any other fact.

**6. Care and caution in applying presumptions.** With regard to the exception to the hearsay rule in favour of ancient document,<sup>16</sup> when tendered in support of ancient possession it has been said : These are often the only attainable evidence of ancient possession, and, therefore, the law yielding to necessity allows them to be used on behalf of persons claiming under them and against persons in no way privy to them, provided that they are not mere narratives of past events, but purport to have formed a part of the act of ownership, exercise of right, or other transaction to which they relate. This species of proof demands careful scrutiny, for first, its effect is to benefit those from whose custody they have been produced, and who are connected in interest with the original parties to the documents, and next, the documents are not proved, but are only presumed to have constituted part of the *res gestae*. Forgery and fraud are, however, matters, comparatively speaking, of rare occurrence, and a fabricated deed generally betrays, from some anachronism or other inconsistency, internal evidence of its real character. The danger of admitting these documents is, consequently, less than might be supposed. It is more expedient to run some risk of occasional deception than to permit injustice to be done by strict exclusion of what, in many cases, would turn out to be highly material evidence.<sup>17</sup> But this rule of presumption which, it has been said, should even in England be carefully exercised, must be applied with exceeding caution in this country where forgery and fraud cannot be said to be of rare occurrence, and where, therefore, this reason for the rule has not the same weight as it is supposed to have in England. Here, therefore, less credit should be given to ancient documents which are unsupported by any evidence that might free them from the suspicion of being fabricated, since even in England this evidence when unsupported is of very little weight.<sup>18</sup>

15. *Mulshankar v. Chunnilal*, 35 Cut. L. T. 1183 (S.C.).

15-1. *Hajiqat Rai v. State of Himachal Pradesh*, 1974 S. L. W. R. 515 (Him. Pra.).

16. Though ancient documents are usually spoken of as hearsay evidence of 'ancient possession', yet they seem, rather to be parts of the *res gestae* and, therefore, admissible as original evidence. See Phipson, 11th Ed., pp. 150, 151.

17. *Taylor, Ev.*, S. 658; *Best, Ev.*, s. 499.

18. *Trailockia v. Shurne*, (1885) 11 C. 539, 541, 542, per Garth, C. J.; *Phool v. Gour*, (1872) 18 W. R.

485, 493, per Couch, C. J. (Accordingly it was not allowed to prevail in this case, in which there was other evidence inconsistent with the title the documents professed to create), ib. 6th Ed., 256; *Baikunt v. Lukhun*, 9 C. L. R. 425, 429; per Field, J.; *Shaik Husain v. Govardhandas*, (1895) 20 B. 1, 5 ("We are fully aware of the danger of treating old documents as established merely because they are 30 years old and come from the proper custody," per Farran, C. J.); *Mansoorali v. Taiyubali*, A. I. R. 1935 Nag. 156; 157 I. C. 302; *Gobinda Chandra Pal v. Pulin Behari Ban-*

The presumption under Section 90 as to documents over thirty years old has, therefore, to be made with some care. In the case of registered documents such a presumption is very readily raised; and in the case of other documents, unless by reason of their appearance or by reason of internal evidence there are some cogent considerations which recommend them to the favour of the Court, the Court is not bound to raise such a presumption usually.<sup>19</sup> Should the genuineness of the document be for any reason doubtful, it is perfectly open to the Court or jury to reject it, however ancient it may be. Even if proper custody be also shown, the Court has still power to reject the document if it is of opinion that it is a fabrication.<sup>20</sup>

Age, proper custody and innocent appearance of the document are the features upon which the presumption under this section is based. But the Court would be well advised not to raise the presumption where the document is apparently suspicious and is betrayed, for example, by writing on folds, ink being new or such other tell tale circumstance.<sup>20-1</sup> In such a case the Court should call for evidence to prove the document as also evidence in rebuttal.

**7. Discretion of Court.** The section only says that the Court may raise the presumptions mentioned in it, not that it must do so, and experience shows that "may presume" in such instances ought generally to be construed in the more rigorous of the senses allowed by the fourth section of this Act.<sup>21</sup> The language used in the section indicates that the presumption raised is a permissive one. Though it is not obligatory on the Court to raise the presumption, it is a matter of judicial discretion whether the Court will make the presumption or call upon the party to offer other proof.<sup>22</sup>

In the undermentioned case, it was held, that when a document which is over thirty years old has been tendered under this section, it is for the Court to determine (which is a matter of judicial discretion) whether it will make the presumption mentioned in this section, or call upon the party to offer proof of the document, stating its reason in the latter event, and in the former whe-

nerjee, A. I. R. 1927 Cal. 102: 98  
I. C. 147: 31 C. W. N. 215; Sri  
Prasad v. Special Manager, Court of  
Wards, Balrampur, A. I. R. 1937  
Oudh 194: I. L. R. 12 Luck. 400:  
164 I. C. 494: 1936 O. W. N.  
768; Special Manager v. Lal Bahadur  
Singh, A. I. R. 1937 Oudh 353:  
166 I. C. 930. See also Jasa v.  
Ganga, (1915) 48 P. R. C. J.  
81, p. 289; Shriji v. Kanhaiyalal,  
15 N. L. R. 192: 53 I.C. 947: A.  
I. R. 1918 Nag. 114.

19. Vaidyanathaswamy Iyer v. Natesa  
Malavarayan, A. I. R. 1921 Mad.  
452: 69 I.C. 289: 41 M. L. J. 310:  
14 L. W. 416: 1921 M. W. N.  
750.

20. Gooroo v. Bykunto, (1886) 6 W.  
R. 82; Uggarkant v. Hurro, (1880)  
6 C. 209; Shyamal Ghosh v.  
Rameswari Basu, A. I. R. 1916

Cal. 938: 33 I.C. 273: 23 C. L.  
J. 82; Channulal v. Puna, A. I.  
R. 1923 Nag. 169: 75 I.C. 660.

20-1 Kapur Chand v. Lal Chand, A.  
I. R. 1975 Raj. 178; Ram Milan v.  
Sher Bahadur, A. I. R. 1976 All.  
251.

21. Timangavda v. Rangangavda,  
(1878) 11 B. 94, 98; cf. S. 4 ante;  
Surendra v. Shambhunath, A. I. R.  
1927 Cal. 870: I. L. R. 55 Cal.  
210: 104 I.C. 219.

22. Kotiswar Mukherjee v. Paresh Nath  
Mukherjee, A. I. R. 1956 Cal.  
205: 60 C. W. N. 821; N. R.  
Padayachi v. C. R. Padayachi, A.  
I. R. 1975 Mad. 88: 87 M. L. W.  
799; Banabehari v. Sarat Chandra,  
(1972) 1 Cut. W. R. 49: I. L.  
R. (1971) 21 Raj. 30: 1969 W. L.  
N. 288; Ram Milan v. Sher Bahadur,  
A. I. R. 1976 All. 251.

ther the presumption has been rebutted or not.<sup>23</sup> If the document is suspicious on the face of it, the Court need not draw the presumption at all.<sup>24</sup> The law on the point has been laid down by their Lordships of the Privy Council in *Shafiqunnissa v. Shaban Ali Khan*.<sup>25</sup> In the case of documents more than thirty years old, the genuineness of which is disputed, it is necessary, therefore, for the Courts to consider the evidence, external and internal, of the document in order to enable them to decide whether in any particular case they should or should not presume proper signature and execution.<sup>1</sup> The presumption under this section is rebuttable.<sup>1-1</sup> The Court must examine the surrounding circumstances tending to establish the connection of the party producing the document with the person with whom the document should naturally have been. For that purpose, contemporary events assume importance. This Court's action will be largely influenced by their appreciation in raising the presumption and appraising the value to be attached to the document.<sup>2</sup> Presumption would be justified in respect of a thirty years old registered document coming from proper custody.<sup>2-1</sup>

*Interference in appeal.* In the State of Madras (now Tamil Nadu), the practice is that the Court marks a document as an exhibit, if *prima facie* evidence of custody and age is produced, and at a later stage of the proceedings gives the hostile party an opportunity of producing evidence to rebut the presumption under this section.<sup>3</sup> The presumption as to the genuineness of a document is a matter for judicial discretion and where the trial Court has exercised a proper discretion in raising the presumption of the genuineness of a document ordinarily it is not proper for the appellate Court to overrule the discretion of the trial Court. Where the appellate Court is constrained to overrule the discretion exercised by the trial Court, the party producing the documents should be given an opportunity of supporting the presumption as to the genuineness of the document.<sup>4</sup>

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| <p>23. <i>Srinath v. Kuloda</i>, 2 C. L. J. 592. See also <i>Narain Singh v. Deputy Commissioner, Partabgarh</i>, 55 I. C. 896; 7 O. L. J. 93; A. I. R. 1920 Oudh 279.</p> <p>24. <i>Baldeo Misir v. Bharos Kunbi</i>, A. I. R. 1926 All. 537 (1); 95 I. C. 261.</p> <p>25. I. L. R. 26 All. 581 (P.C.); 7 O. C. 290; 30 I. A. 217; 8 Sar. 674 (P.C.).</p> <p>1. <i>Mansukh Panachand Shah v. Tri-kambhai Ichhabhai Patel</i>, A. I. R. 1930 Bom. 39; 123 I.C. 492; 31 Bom. L. R. 1279; <i>Brij Raj Saran Singh v. Basant Singh</i>, A. I. R. 1929 All. 561; 118 I.C. 154.</p> <p>1-1. I. L. R. (1971) 21 Raj. 30; 1969 W. L. N. 288 (the Court is not bound to give opportunity for leading evidence in rebuttal unless asked for).</p> <p>2. <i>Rudra Gouda v. Basangouda</i>, A. I. R. 1938 Bom. 257; 175 I.C. 361; 40 Bom. L. R. 202; <i>Narain Singh v. Deputy Commissioner, Pratabgarh</i>, 55 I. C. 896; 7 O. L. J. 93; A. I. R. 1920 Oudh 279.</p> <p>2-1. <i>Tej Singh v. Hasti Mal</i>, A. I. R. 1972 Raj. 191; 1972 Raj. L. W.</p> | <p>183. <i>Ramien v. Veerappudian</i>, A. I. R. 1914 Mad. 473 (2); I. L. R. 37 Mad. 455; 14 I.C. 398; 22 M. L. J. 217; 1912 M. W. N. 117. See also <i>Ramaswami Goundan v. Subbaraya Goundan</i>, A. I. R. 1948 Mad. 388; (1948) 1 M. L. J. 215; 1948 M. W. N. 201; 61 L.W. 193; <i>Radhe Kishun v. Basdeolal</i>, A. I. R. 1935 Oudh 482; 156 I. C. 983; 1935 O. L. R. 447; 1935 O. W. N. 845; <i>Vaidyanathaswamy Iyer v. Natesa Malarayan</i>, A. I. R. 1921 Mad. 452; 69 I.C. 289; 41 M. L. J. 310; 14 L.W. 416; 1921 M. W. N. 750; <i>Mst. Gomti v. Megh Raj Singh</i>, A. I. R. 1933 All. 443; 145 I. C. 147; 1933 A. L. J. 907; <i>Rajendra Prasad Bose v. Gopal Prasad Sen</i>, A. I. R. 1929 Pat. 51; I. L. R. 7 Pat. 245; 108 I.C. 545; 9 P.L. T. 123. See also <i>Ramien v. Veerappudian</i>, A. I. R. 1914 Mad. 473 (2); I. L. R. 37 Mad. 455; 14 I. C. 398; 22 M. L. J. 217; 1912 M. W. N. 117; <i>Ranga Vithoba v. Ram-bha Dina</i>, 69 Bom. L. R. 559; 1967 Mah. L. J. 41; A. I. R. 1967 Bom. 382 (387).</p> |
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Where a document more than thirty years old, purporting to come from proper custody, is required by the Court before which it is produced, to be proved, and is left unproved and there are circumstances, both external and internal, which throw great doubts upon the genuineness of the document, the Court can, in the exercise of the discretion vested in it under this section, decline to admit it in evidence without formal proof, and their Lordships of the Privy Council will be always slow to overrule the discretion exercised by a Judge under Section 90.<sup>5</sup> A judge should not reject a document without giving the party producing it an opportunity for supporting the presumption.<sup>6</sup> Where the discretion has been exercised with due care and the presumption allowed by law has been made, an appellate Court should be slow to interfere with such discretion,<sup>7</sup> but where it is shown that the exercise was made arbitrarily and not on judicial grounds it may be challenged even in second appeal.<sup>8</sup>

Where the trial Court exercises its discretion under Section 90 and admits a document and the first Appellate Court finds no reason to interfere with it, the High Court should not overrule the discretion and reject the document.<sup>9</sup> Whether the presumption under the section can be raised or not is a question of law and can be urged at any stage of the litigation.<sup>10</sup>

**8. Extent of presumption.** The section empowers the Court to presume the signature and every other part of a document thirty years old which purports to be in the handwriting of any particular person as in that person's handwriting, and in the case of a document executed or attested that it was duly executed and attested by the persons by whom it purports to be executed and attested. A thirty years old document can be read in evidence without having been formally proved. In Uttar Pradesh the same is the position with twenty years old documents.<sup>10-1</sup>

*Presumption of due execution.* The presumption is one of due execution and attestation.<sup>11</sup> This involves the idea that the document was execut-

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- 5. Shafiq-un-nisa v. Shaban Ali Khan, (1904) 6 Bom. L. R. 750: 30 I.A. 217: 7 O. C. 290; I. L. R. 26 All. 581 (P.C.).
- 6. Imrit v. Sibdhari, (1911) 17 C. W. N. 108: 15 C. L. J. 7; I. L. R. 18 Cal. 120.
- 7. Mohammad Usman v. Rahim Bukhsh, 44 I.C. 559: 57 P. W. R. 1918: A. I. R. 1919 L. 69. See also Imam Din v. Natha Singh, 1932 Lah. 43: 134 I. C. 296: 32 P. L. R. 626; I. L. R. (1971) 21 Raj. 30: 1969 W. L. N. 288.
- 8. Mahadin Singh v. Bikrama Singh, A. I. R. 1926 Oudh 362: 93 I.C. 13: 13 O. L. J. 456. See also Kamteswar Singh v. Hridoy Nath Sahoo, A. I. R. 1938 Cal. 763: 67 C. L. J. 111.
- 9. Nathu Lal v. Mst. Gomti Kuar, A. I. R. 1940 P.C. 160: 67 I. A. 318; I. L. R. 1940 All. 625: 190 I. C. 135: 1940 A. L. J. 598: 1940 A. W. R. 107: 42 Bom. L. R. 1156: 72 C. L. J. 509: 45 C. W. N. 29: (1941) 1 M. L. J. 204: 1940 M. W. N. 1018: 52 L. W. 918: 7 B. R. 97: 1940 O. L. R. 580.
- 10. Pandappa Mahalingappa v. Shivalingappa Murteppa, A. I. R. 1946 Bom. 193: 224 I.C. 169: 47 Bom. L. R. 962; Parankusa Zatindra Maha desikaswami v. Subramania Pillai, 26 I. C. 117: A. I. R. 1915 M. 839 per Tyabji, J., Sankaran Nair, J., dissenting; Ramakrushna Mohapatra v. Gangadhar, A. I. R. 1958 Orissa 26.
- 10-1. Liladhar v. Siaram, A. I. R. 1976 All. 213; Babu Nandan v. Board of Revenue, A. I. R. 1972 All. 406.
- 11. Nammalwar v. Appavu, I. L. R. 1960 M. 2: A. I. R. 1960 M. 283; B. Veeraiah v. A. Venkata

ed duly and attested duly; in other words, that the document was validly executed. But mere production of a certified copy of a document more than thirty years old is not sufficient to raise a presumption under this section regarding its genuineness of due execution, although the certified copy may be used to prove the contents of the document.<sup>12</sup>

*Presumption of testamentary capacity.* In the case of a will this involves a further conception that the testator had testamentary capacity to execute the will.<sup>13</sup> As their Lordships of the Privy Council observed :

"A party setting up a will is required to prove that the testator was of sound disposing mind when he made his will but, in the absence of any evidence as to the state of the testator's mind, proof that he had executed a will rational in character in the presence of witnesses must lead to a presumption that he was of sound mind, and understood what he was about. This presumption can be justified under the express provisions of Section 90, since a will cannot be said to be 'duly' executed by a person who was not competent to execute it, and the presumptions can be fortified under the more general provisions of Section 114, since it is likely that a man who performs a solemn and rational act in the presence of witnesses is sane and understands what he is about."<sup>14</sup>

That is to say, where the document (the will) emanates from an apparently lawful custody and where the document is such that it is likely to have been executed, having regard to the common course of human conduct, and there are no circumstances exciting suspicion, or evidence of artificiality and unnaturalness, or interlineation or correction or tampering with the document, the presumption in favour of the due execution of the will may be drawn. The degree of proof sufficient to establish a will is not what is required to satisfy the mind of every sceptic, but what would appease the conscience of the Court.<sup>15</sup>

Laxmamma, (1968) 1 Andh. L. T. 377; A. I. R. 1968 A. P. 276 (280); Mohd. Ahmad Amolia v. Nirmal Chandra Roy, A. I. R. 1978 Cal. 312.

12. Basant Singh v. Brij Raj Saran Singh, I. L. R. 62 I.A. 180; A. I. R. 1935 P.C. 132; Harihar Prasad v. Deonarain, 1956 S. C. R. I: A. I. R. 1956 S.C. 305; 1956 S. C.A. 316; 1956 S. C. J. 279; 1956 B. L. J. R. 306; 35 Pat. 221; 1956 S. C. C. 124; Rajeshwari v. Varalakshamma, A. I. R. 1964 A. P. 284.

13. Sarat Chandra Mondal v. Panchanan Mondal, A. I. R. 1958 Cal. 471; 58 C. W. N. 271.

14. Munnalal v. Mst. Kashibai, A. I. R. 1947 P.C. 15; 73 I.A. 223; I. L. R. 1946 Nag. 917; 227 I.C. 195; 1946 A. L. J. 472; 1946 A. W. R. 179 (P.C.); 49 Bom. L. R. 231; 51 C. W. N. 175; (1946) 2 M. L. J. 453; 1946 M. W. N. 759; 60 L. W. 5; 1957 N. L. J. 106; 13 B.R. 78. See also Mst. Saran Bai v. Abdul Rashid, A. I. R. 1948 Sind 127; Kotayya v. Vardhamma, A. I. R. 1930 Mad. 744; 127 I.C. 619; 59 M. L. J. 461; 32 L. W. 584; Badri Prasad Singh v. Anpurna Kuwar, 52 I.C. 837; 6 O. L. J. 311; A. I. R. 1919 Oudh 210. In view of the above Privy Council decision the ruling in Shankar Das v. Mst. Dhan Devi, A. I. R. 1933 Lah. 53; 145 I.C. 241, that the presumption does not cover the question of disposing mind is not correct. See also Mono Mohoto v. Binia Mahtani, 1959 B. L. J. R. 525; Voleti Venkatarao v. Kasapragna, A. I. R. 1962 Andh. Pra. 29; Ranga Vithoba v. Rambha Dina, 69 Bom. L. R. 559; 1967 M.ah. L. J. 41; A. I. R. 1967 Bom. 382 (387); Rameswar Prasad v. Krishna Mohanath Raina, 1968 Jab. L. J. 891; 1968 M. P. L. J. 545; 1968 M. P. W. R. 773; A. I. R. 1969 M. P. 4(6) (will more than forty-five years old); Motilal v. Sardari Mal, A. I. R. 1976 Raj. 40.

15. Dhanapal v. Govindaraja, A. I. R. 1961 Mad. 262.

*Presumption of due attestation.* Again, ordinarily, the presumption under the section would include "due" attestation by the persons by whom the document purported to be attested. On the plain meaning of the section, if a document thirty years old shows that certain persons witnessed it in token of its execution by the maker of that deed, and it is produced from proper custody, the Court can presume "due" attestation, and if the proof of attestation is rendered necessary by reason of the requirements laid down by the Transfer of Property Act, the presumption will go the whole length of the definition of attestation as given in Section 3 of that Act.<sup>16</sup> The affixing of the signature of the attesting witnesses in the presence of the testator is the ordinary mode of attesting a document and is the mode by which attestation is defined in Section 3, Transfer of Property Act. If, therefore, under this section the presumption of due execution is drawn, it necessarily amounts to a finding that the attesting witnesses signed in the presence of the testator.<sup>17</sup>

*No presumption of truth of contents of document being acted upon.* The section makes it clear that the presumption which is to be raised relates only to the signature, execution or attestation of a document. It does not involve any presumption that the contents of the document are true or that it had been acted upon. Such allegation has to be proved on adducing proper and relevant evidence.<sup>18</sup> It raises no presumption whatever as regards the accuracy of the document and cannot be used so as to dispense with formal proof of the contents of the document.<sup>19</sup> The person producing such a document is relieved of the necessity of proving that it was executed by the person who purported to be the executant, provided that it satisfies the other conditions, namely, it is thirty years old and produced from proper custody. But that is not the same as saying that the Court shall presume the correctness or genuineness of every statement appearing in the document.<sup>20</sup> If a Court is prepared to presume the genuineness of a document under this section, the question whether the endorsement of the stamp vendor thereon sets out the true facts as to the name of the purchaser of the stamp and the object for which he wanted the stamp paper is not so much a question governed by this section as by Section 114, an illustration to which provides that the regularity of official acts might be presumed.<sup>21</sup>

*Presumption as to passing of consideration.* But it has been held that the passing of consideration for a document which is more than thirty years

16. Chandi v. Kalicharan, A. I. R. 1949 All. 733, 735.
17. Rajeshwar Misser v. Sukhdeo Misir, A. I. R. 1947 Pat. 449, 451.
18. Kotiswar v. Paresh Nath, A. I. R. 1956 Cal. 205, 206: 60 C. W. N. 821; Bhagirathmal v. Bibhuti Bhushan, A. I. R. 1942 Cal. 309: 200 I.C. 749: 46 C. W. N. 309; Chandulal v. Bai Kashi, A.I.R. 1939 Bom. 59; I.L.R. 1939 Bom. 97: 179 I.C. 697: 40 Bom.L.R. 1262; Mahadeo v. Raghoji, A.I.R. 1923 Bom. 293 : 77 I.C. 472; Banamali v. Padmalalba, A.I.R. 1951 Orissa 262: 18 C.L.T. 117; Mst. Afsar Begum v. Muhammad Yusuf, A.I.R. 1931 Oudh 103: I.L.R. 5 Luck. 526: 130 I. C. 861;

- Rai Rajeshwar Bali v. Har Kishen Bali, A.I.R. 1933 Oudh 170 (2): I.L.R. 8 Luck. 538; Ram Naresh v. Chrikut, A.I.R. 1932 Oudh 227 : 138 I.C. 513. See also Hara Bewa v. Banchanidhi, I.L.R. 1957 Cut. 380: A.I.R. 1957 Orissa 243; Ramakrishna v. Gangadhar, A.I.R. 1958 Orissa 26.
19. Abdul Ghani v. Fakir Mohammad, A.I.R. 1929 Lah. 78 : 111 I.C. 361.
20. Khetra Mohan v. Bhairab Chandra, A. I. R. 1927 Cal. 229: 98 I.C. 1021.
21. Vaidyanatha Iyer v. Natesa Malavarayan, A.I.R. 1921 Mad. 452 : 69 I.C. 289: 41 M.L.J. 310 ; 14 L.W. 416.

old, and which was never questioned till the suit was brought, should be taken as proved, even if the direct evidence is not as strong as might be naturally expected in respect of recent transactions.<sup>22</sup>

*Registration endorsement.* Where, in the case of a registered document over thirty years old, the endorsement of the Registrar shows that the executant had admitted execution of the document before the Registrar, but there is no evidence that the Registrar had signed in the presence of the executant, it cannot be presumed that the document was duly attested and that the signature of the Registrar was made in the presence of the executant.<sup>23</sup> But the endorsement of the Registrar is a factor to be taken into account for considering whether presumption under Section 90 should be raised.<sup>23-1</sup>

*Presumption as to stamping.* The section does not refer to stamps, but though a presumption as to stamping is not raised by Section 90 of the Evidence Act, a lower Court can draw that presumption under Section 114; and if it does so, an appellate Court should not lightly interfere with it.<sup>24</sup>

*Presumption of authority to execute document.* The presumptions raised by the section are confined to handwriting, execution and attestation,<sup>25</sup> so where a document more than thirty years old purports to be signed by an agent on behalf of a principal, no presumption arises as to the agent's authority, which must be proved.<sup>1</sup> This section does not justify the inference that the documents, which are established to be genuine, were in fact executed by the persons possessed of the requisite authority, but when a grant has been in operation for a long series of years it may be impossible to adduce direct evidence of authority. In such a contingency the Court may draw an inference from all the surrounding circumstances.<sup>2</sup>

*Documents executed by pardanashin ladies.* The section permits a presumption of due execution, but the question whether the document has been explained to the *pardanashin* lady, and whether she has fully understood the import and effect of it, is hardly a question of execution.<sup>3</sup> Where an old deed

- 22. Sanyasiah v. Atchanna, A.I.R. 1921 Mad. 624: 70 I.C. 759; 42 M.L.J. 339 : 15 L.W. 289. But see Hara Bewa v. Banchanidhi, I.L.R. 1957 Cut. 380 : A.I.R. 1957 Orissa 243.
- 23. Neelima Basu v. Jaharlal, A.I.R. 1934 Cal. 772 : I.L.R. 61 Cal. 525: 151 I. C. 1063. See however, Voleti Venkatarama Rao v. Kasa Baragada, A.I.R. 1962 A.P. 29.
- 23-1. K. Ramaiah v. S. Veerbhadrainyya, (1971) 1 A.P.L.J. 61.
- 24. Manavikraman v. Nilambar, 31 I. C. 597 (2).
- 25. See Khageshwari v. Someshwar, A.I. R. 1921 Cal. 334 : 63 I.C. 518 : 33 C.L.J. 382.
- 1. Harihar Prasad v. Deonarain Prasad, A.I.R. 1956 S.C. 305, 310 : I. L.R. 55 Pat. 221 : 1956 S.C.J. 279 : 1956 S.C.A. 316 : 1956 S.C.C. 124: 1956 S.C.R. 1; Ramani Kanta v. Bhimnandan, A.I.R. 1924 Cal. 82 : I.L.R. 50 Cal. 526 ; 85 I.C. 221;

- Sri Prasad v. Court of Wards, Balrampur, A.I.R. 1937 Oudh 194 : I. L.R. 12 Luck. 400 : 164 I.C. 494 : 1936 O.W.N. 768; Rai Rajeshwar Bali v. Har Kishen Bali, A.I.R. 1933 Oudh 170(2): I.L.R. 8 Luck. 538 : 10 O.W.N. 147; Mohammad Azim v. Special Manager, Court of Wards, A.I.R. 1936 Oudh 170 : 161 I.C. 269 : 1936 O.W.N. 298; Ubilack v. Dallial, (1878) 3 C. 557; Thakoor v. Bushmutty, (1875) 24 W.R. 428; Uggrakant v. Hurro, (1880) 6 C. 209; Ramaji v. Manohar, A. I. R. 1961 Bom. 169.
- 2. Tarakeshwari Pal v. Sirish Chandra, 1924 Cal. 236: 80 I.C. 628: 27 C.W. N. 964.
- 3. Mst. Afzar Begum v. Muhammad Yusuf, A.I.R. 1931 Oudh 103: I. L. R. 5 Luck. 526 : 130 I.C. 861 : 8 O.W.N. 55; Rai Rajeshwar Bali v. Har Kishen Bali, 1933 Oudh 170(2): I.L.R. 8 Luck. 538 : 10 O.W.N. 147.

purported to be an appointment under a special power and to be executed by the attorney of the donee of the power, the Court presumed only the execution of the deed, but not, in the absence of the power or evidence thereof, the authority of the solicitor to execute it.<sup>4</sup>

*Documents executed by illiterate persons.* The presumption arising under this section can be applied to a deed executed by an illiterate person whose signature has been made by some other person on his behalf.<sup>5</sup> A Full Bench of the Allahabad High Court has held that the presumption permitted includes the presumption that when the signature of the executant purports to have been made by the pen of the scribe, the latter was duly authorized to sign for him.<sup>6</sup> A contrary view has, however, been taken by the Andhra Pradesh High Court in the undernoted case in which it was held that no such presumption of authorisation can be raised.<sup>6-1</sup>

*Presumption as to marks.* The section does not contain any restriction that a presumption should not be drawn thereunder, if the person claiming title under the document in question is out of possession or has not actually signed or thumb-marked the document himself.<sup>7</sup> According to the general policy of the law "signature" includes a mark, a mark being a sort of symbolic writing.<sup>8</sup>

A mark *shree sahi* in the place of signature of the executant of a document was taken to be signature, and the presumption under the section extends to such a mark.<sup>9</sup> The provisions of this section cannot be pressed into service to presume extraneous matters. Thus, for example a presumption as to authenticity could be drawn in the case of ancient alienations by Hindu widows, but that would not make out the existence of legal necessity, especially when other evidence as to the circumstances of legal necessity had not disappeared.<sup>10</sup>

The section merely allows a party to ask the Court to presume that a document which is more than thirty years old and purports to have been prepared or signed by a particular person was in fact prepared or signed by such person. But when a party producing such a document cannot show, and the document itself does not purport to show, who prepared or signed it, the mere fact of the document being more than thirty years old does not make it admissible, without proof, under this section.<sup>11</sup> Thus where at the place meant for

4. Re Airey, (1897) 1 Ch. 164.
5. Shed v. Ibrahim, 1919 Cal. 741 : 52 I.C. 314; Bhairon Prasad v. Ablak Singh, A.I.R. 1934 All. 529 : 148 I.C. 1172 ; 3 A.W.R. 537; Mohammad Rafi v. Kripa Ramji, 1933 All. 99 : 142 I.C. 784; 1932 A.L.J. 1010; Bhim Shanker Datt v. Mani Ram, A.I.R. 1924 Oudh 265 : 80 I.C. 457 : 10 O.L.J. 643.
6. Haji Bodha v. Sukhram, A.I.R. 1925 All. 1 : I.L.R. 47 All. 31 : 83 I.C. 5 : 22 A.L.J. 857 (F.B.), overruling previous cases Balkaran v. Dulari, A.I.R. 1927 All. 231 : I.L.R. 49 All. 55; 97 I.C. 292; 24 A.L.J. 920; Ganga Ram v. Chunni Lal, A.I.R. 1927 All. 765 : 99 I.C. 759.

- 6-1. K. Ramaiah v. S. Veerbadriayya, (1971) 1 A.P.L.J. 61.
7. Imam Din v. Natha Singh, A.I.R. 1932 Lah. 43; 134 I.C. 296: 32 P. L. R. 626.
8. M. Acharyalu v. M. Venkayamma, (1971) 1 A.P.L.J. 350. See Pran Krishna Tewary v. Jadunath Trivedy, (1998) 2 C.W.N. 603.
9. Shailendra Nath Mitra v. Girija-bhushan Mukherji, A. I. R. 1931 Cal. 596 : I.L.R. 58 Cal. 686' : 133 I.C. 696.
10. Ramaji Ratanji v. Manohar, 1961 Bom. 169.
11. Charitter v. Kailash, 1918 Pat. 537: 44 I.C. 422 : 4 P.L.W. 213 : 3 Pat.L.J. 306.

executant's signature his name is written preceded with the word 'Nisani' but no mark is present, all it means is that the executant was expected to put a mark there; no presumption can be made that it was actually executed by them.<sup>11-1</sup> Similarly no presumption can be raised in respect of a document which is neither signed nor attested and which does not give the name of the scribe either.<sup>11-2</sup>

*Presumption in cases of wills.* Where the will in question is more than thirty years old and is produced from proper custody, the Court can presume both the actual execution and attestation of the will. Therefore, it can also presume that the will was executed and the testator was competent to execute it, that is, the Court may make a presumption in favour of the disposing power of the testator.<sup>12</sup> The language used in the section is "may presume". The Court has, therefore, a discretion whether or not to draw the presumption. The discretion, however, is not arbitrary. The section enacts that in the normal circumstances, where a document emanates from an apparently lawful custody, and is such that it is likely to have been executed, having regard to the common course of human conduct, and there are no circumstances to excite the suspicion of the Court, the Court should draw the presumption.<sup>13</sup> But where there is some suspicion, the Court must act with extreme caution and the utmost circumspection.<sup>14</sup>

**9. Thirty years.** Since the chief reason for the rule is the impossibility of obtaining living testimony to the signing or to the handwriting, the necessity does not arise until lapse of time has made such testimony unavailable. At first, this requirement was satisfied by the simple and indefinite notion that the deed must be "ancient".<sup>15</sup> By the 1700's the period of forty years came to be taken as the time when a document was treated as "ancient" under this rule.<sup>16</sup> Ever since the second half of the 1700's, the period of thirty years has sufficed to constitute an "ancient document".<sup>17</sup> This is the period adopted in this Act. But by Section 4 of the English Evidence Act, 1938, the period has been reduced to twenty years. In India also, the period has been reduced to twenty years by the Uttar Pradesh Civil Laws Reforms and Amendment Act of 1954.<sup>18</sup>

*Purporting or proved to be thirty years old.* It is not necessary in every case to prove that the document is thirty years old if intrinsically it purports to be that old.<sup>18-1</sup>

*Mode of reckoning period.* As the rule embodied in this section is based on the impossibility of obtaining living testimony to the signing or the handwriting of a document, it logically follows that time should run from the date

11-1. K. Ramaiah v. S. Veerbhadrappa, (1971) 1 A.P.L.J. 61.

11-2. Hiralal v. Farshottam Das, A.I.R. 1974 Guj. 74. ..

12. Munna Lal v. Kashibai, I.L.R. 1947 K.P.C. 78 : A.I.R. 1947 P.C. 15; Dhanapal v. Govindaraja, A.I.R. 1961 M. 262 : 74 L.W. 261; Rama Rao v. Bhaskarao, A.I.R. 1962 Andh. Pra. 29; Motilal v. Sardari Mal, A.I.R. 1976 Raj. 40; M. Acharyalu v. M. Venkayamma, (1971) 1 A.P.L.J. 350.

13. Dhanapal v. Govindaraja, A. I. R.

1961 M. 262: 74 L.W. 261.  
14. Shaik Husain v. Govardhandas, I.L.R. 20 B. 1.

15. Wigmore, Ev., s. 2138.

16. Gilbert, Ev. (1st Ed.), 102.  
17. R. v. Farringdon, (1788) 2 T.R. 466, seems to be the first case applying the term of thirty years. See Phipson, Ev., 11th Ed., p. 724.

18. Act 24 of 1954, S. 2 and Sch. Item 1.  
18-1. I.I.R. (1971) 21 Raj. 30 : 1969 W L.N. 288.

which the document bears whether it is a *will* or any other document.<sup>19</sup> Where a document is undated, no presumption can be drawn under this section, as it cannot be said that the document is thirty years old.<sup>20</sup>

The period of thirty years is to be reckoned, not from the date on which the document is filed in Court, but from the date on which, it having been tendered in evidence, its genuineness or otherwise becomes the subject of proof.<sup>21</sup> It is not until the case comes on for hearing and the party producing the document is called upon to prove it, that the Court, after being satisfied that it comes from proper custody, can be asked to make the presumptions allowed by this section. Thus where the document was dated 7th August, 1885 and the suit based on it was filed on 3rd July, 1915, before the period of thirty years elapsed, and the written statement challenging the genuineness of the document was filed on the 9th August, 1915, by which time the document became thirty years old, it was held that the presumption under the section applied.<sup>22</sup> In one case it has been held that for the application of this section it is enough if the document is thirty years old on the date when arguments were heard.<sup>23</sup>

**10. Corroboration.** The presumption of genuineness of a document can only dispense with the necessity of its proof, but the question of sufficiency of evidence is not affected thereby.<sup>24</sup> Ancient documents are admissible under this section without proof of any acts, transaction or state of affairs necessarily, properly or naturally referable to them. Inconsiderable (if any) weight, however, will be attached to documents, which, though ancient, are not corroborated by evidence of ancient or modern enjoyment or by other equivalent or explanatory proof.<sup>25</sup>

The value of ancient documents, as evidence, when admitted, must depend, in each case, upon the corroboration derivable from external circumstances.

19. Sarat Chandra Mondal v. Panchanan Mondal, A.I.R. 1953 Cal. 471, 472 : 58 C.W.N. 271.
20. Veerabhadrayya v. Ramchandra Venkata Krishna Rao, A.I.R. 1923 Mad. 674: 73 I.C. 66: 1923 M.W.N. 454.
21. Minu v. Reddy, (1879) 5 C.L.R. 135; Surendra Krishna Roy v. Mirza Mohammad Syed Ali, A.I.R. 1936 P.C. 15: 63 I.A. 85: 160 I.C. 29: 1936 A.L.J. 84: 38 Bom. L.R. 330: 63 C.L.J. 29: 40 C.W.N. 226: 43 L.W. 107: 70 M. L. J. 206: 1936 M.W.N. 22: 1936 O.W.N. 10: 1936 A.W.R. 45: 1936 P.W.N. 159: 19 N.L.J. 29: 38 P.L.R. 19; Sarat Chandra Mondal v. Panchanan Mondal, A.I.R. 1953 Cal. 471; 58 C.W.N. 271; Konda Reddi v. Pichireddi, A.I.R. 1925 Mad. 184: 82 I.C. 487; Ladha Singh v. Mst. Hukam Devi, A.I.R. 1924 Lah. 145: I.L.R. 4 Lah. 233: 75 I.C. 57: 6 L.L.J. 97; Babu Nandan v. Board of Revenue, A.I.R. 1972 All. 406.
22. Hari Ram v. Mutsaddi, A.I.R. 1917 Lah. 36 : 42 I.C. 50 : 146 P.W.R. 1917.
23. Mahadeo Prasad v. Mst. Nasiban, A.I.R. 1920 Oudh 11 (1): 54 I.C. 368: 6 O.L.J. 615.
24. Baldeo Misir v. Bharos Kunbi, A.I.R. 1926 All. 537 (1): 95 I.C. 261.
25. Taylor, Ev., ss. 665, 666; Markby, Ev., 68, 69; Boikunt v. Lukhun, (1881) 9 C.L.R. 425, 429; Anund v. Mookta, (1874) 21 W.R. 130; Grant v. Baijnath, (1874) 21 W.R. 270; Sreekanth v. Rajnarain, (1868) 10 W.R. 1; Bisheshur v. Lamb, (1873) 21 W.R. 22; Timangavda v. Rangangavda, (1877) 11 B. 94, 98, 102; Hari v. Moro, (1886) 11 B. 89; Swarnamoyi v. Sourindra, A.I.R. 1925 Cal. 1189: 89 I.C. 747: 42 C.L.J. 14; Special Manager, Court of Wards, Balrampur v. Lal Bahadur Singh, A.I.R. 1937 Oudh 353 : 166 I.C. 930 : 1937 O.W.N. 179. See also Ram Baran Dube v. Bahadur Khan, A.I.R. 1942 All. 425 : 1942 A.L.J. 449 : 1942 A.W.R. (H.C.) 297.

tances. In order to form an estimate of their value, the following considerations have usually been regarded as important: have they been produced on those previous occasions when they would have been naturally produced, if in existence at the time,<sup>1</sup> have any acts been done under them, has there been ancient or modern corresponding enjoyment?<sup>2</sup> Thus, where the intention of the founder of an endowment of an idol could only be gathered from an ancient and ambiguous document, evidence of the purpose for which the proceeds of the land had been used was admitted to explain and corroborate it,<sup>3</sup> and the Court may call in aid evidence of acts under it as a clue to its intention.<sup>4</sup>

It is not sufficient that a document on the face of it purports to be more than thirty years old. In order to prove its authentication, a party must adduce evidence of the custody of the document, and ought (in order to give weight to it) to adduce such evidence of possession or other evidence of a like corroborative nature as he is able.<sup>5</sup> The degree of credit to be given to an ancient document depends chiefly on the proof of transaction or state of affairs necessarily, or at least properly, or naturally referable to it.<sup>6</sup> But the mere fact that proof of consideration is not at all satisfactory is by itself a slender ground for holding that the document known to have come into existence was entirely unreal.<sup>7</sup> In the undermentioned case, the Court observed that documents relating to land produced by a person out of possession, without proof of any fact done in connection with them with the object of reducing the possession actually enjoyed by another to a limited or temporary interest, may be admissible as being produced from proper custody, but would generally have almost no weight in this country as a ground of inference.<sup>8</sup>

**11. Custody.** This condition of admissibility must generally be proved by some other evidence. Where a party offers documents of such an age as to be incapable of being proved by direct evidence, he is bound to prove their custody.<sup>9</sup> The presumption being based on the rule of expediency, unless the surrounding circumstances satisfied the Court that the documents were produced from proper custody, it would be unsound to admit them. The provisions in Section 90 read with the Explanation insist on a satisfactory account of the origin of the possession being given by the party relying

1. Some evidence may be required to be given of the early existence and publicity of the document; Allucka v. Kashee, (1864) 1 W.R. 131.
2. Bolkunt v. Lakhun, (1881) 9 C. L. R. 425, 429. See also Ram Baran Dube v. Bahadur Khan, A. I. R. 1942 All. 425; 1942 A. L. J. 449; 1942 A. W. R. (H.C.) 297.
3. Abhiram v. Shyama, (1909) 36 C. 1103 (P.C.).
4. Hulada v. Kalidas; (1915) 42 C. 536 : 24 I.C. 899 : A.I.R. 1914 C. 813 citing English cases.
5. Grant v. Baijnath, (1874) 21 W.R. 270; Sreekanth v. Rajnarain, (1868) 10 W.R. 1.
6. Hari v. Moro, (1886) 11 B. 89.
7. Sailaja Nath v. Raja Reshee Case,

- A. I. R. 1924 Cal. 693 : I. L. R. 51 Cal. 135 ; 81 I.C. 493; 39 C.L.J. 380.
8. Timangavda v. Rangangavda, (1887) 11 B. 94, 98, 99, per West, J.
9. Gour v. Wooma, (1869) 12 W.R. 472; Ramaswami Goundan v. Subbaraya Goundan, A.I.R. 1948 Mad. 388 : (1948) 1 M.L.J. 215 : 1948 M.W.N. 201 : 61 L.W. 193; Trimbakdas v. Mst. Mathabai, A.I.R. 1930 Nag. 225 : 124 I.C. 609; Ram Piari v. Sardar Singh, A.I.R. 1937 Lah. 786 : 40 P.L.R. 82. But such proof is not necessary if the documents are produced only as instances of a custom; Dasondhi v. Milkhi Ram, A.I.R. 1939 Lah. 152 : 181 I.C. 703; 41 P.L.R. 670.

upon the documents.<sup>10</sup> Proper custody is not a matter in respect of which any presumption can be raised, it has to be proved to the satisfaction of the Court.<sup>10-1</sup>

For the purposes of this section it is not necessary that the person from whose custody the document is coming was legally entitled to have the document in his custody, it is sufficient if that person is so placed that in the circumstances of the case he may reasonably be supposed to be in possession of the document without any element of fraud.<sup>10-2</sup> The custody might not be in the strictest sense custody, but, whether it originated in right or wrong, the origin must be explained.<sup>11</sup> Investigation must commence as to the circumstances under which the document was brought and possessed. The Court must examine the surrounding circumstances tending to establish the connection of the party producing the documents with the person with whom the documents should naturally have been. For that purpose contemporary events assume importance. The Court's action will be largely influenced by their appreciation in raising the presumption and appraising the value to be attached to the documents.<sup>12</sup> It has been held that where a party to a suit cannot properly explain how a document produced by him came into his possession, the custody of the document cannot be said to be clearly proved.<sup>13</sup> Though absence of proof of possession does not affect its admissibility, it undoubtedly affects the weight to be attached to the document.<sup>14</sup>

It is the discretion of the Court to decide what is "proper custody", but this discretion is limited by the Explanation given of the section which itself follows the rule of English law laid down in the case of the *Bishop of Meath v. Marquis of Winchester*.<sup>15</sup> The observations of Tindal, C. J., in that case have been adopted as applicable to cases coming within this section.<sup>16</sup> In that case Tindal, C. J., in speaking of documents found in place in which, and under the care of persons with whom, such papers might naturally and reasonably be expected to be found, says, "and this is precisely the custody which gives authenticity to documents found within it, for it is not necessary that they should be found in the best and most proper place of deposit".<sup>17</sup> If documents continued in such custody, there never would be any question as to their authenticity, but it is, when documents are found in other than their proper place of deposit, that the investigation commences, whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found for it is obvious that, while there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and

10. See *Sharfuddin v. Govind*, (1902) 27 Bom. 452 : 5 Bom.L.R. 144.

10-1. C. A. Uditlakshamma v. A. Ramarao, A.I.R. 1973 A.P. 149 : (1972) 2 Andh.W.R. 346 : 1973 Rev.C.R. 438.

10-2. M. Acharyalu v. M. Venkayamma, (1971) 1 A.P.L.J. 350.

11. Rudragouda v. Basangauda, 1938 Bom. 257 : 175 I.C. 361 : 40 Bom. L.R. 202.

12. ib.

13. *Manmatha Nath Mitter v. Anath* L.E.-225

Bandhu Pat, 1919 Cal. 482 : 50 I.C. 222; 23 C.W.N. 201.

14. *Swarna Moyi v. Sourinder Nath*, 1925 Cal. 1189 : 89 I.C. 747 : 42 C.L.J. 14; *Imam Din v. Natha Singh*, 1932 Lah. 43 : 134 I.C. 296 : 32 P.L.R. 626.

15. (1836) 3 Bing.N.C. 183, 200 : 10 Bligh, 462.

16. *Trailocia v. Shurno*, (1885) 11 C. 539, 542.

17. Followed in *Sharfuddin v. Govind*, (1902) 27 B. 452, 462.

probable, though differing in degree, some being more so, some less, and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all cases. Many decisions have been given both in England<sup>18</sup> and in India<sup>19</sup> as to the conditions which constitute proper custody but each case must depend upon its own particular circumstances, it being impossible to lay down any rule which shall apply to all.<sup>20</sup> Thus, in a suit to eject a tenant who had been in possession of a small homestead for forty years, the tenant produced a *pattah* purporting to be sixty years old granted to her father who had held possession under it for twenty years until his death. It appeared that her father had left an infant grandson who was his sole heir, but who had never either before or after attaining his majority made any claim to the property. The Court held that her custody of the *pattah* was a natural and proper one within the meaning of this section.<sup>21</sup>

*Custody of mortgagee and lessee.* A mortgage deed produced by one of the alleged mortgagees must be deemed to be produced from proper custody.<sup>22</sup> In the case of a lease the custody of the lessee in possession of the property leased has been held to be proper custody.<sup>23</sup>

*Custody of member of family.* Where a deed relating to the affairs of a family of three brothers was found to be in the custody of their mother it was observed : "The deed relating to the affairs of the family, in which every member was evenly interested, has to be placed in the custody of someone and there can be no better custodian than the mother to whom all the three sons were alike and who was evenly interested in all".<sup>24</sup> When property had been in the possession of the plaintiff's father, and documents relating to the property were found among the papers of a deceased *gomastah*, who had been in the father's employ and had managed the property for the plaintiff during his minority this was held to be a proper custody.<sup>25</sup>

Presumption under this section may be raised in respect of an order of the Rent Controller fixing rent sent to A's father thirty years ago if it comes from the custody of A.<sup>25-1</sup>

*Custody of manager of lunatic.* Although a person appointed manager of the property of an insane person by the Court ought to restore a document in his possession, as such manager, to the proprietor, when he is removed from the management, his failure to do so does not make his custody of the document improper within the meaning of this section.<sup>1</sup>

- 18. See Taylor, Ev., ss. 660—664; Phipson, Ev., 5th Ed., 497—499.
- 19. v. post.
- 20. Norton, Ev., 267. For meaning of custody under the Indian Penal Code, Sec. 27, see Fatehchand v. Emperor, A.I.R. 1917 Cal. 123 : I.L.R. 44 Cal. 477: 38 I.C. 945 (F.B.) (possession on behalf of another).
- 21. Trailokia v. Shurno, (1885) 11 C. 539.
- 22. Ramachari v. Sadhosaran, A.I.R.

- 1924 All. 869: 79 I.C. 405.
- 23. Ramlal v. Satya Nirajan, A.I.R. 1921 Pat. 379 (2).
- 24. Darshan Singh v. Prabhu Singh, A.I.R. 1946 All. 67, 79: I.L.R. 1946 All. 130: 1945 A.L.J. 426.
- 25. Hari v. Moro, (1886) 11 B. 89.
- 25-1. M. N. Soi v. New Delhi Municipal Committee, A.I.R. 1975 Delhi 236 (F.B.).
- 1. Shama v. Abhiram, 33 Q. 511, reversed in 36 Q. 1003,

*Custody of Court.* The mere fact that an ancient document is produced from the records of a Court does not raise any presumption that it was filed for a proper purpose, and that, consequently, the Court's custody was a proper custody. The document must be shown to have been so filed in order to the adjudication of some question of which that Court had cognizance and which had actually come under its cognizance.<sup>2</sup>

However, a compromise petition thirty years old kept in Record Room as part of a decree can be presumed to be genuine under this section as the custody of court would be proper in such a case.<sup>2-1</sup>

*Custody of Collector.* Normally the Collector cannot be considered to be the proper custodian of a *chitta* relating to a private partition.<sup>3</sup> In the undermentioned case, the Privy Council observed as follows :

"With reference to the argument as to the evidence in support of the bond and particularly with respect to the custody of the bond, it is in their Lordships' opinion sufficient to state that the bond was produced in the usual manner by the persons who claimed title under the provisions of it and who therefore were entitled to the possession of it, so that the bond must be held to have come from the proper custody."<sup>4</sup>

*Custody having legitimate origin is proper custody.* No custody is improper, if it is proved to have had a legitimate origin or if the circumstances of the particular case are such as to render such an origin probable. This provision is applicable to those cases in which the custody is not, perhaps, that where it might be most reasonably expected, but is yet sufficiently reasonable to constitute such custody not improper. Thus, in the two illustrations to the section the documents are produced from their natural place of custody. In the third illustration the documents ordinarily would be with the owner *B* but under the circumstances *A*'s custody is proper.<sup>5</sup>

In the undermentioned case,<sup>6</sup> Batty, J., was of opinion that the section read with the explanation seemed to insist only on a satisfactory account of the origin of the custody, and not in the history of its continuance ; and that possibly the origin of the custody was alone regarded as material because it is intelligible that ancient documents may be overlooked and left undisturbed, notwithstanding a transfer of old, or creation of new, interests. So an anonymous document is not within the scope of this section.<sup>7</sup>

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2. Gudadur v. Bhyrub, (1880) 5 C. 918; Sri Prasad v. Special Manager, Court of Wards, Balrampur, A.I.R. 1937 Oudh 194 : I.L.R. 12 Luck. 400 : 164 I.C. 494; Rajendra Prasad v. Gopal Prasad, A.I.R. 1925 Pat. 442 : I.L.R. 4 Pat. 67.
- 2-1. Savitri Devi v. Bhaskar, A.I.R. 1972 Orissa 148 : (1971) 2 Cut.W.R. 814.
3. Purna Chandra v. Radhika, A.I.R. 1926 Cal. 370 : 90 I.C. 722.
4. Devaji v. Godabhai, (1809) 2 B.L.R. 85, 86 (P.C.); see also as to proper custody, Thakoor v. Bashamutty, (1875) 24 W.R. 428; Eko-wrie v. Koylash, (1874) 21 W.R. 45; Fureedoonaissa v. Ram, (1878) 21 W.R. 19; Chunder v. Brojo, (1870) 13 W.R. 109; Gour v. Wooma, (1869) 12 W.R. 472; Gurudas v. Sambhu, (1869) 3 B.L.R. 258; Sreekanth v. Rajnarain, (1868) 10 W.R. 1; Mahomed v. Shafi, (1871) 8 B.L.R. 26, 29; Vital v. Muhammad, (1869) 6 Bom.H.C.R. 90; Rajendra v. Gopal, 1925 Pat. 442 : I.L.R. 4 Pat. 67.
5. Norton, Ev., 267.
6. Sharfuddin v. Govind, (1902) 27 B. 452, 462.
7. Venkat Rao v. Venkateswara Rao, A.I.R. 1956 Andh. 1 ; 1955 Andh. W.R. 783.

**12. Mutilated documents.** The rule of law which requires the party tendering in evidence an altered instrument to explain its appearance, does not apply to letters and ancient documents coming from the right custody merely because they are in a mutilated or imperfect state.<sup>8</sup>

**13. Construction of ancient documents.** Where an ancient document is ambiguous but it is produced from proper custody, the Court may presume under Section 90 that the deed was duly executed. It is to be interpreted and construed according to the plain and the ordinary meanings of the words used therein. If the words are vague and ambiguous, extrinsic evidence is admissible under proviso 6 to Section 92 for resolving the ambiguity, and for showing that the words used related to some existing state of things. Resort may also be had to any contemporaneous usage.<sup>9</sup>

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8. Taylor, Ev., S. 1838. As to the effect of the alteration of a document in a material particular, see Mangal v. Shanker, (1903) 25 A.

580.  
9. Union of India v. Nand Kishore, A.I.R. 1966 H.P. 54.

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